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Article 21c CRD VI and «Other Repayable Funds»: Branch Requirement and Ordinary Capital Market Funding

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Paola Leocani, Ph.D. in Civil Law, Partner, Simmons & Simmons





Paola Leocani, Ph.D. in Civil Law, Partner, Simmons & Simmons

Paola Leocani

Paola Leocani heads the Debt Capital Markets group in the Milan office. She has almost 30 years' experience in advising Italian and international clients, corporate, financial institutions and banks, sovereign and supranational entities, on securities transactions and regulatory matters related to debt issuances with a particular focus on debuts, and first-of-its-kind transactions.

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Synopsis

Article 21c CRD VI does not extend to ordinary bank issuances merely because they are repayable. It applies only to deposits and other forms of funding capable of generating the local liquidity, outflow and systemic risks that the new branch requirement was designed to address. Applying the same branch regime to other repayable funds as to deposits—with its prior scrutiny of applications, ongoing prudential supervision, related obligations, and rules on withdrawal and lapse of authorisation—is justified

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only where those funds have certain characteristics which are not normally found in plain vanilla bonds or structured notes, whether or not capital-protected. The distinction directly affects those issuers' access to EU capital markets: issuance alone should not require the establishment of a branch in the relevant Member State. Such instruments remain mainly subject to capital market safeguards, reflecting the complementary roles of banking and securities law in protecting bank savings and investment according to their respective risks.

CRD VI has left the relevant wording unchanged. None of the national implementing measures reviewed points to an extension of the branch requirement to «ordinary capital market funding». In Italy, moving away from the historically restrictive approach would be consistent with the national implementing provisions and with the principles of Italian law, including its constitutional principles, without the need for further legislative intervention.

The interpretive question is not new, but the more onerous legal consequence that Article 21c now attaches to the classification of funding calls for an in-depth examination of the applicable rules, starting from the scope of the expression «other repayable funds» and set within the broader context of the Banking Package, of which CRD VI forms an integral part.

Executive Summary

European financial law does not protect savings, meant in their broadest sense as wealth or liquidity not intended for immediate consumption, through a single regulatory system, *but articulates* that protection *according to technical forms consistent with the underlying* expectations. Savings in the technical sense are intended to preserve liquidity and keep it available within the banking system. Investment, by contrast, involves the dynamic allocation of capital through financial markets in pursuit of a return and with the conscious assumption of risk.

This distinction determines at the same time the applicable safeguards, supervisory authorities and remedies. It also provides the basis for examining whether Article 21c CRD VI requires third-country undertakings issuing bonds or other instruments with a repayment obligation to establish a branch in the relevant Member State. This new provision forms part of the Banking Package, as the final stage in the implementation of the Basel III prudential framework. It makes the performance of certain «core banking services», including the taking of «deposits and other repayable funds», conditional on the establishment of a branch in the Member State in which those services are provided.

A historical, literal, systematic and functional reading of the legislation, the approaches followed by Member States and the guidance provided at EU level, particularly by the EBA, explains why the same prudential requirement applies both to deposits and to certain other funds equally carrying a repayment obligation. Conversely, it shows why ordinary capital market funding cannot automatically be treated in the same way merely because it is formally repayable. The risks arising from ordinary bank issuances are already, and will continue to be, addressed by capital market regulation, including through the powers available to supervisory authorities to protect market integrity and financial stability.

CRD VI did not amend the wording of the existing provisions referring to «other repayable funds», from the definition of a credit institution to the list of activities in Annex I CRD. The need to revisit the expression therefore arises not from a textual change, but from the new and onerous legal consequence that Article 21c attaches to it: the establishment of a branch. Given the unchanged wording, no extension to ordinary capital market funding is expected, absent divergent national implementing provisions, which are neither anticipated nor apparent in the measures reviewed. On the contrary, the specific prudential function of the branch requirement supports a more narrowly defined scope for «other repayable funds» under Article 21c.

The expression appears first in Article 4(1)(1)(a) CRR, which defines a credit institution by reference to an undertaking whose business is «to take deposits or other repayable funds from the public and to grant credits for its own account». Recital 14 CRD preserves the historical rationale for a broad definition: preventing evasion of banking regulation by covering funding other than deposits, including «the continuing issue of bonds and other comparable securities», used for the professional granting of credit. Read in this historical setting, the Court of Justice's judgment in Romanelli (C-366/97) likewise reflects a broad approach to the scope of repayable funds under the dated banking legislation. The disjunctive formula recurs in Article 9 CRD, which reserves the taking of deposits or other repayable funds from the public to credit institutions: like the definition, it is an anti-avoidance rule on unauthorised banking activity.

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The same expression now operates in the different context of Article 21c. Through Article 47(1), that provision refers to Annex I CRD to identify the «core banking services» whose performance by third-country undertakings may trigger the branch requirement, including «taking deposits and other repayable funds» as a standalone activity.

The wording itself reveals similar, but not identical, expressions in provisions developed over time for different purposes: defining a credit institution, identifying business activities and, now, specifying relevant core banking services.

The disjunctive «or» gives way to «and»; the funding-and-lending combination becomes a standalone activity; and a description of a business becomes a reference to a service. These differences are not decisive in themselves, but reinforce the need for a contextual reading.

Interpretive uncertainty arises when meanings developed in one setting are transferred automatically to another despite their different regulatory functions. As legal scholarship recognises in relation to concepts whose meaning is not fixed by a statutory definition, the same expression may have a different scope in different contexts without creating any inconsistency, provided each reflects the purpose and function of the relevant rules.

Read together, the EBA's interventions confirm the importance of distinguishing the contexts in which «other repayable funds» is used.

Within the definition of a «credit institution», the expression serves the anti-avoidance function just outlined, identifying the funding-and-lending combination that characterises a banking business; the focus is therefore on that combination rather than on the specific characteristics of the funding. Article 21c has a different function. In that provision, the relevant types of funding are those capable of generating locally significant outflow and systemic risks in themselves, that is, even where they are raised independently of any lending activity carried on in the relevant territory. CRD VI expressly seeks to mitigate those risks through a harmonised prudential regime. It is their common capacity to generate such risks, rather than formal repayability, that explains why the regime covers both deposits and certain other sources of funding. This interpretation draws on the harmonised authorisation requirement in recital 5 and the financial stability and proportionality objectives set out in recitals 17 and 19 CRD VI.

The general concepts of banking activity and credit institution, and the interpretation of «other repayable funds» developed in their respect, are therefore not decisive for this purpose. Its meaning must instead be determined by reference to the function of the branch within the CRD VI framework and the objectives expressly pursued by the Directive.

CRD VI identifies the fragmentation of national regimes and the absence of a common prudential framework as sources of risk to financial stability and market integrity in the Union. Recital 17 makes this concern explicit. The obligations imposed on third-country branches are calibrated to the activities carried on and the risks generated in the individual Member State. Recital 19 expressly links proportionality to the risk posed to financial stability and market integrity in the Union and the Member States. It identifies size, complexity and retail deposit-taking above a specified threshold as grounds for classifying branches as riskier; for retail deposits, it specifically refers to the potential loss of confidence in the safety and soundness of the banking system, to which behavioural expectations and the related risk are linked.

The analysis should consequently begin not with fine distinctions between individual products or a granular examination of their payoffs and terms and conditions, but with the regulatory function assigned to the establishment requirement. That function is reflected in the organisational, capital and reporting obligations imposed on a branch, the nature of the authorisation process and the rules and timing governing the lapse or withdrawal of authorisation. The programme of operations, business plan, governance arrangements, booking arrangements, capital and liquidity requirements, regulatory reporting, cooperation with the home-country authority and identification of the assets, liabilities and risks attributable to the branch all presuppose activities and risks that arise locally and are capable of being managed at that level. Once a branch has been established, ordinary capital market liabilities may of course become relevant to its prudential treatment where they are attributed to its balance sheet or operational perimeter. That ex post relevance cannot, however, be read backwards as establishing that the issuance itself triggers the branch requirement: the question here is in which situations the opening of a branch makes sense, not how a branch that already exists is to be treated.

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This reading is consistent with the Banking Package and the Basel III framework, where the relevant focus is not credit intermediation in the abstract, but a specific form involving maturity transformation: the use of funding obtained through deposits and other repayable funds to finance assets with longer maturities. The FSB, ECB, EBA and Basel Committee have treated this specific type of intermediation as central to the prudential framework directed, from different perspectives, at the same systemic vulnerabilities revealed by the actual events that prompted the relevant legislative reforms.

The branch regime is therefore suited to sources of funding which, because they are accessible and withdrawable on demand without significant penalties or restrictions, and because they are sensitive to collective behaviour under stress, may give rise to outflows, liquidity pressure and contagion capable of affecting the stability and integrity of the financial system of the relevant Member State and, in turn, of the wider financial system.

Those characteristics are normally absent from ordinary capital market funding and from conventional bank securities offered to investors, including retail investors. Such instruments generally fall outside the scope of Article 21c because they lack those elements; formal repayability alone does not bring them within it. This is the substance of the «deposit-likeness» to which the EBA refers when identifying the features of other repayable funds that, in the context examined here, may justify the application of the same prudential regime to deposits and other sources of funding. Ordinary issuances also do not normally establish the relationship with the holder that forms part of this deposit-like character, and which in particular shapes the accessibility of the funds and behavioural risk; the relationship remains the ordinary issuer-investor one. Ordinary capital market funding that does not embed these features can actually contribute to a more resilient funding structure, reducing maturity mismatch and thus mitigating, rather than amplifying, the very risks that the new branch regime is intended to contain. This positive role of longer-term market funding is also recognised in the European and international prudential framework, including by the Basel Committee.

The contrary interpretation would leave an important question unanswered. What risk is inherently created by a bank bond lacking these characteristics that is not equally present in securities issued by corporate or sovereign issuers, and that the EU legislature could therefore have considered manageable only through the establishment of a branch, as in the case of deposits?

What deposits and comparable «other repayable funds» have in common is not simply «the existence» of a right to repayment: it is the «manner» in which, and the times at which, that right may be exercised.

Based on the above, financial instruments should not be brought within Article 21c solely because they incorporate a repayment obligation and a corresponding right to repayment if they do not also present the risks that this provision is intended to address. Falling outside the scope of the prudential safeguard represented by the branch requirement does not, however, reduce the protection available to investors or financial stability. Such instruments remain subject to the effective regulatory framework designed for ordinary market funding: capital market regulation.

Capital market law and regulation frequently respond to concerns originating in the banking system, including financial stability, the resolvability of institutions and market integrity. Banking regulation and capital market regulation operate in a complementary manner, with each providing the safeguards most appropriate to the activities and risks within its scope. Article 44a BRRD and the regulatory response to self-placement illustrate this relationship: investor-protection safeguards in the distribution of bank instruments are used primarily as a means of preserving effective bail-in and orderly resolution.

The fact that the issuer is a bank is neither disregarded nor underestimated by securities law: it is specifically addressed through robust disclosure and conduct-of-business safeguards. Prospectuses for the offer and admission to trading of bank securities must cover matters such as bail-in, the position of the instruments in the creditor hierarchy, their capacity to absorb losses and contribute to recapitalisation, and the issuer's resolution strategy. These requirements operate alongside the disclosure regime under the Market Abuse Regulation, enhanced MiFID conduct-of-business rules and product governance obligations throughout the structuring, approval and distribution of the product.

Capital market legislation also gives supervisory authorities, including European and national banking authorities, extensive intervention powers. Those powers may extend to prohibiting or restricting the marketing of particular instruments where their features, the identity of the issuer, or the instruments' distribution, circulation or concentration create risks to market integrity or financial stability.

A separate clarification concerns the objective and subjective limits of the expression «other repay-

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able funds» under Article 21c. Certain exclusions can be identified independently of whether a formal or functional interpretation of that expression is adopted.

As regards its objective scope, certificates, as securitised derivatives, fall outside the concept of funds which embed an obligation to «repay», under either a formal or a functional interpretation. Payments described, depending on the structure, as a notional amount, redemption amount, premium or coupon depend on one or more underlying assets and the applicable payoff formula. Certificates do not embody a lending relationship and therefore do not create an obligation to repay borrowed money or pay interest as remuneration for its use. References to capital-protected certificates describe the instrument's economic effect. The payoff structure, including any floor or embedded options, may produce an amount equal to all or part of the capital invested, but this does not convert the payment into the discharge of a repayment obligation in respect of borrowed money.

Structured notes require separate consideration. They remain debt securities and include an obligation to repay the capital advanced by the investor. Under the functional analysis proposed here, they generally fall outside Article 21c because they lack the relevant deposit-like characteristics. Even on a formal reading, an approach that gives precedence to their investment function should consistently lead to their exclusion regardless of the degree of capital protection provided. Their investment function overshadows their funding role; as the Federal Reserve has noted in a different context, investors tend to pay less attention to issuer creditworthiness, focusing instead on the payoff and exposure to the underlying financial risks and gains.

As regards the subjective scope of the provision, the branch requirement should not ordinarily apply to non-bank holding companies at the head of banking groups. This conclusion is also consistent with the approach traditionally followed in Italy, notwithstanding the more conservative position historically adopted there in relation to other repayable funds.

The national implementing measures reviewed indicate continuity with the interpretation previously followed in other Member States, where bond issuances were not treated as «other repayable funds» merely because they were repayable. Italy was an exception. The Italian approach required prior authorisation from the Bank of Italy, or compliance with the relevant passporting requirements, for deposit-taking as a prerequisite to the marketing in Italy of bonds issued by third-country credit institutions.

The interpretation proposed here can be adopted in Italy without legislative amendment. It is consistent with the domestic legal framework, including the relevant constitutional principles, the Consolidated Financial Act, the Consolidated Banking Act and, in particular, Article 14-bis of the latter implementing CRD VI. The proposed interpretation also reflects the objectives and context of Article 21c, which differ from those in which the Italian regulator historically adopted its formalistic interpretation.

This does not require denying the historical justification for the Italian approach. The question is instead whether it remains consistent with, and can be replicated within, the new framework. That approach developed in the absence of a harmonised regime governing access by third-country undertakings to the EU banking market, and before the development of the regulatory framework embodied in the Banking Package and of the more mature interpretation of the constitutional principles governing the protection of savings.

Under the new legislative and regulatory landscape, developed in response to concrete experience, the decisive point is no longer whether an instrument carries an obligation to repay an amount at par, below par or subject to conditions. Nor does the classification turn on whether the instrument is senior, subordinated, plain vanilla or structured, or whether it provides capital protection. The relevant inquiry is whether the instrument is inherently capable of generating the risks whose prevention and management underpin CRD VI and the introduction of the new branch requirement as a far-reaching territorial prudential safeguard. Those are the local liquidity, behavioural and outflow risks identified within the banking framework. Where an ordinary market instrument lacks those characteristics, any risks arising from its issuance, distribution or concentration must instead be considered within the capital market framework.

Adopting this interpretation would not reduce protection. It would allocate safeguards more rationally between banking and capital market regulation. In the Italian legal system, it would also give more effective expression to the constitutional protection of savings by applying safeguards specifically designed for bank savings and financial investment according to their respective features and needs.

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Recognising the change in the regulatory framework would allow Italy to align its approach with that followed in other Member States and with the harmonising purpose of CRD VI. The alternative would not merely reproduce the fragmentation that CRD VI seeks to overcome. It would carry that fragmentation from the banking system into the capital markets. A formalistic interpretation would require a territorial presence even where the only activity carried out in the territory is the issuance of ordinary financial instruments, which cannot create any relationship with investors beyond the ordinary issuer-investor one, and with no meaningful operational substance. Such a requirement would be disproportionate to the objectives pursued and would provide no appreciable additional protection for investors or the market. A formalistic reading would also sit uneasily with the harmonised EU framework governing cross-border offers and distribution of investment products through disclosure and conduct-of-business safeguards, a model also reflected in IOSCO's cross-border disclosure principles for debt securities.

The branch requirement would cease to operate as a prudential safeguard for the banking system and would instead become an inappropriate barrier to access to the European capital markets, based solely on the banking status of the issuer and the ordinary repayability of the instruments it issues.

PART I — ARTICLE 21C CRD VI: «*CORE BANKING SERVICES*», THE BRANCH REQUIREMENT AND THE SCOPE OF «*OTHER REPAYABLE FUNDS*»

1. Methodological background, proposed position and related supporting arguments

Systematic framework — Savings, understood in the ordinary, descriptive sense as household wealth and liquidity not intended for immediate consumption, are no longer protected by a single, undifferentiated regulatory system. The *Banking Package* [1] and the *Savings and Investments Union* (SIU) agen-

1 In EU terminology, the *"Banking Package"* broadly designates the coordinated set of European reforms concerning not only the prudential regulation of banks but also the framework for bank crisis management and resolution. In the official documentation of the Council of the European Union, the package presented by the Commission in November 2016 is described as comprising, in particular, the proposals on the CRR, CRD, BRRD, and SRMR, that is, the measures concerning, on the one hand, capital, liquidity, leverage, risk-management, and supervisory requirements for institutions and, on the other, the recovery and resolution framework for banks. The function of the package is not merely one of compilation or technical updating: the Council's official sources make clear that its main objective is to reduce risk in the Union banking sector, in implementation of the international reforms developed after the 2007–2008 crisis by the *Basel Committee on Banking Supervision* and the *Financial Stability Board*. In this sense, the *Banking Package* responds to a structural need to strengthen the resilience of European banks, improve the quality of their supervision, and contain the systemic risks that could destabilize the financial system and the real economy. But the package also meets a second need, of a more institutional and systemic nature. From the standpoint of the Council of the European Union, risk reduction is the precondition for further progress in the integration of the Banking Union and for strengthening forms of *risk sharing*. The *Banking Package* thus sits at the crossroads of two complementary logics: that of *ex ante* prudential regulation, aimed at better capitalized, more liquid, and sounder banks; and that of orderly *ex post* crisis management, aimed at ensuring that the failure of an institution can be handled without compromising financial stability, without improper recourse to public resources, and with adequate protection of depositors and critical functions. In this sense, the *Banking Package* expresses a profound transformation of post-crisis European banking law: it does not merely strengthen prudential rules, but brings supervision, resilience, recovery, and resolution together in a single design. See Council of the European Union, *Amendments to the banking union rules*, December 2016; Council of the European Union, press release of 14 May 2019, *Banking Union: Council adopts measures to reduce risk in the banking system*; Council of the European Union, press release of 15 February 2019, *Banking Union: EU ambassadors endorse full package of risk reduction measures*. Most recently, on the link between stability and competitiveness of the single banking market in the new framework, see European Commission, *Competitiveness of the Banking Sector and the Single Market in Banking*, COM(2026) 615 final, 17 July 2026, and the related press release, *Commission outlines measures to strengthen Europe's banking sector and support growth*, IP/26/1637, 17 July 2026. For the references to the acts and the abbreviations used in this paper: Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27 June 2013, pp. 1–337 ("CRR"); Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27 June 2013, pp. 338–436 ("CRD"); Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12 June 2014, pp. 190–348 ("BRRD"); Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30 July 2014, pp. 1–90 ("SRMR"); 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, OJ L 2024/1619, 19 June 2024 ("CRD VI"); Regulation (EU) 2024/1623 of the European Parliament and of the Council of 31 May 2024 amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor, OJ L 2024/1623, 19 June 2024 ("CRR III"). Except where reference is made to a specific historical version, references to the acts are to the text as subsequently amended.

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da[2] reflect in this respect the maturity of the European financial market. The guiding criterion is now the distinction between savings in the technical sense, which serve to preserve liquidity and keep it available within the banking system, and financial investment, which aims at a return, involves the conscious assumption of risk, and channels savings into productive investment. The most significant result of the recent reforms is that they achieve full complementarity and systemic coherence between banking regulation and capital market regulation, in application of two general principles of EU law (Article 5 TEU): proportionality and, too often overlooked by interpreters, subsidiarity.

The allocation of safeguards and the protection of the weaker party — Within this integrated legal architecture, what matters is not the protection of the weaker party in the abstract, but the efficient allocation of safeguards according to the interests and expectations involved, which arise from the nature of the transaction, the relationships it creates, and the risk it entails. Accordingly, where the relationship relates to an investment instrument, prudential and system-stability concerns find an effective, and often exhaustive, response in the capital market regime and its sectoral supervision, consistent with a logic of regulatory proximity that follows from the principle of subsidiarity. Several developments illustrate the point: *self-placement* (where the closeness between liquidity held in deposits and its redeployment into securities of the same bank appeared *in vitro*); the strengthening of conduct-of-business and *product governance* rules under MiFID, also for purposes of Article 44a BRRD; the disclosure obligations arising from both the prospectus regime for offers and admissions to trading, which covers, among other things, *bail-in*, the creditor hierarchy, loss absorption and recapitalisation, and resolution strategies, and the MAR regime; and the *product intervention* powers conferred on European and national authorities to address risks to the system.[3] These developments show that securities law is

2 On the *Savings and Investments Union*, see European Commission, *Savings and Investments Union: A Strategy to Foster Citizens' Wealth and Economic Competitiveness in the EU*, COM(2025) 124 final, 19 March 2025; and, for the most recent developments concerning the *Market Integration and Supervision Package*, Economic and Financial Affairs Council (ECOFIN), *Main results*, 10 July 2026, and Council of the European Union, *Economic and Financial Affairs Council, 9 October 2026 — Agenda highlights*, 25 September 2026, where the Council is expected to reach a general approach on the package.

3 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173, 12 June 2014, pp. 349–496 ("MiFID II"); BRRD, cited *supra*, note 1, in particular Article 44*a*. For prospectus disclosure: Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities

used to pursue, first and foremost, objectives of integrity, stability, and resolvability, without recourse to banking regulation and the expansion of banking supervisory powers.

The novelties introduced by CRD VI: the prudential purpose of the branch requirement and «ordinary capital market funding» — CRD VI offers a further occasion to revisit these boundaries of the financial system and to verify that the relevant interests and risks are covered by the regime functionally closest to them, whether banking or, as will be seen, securities regulation.[4] The Directive introduces a harmonised regime for access to the banking system by third-country undertakings. Its stated aim is to

are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30 June 2017, pp. 12–82 ("Prospectus Regulation"), in particular Articles 6, 13, and 16; Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004, OJ L 166, 21 June 2019, pp. 26–176, and the annexes applicable to the issuer and the securities; Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulations (EU) No 382/2014 and (EU) 2016/301, OJ L 166, 21 June 2019, pp. 1–25. For disclosure to the market: Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12 June 2014, pp. 1–61 ("MAR"). For intervention powers: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12 June 2014, pp. 84–148 ("MiFIR"), Articles 40–42; Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions, OJ L 87, 31 March 2017, pp. 90–116, Articles 19–21. See also Joint Committee of the European Supervisory Authorities, *Placement of financial instruments with depositors, retail investors and policy holders ("Self placement")*, JC 2014 62, 31 July 2014; European Banking Authority (EBA) and European Securities and Markets Authority (ESMA), *Statement of the EBA and ESMA on the treatment of retail holdings of debt financial instruments subject to the Bank Recovery and Resolution Directive*, EBA/Op/2018/03 (ESMA71-99-991), 30 May 2018.

4 CRD VI and CRD, cited *supra*, note 1, in particular Article 21c CRD, as amended by CRD VI. Article 21c(1) does not refer directly to Annex I, but to the "activities referred to in Article 47(1)", which covers: (a) the activities referred to in points 2 and 6 of Annex I, where carried out by an undertaking established in a third country that would qualify as a credit institution, or would meet the criteria set out in Article 4(1), point (1)(b), CRR, if it were established in the Union; (b) the activity referred to in point 1 of Annex I, carried out by an undertaking established in a third country. Recital 5 of CRD VI describes these activities as the "core banking services listed in Annex I, points 1, 2 and 6".

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reduce the fragmentation of national approaches, which, as recital 17 notes, «creates risks to financial stability and market integrity in the Union», and thus to ensure more effective control of the activities carried out in the Union by non-EU banking groups.

The reform is part of the completion of the Basel III prudential framework. It responds to the need to bring the banking business that third-country undertakings actually carry on in the Union within a common regime of authorisation and supervision. That need became especially clear after Brexit, which exposed both cross-border activity conducted under non-uniform national regimes and activity conducted through branches that were not only subject to non-uniform safeguards but also often lacked assets, resources, staff, data, and risk-management capacity proportionate to their activities and to the systemic risks they could generate. This variety of approaches fostered regulatory competition between Member States and arbitrage in the choice of the Member State from which to operate in the Union. Above all, it made locally relevant assets, liabilities, and risks harder to identify and supervise. The branch requirement and the new regime for *third-country branches* thus serve a purely prudential objective: to ensure that territorially relevant banking activity is anchored to an effective organisational presence, with adequate *governance*, *booking*, and *reporting* arrangements and with capital and liquidity resources proportionate to the nature and risks of the activities carried out.[5]

The performance of banking services on a purely cross-border basis has thus been restricted. Third-country undertakings must now establish a branch, whose activity remains confined to the territory of the Member State in which it is authorised. The obligation applies to undertakings that intend to provide the so-called «core banking services» in the European Union. Under Article 21c CRD VI, read together with Article 47(1) CRD, these services are identified by formal reference to the activities listed in points 1, 2, and 6 of Annex I to that Directive («*core banking activities*»): (i) taking deposits and other repayable funds, (ii) lending, and (iii) issuing guarantees and commitments.[6]

In response to the absence of a common prudential framework (recital 17), under which such activity, whether conducted cross-border or through branches lacking real substance, remained in practice beyond effective supervision, the legislature then prescribed an «explicit and harmonised authorisation requirement» (recital 5) for certain activities deemed critical to safeguarding the system. That need seems intuitive for lending, but it was identified for funding itself, even where funding is detached from the local exercise of lending, on the premise that funds obtained from the public of a Member State can in themselves generate systemic risks. Deposits are the paradigm case: the relationship they create locally with the depositor, together with their repayability on demand, exposes the institution, and through it the system, to sudden and simultaneous outflows. The obligations attached to a territorial presence are, in turn, commensurate with «the risk that they pose to financial stability and market integrity» (recital 19), in accordance with the principle of proportionality.[7] It is no coincidence that this recital also identifies the acceptance of retail deposits as an indicator of higher risk.[8]

5 On the *ratio* and architecture of the regime for third-country branches, recitals 17 to 19 of CRD VI refer to the fragmentation of national regimes applicable to third-country branches, the absence of prudential standards and supervisory cooperation arrangements at Union level, information and supervisory gaps, the need for cooperation between the authorities of the host Member State and those of the home country, and the need for a proportionate classification of branches. With specific regard to the post-Brexit experience, see EBA, *Opinion on issues related to the departure of the United Kingdom from the European Union*, EBA/Op/2017/12, 12 October 2017, in particular on authorization, substance of the establishment, *internal governance*, *outsourcing*, risk transfers, and *empty shell companies*; EBA, *The EBA calls on financial institutions to finalise preparations for the end of the transitional arrangements between the EU and UK*, 29 July 2020, which calls for management capacity, local resources, assets, staff, and data to be proportionate to the volumes, nature, and complexity of the activity carried out in the Union.

6 EU legal sources are examined and cited in the English-language version, unless otherwise indicated (on the divergence between the language versions of Annex I CRD, see *infra*, note 57). For the articles inserted into the CRD by CRD VI, the numbering of the English version of the Directive is used (Articles 21c, 48a, 48b, 48c, and 48f), which has become established in international practice and in EBA documents; in the Italian version these provisions are numbered, respectively, Articles 21-*quater*, 48-*bis*, 48-*ter*, 48-*quater*, and 48-*septies*. For the other Union acts referred to (for example, Article 44a BRRD and Article 72a CRR), the English-version numbering is likewise used.

7 Recital 19 of CRD VI makes the obligations of branches commensurate, in accordance with the principle of proportionality, including through their classification, to the "risk that they pose to financial stability and market integrity", and identifies as an indicator of higher risk, alongside size, the acceptance of retail deposits above a given threshold.

8 Article 48f CRD (Article 48-*septies* in the Italian version) requires branches to hold, at all times, unencumbered liquid assets sufficient to cover liquidity outflows over a minimum period of thirty days, deposited in an account held in the Member State in which the branch is authorized and available, in the event of resolution or winding-up of the branch, for the purposes of the relevant proceedings. The provision responds precisely to the need to have liquidity available against the liabilities arising from the relationships established in the territory, preventing that liquidity from remaining centralized at the *head undertaking*. Once the branch is actually established, the requirement is thus commensurate with the branch's liquidity outflows; for class 1 branches, the provision refers to the liquidity coverage requirement (*Liquidity Coverage Ratio*, LCR) laid down in Part Six, Title I, CRR and to Commission

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The central question: is repayability a sufficient criterion? — This paper asks whether the mere issuance of bonds or other financial instruments embodying a repayment obligation, when offered (or made available) to investors located in a Member State, is in itself enough to constitute a raising of «*other repayable funds*» under Article 21c and, consequently, to trigger the onerous requirement to establish a branch. On the basis of a historical, textual, systematic, and functional reading of the legislative framework, the solutions adopted in the Member States, and the guidance of the EBA, it concludes that such an extension is not justified. The *ratio* of the branch requirement calls for limiting the notion of «other repayable funds» to forms of funding that are intrinsically capable of generating locally relevant risks to the stability of the system. Ordinary bank bond issues lack those structural characteristics. They carry ordinary credit risk, like issues by entities of a different nature (for example, corporate or sovereign issuers), and remain subject to the safeguards that capital market regulation effectively provides, without thereby becoming a savings product.

To this end, the inquiry into «other repayable funds» cannot stop at the mere "*existence*" of an obligation to "re-pay". That obligation is common to every form of bank funding, understood historically and technically as the raising of borrowed money in order to lend it on. The inquiry must instead focus on "*how*" the obligation operates, and on the resulting capacity of such funds to generate vulnerability for the stability of the system, as deposits do. That capacity is why they are treated as equivalent to deposits for purposes of the same safeguard. This reading follows directly from the prudential function that CRD VI expressly attributes to the safeguard (recitals 5, 17, and 19). It is also consistent with the architecture

Delegated Regulation (EU) 2015/61 of 10 October 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to the liquidity coverage requirement for credit institutions, OJ L 11, 17 January 2015, pp. 1–36, that is, to a parameter built on expected outflows under stress and therefore on those liabilities alone that are capable of generating them. In this framework, ordinary bonds with a maturity of more than thirty days do not, as a rule, generate outflows within the horizon considered, whereas those maturing within that period give rise to an outflow equal to the amount falling due (Article 28(6) of the same Delegated Regulation), which is foreseeable *ex ante* on the basis of the contractual maturity and is not linked to the behavior of holders; the treatment proper to deposits is permitted only for securities sold exclusively on the retail market and held in a *retail account* (EBA, Single Rulebook Q&A 2020_5518, final answer published on 11 February 2022, concerning the LCR treatment of debt securities held in a *retail account* under Article 28(6) of the same Delegated Regulation; see *infra*, note 16 and § 3.5.2). It follows that, irrespective of the application of that regime to a branch already established, ordinary bonds, which are repayable at maturity and not on demand, do not present the behavioral risk proper to deposits that the liquidity requirement for the branch is meant to cover.

in which that safeguard sits. According to the work of the FSB, the ECB, the EBA, and the Basel Committee,[9] that architecture is built around «*credit intermediation*» based on «*maturity transformation*»: the use of funding, traditionally obtained through deposits, to finance assets with longer maturities. It is this mismatch that produces the systemic risks the branch requirement and the related safeguards are expressly meant to prevent. What matters, therefore, are only instruments capable of generating sudden and simultaneous outflows: those repayable on demand or at short notice, without significant penalties or restrictions, and sensitive to the collective behaviour of holders under stress. An ordinary bond, whose repayment is anchored to a contractual maturity and is not payable on demand, does not normally display these structural features and therefore has no intrinsic potential to generate sudden or behavioural outflows.[10]

9 On "*credit intermediation*" based on maturity and liquidity transformation as the source of the risk characteristic of banking activity and the core of the related prudential regulation, see, for the Basel Committee, Basel Committee on Banking Supervision, *Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools*, January 2013, and *Basel III: the Net Stable Funding Ratio*, October 2014. Their requirements, implemented in Part Six of the CRR and in Delegated Regulation (EU) 2015/61, cited *supra*, note 8, are aimed, respectively, at addressing short-term liquidity outflows and at structurally containing the mismatch between the maturity of assets and that of funding. For the Financial Stability Board (FSB), see *Shadow Banking: Strengthening Oversight and Regulation. Recommendations of the Financial Stability Board*, 27 October 2011 (see *infra*, note 53), where maturity and liquidity transformation, together with leverage and credit risk transfer, are identified among the risk factors that make credit intermediation, even when carried out outside the banking system, a source of risks similar to those of banks. For the EBA, see the *Guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of Regulation (EU) No 575/2013*, EBA/GL/2015/20, 14 December 2015, which identify activities carried out outside a regulated banking framework precisely by reference to credit intermediation and the related maturity and liquidity transformation. For the European Central Bank (ECB), see L. Coulier, S. Gardó, B. Klaus, F. Lenoci, C. Pancaro, A. Reghezza, *Assessing risks from euro area banks' maturity transformation*, in ECB, *Financial Stability Review*, November 2023, Special feature A, pp. 94–105, where maturity transformation is traced to traditional banking activity and linked, in particular, to exposure to interest rate risk (see also Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29 October 2013, pp. 63–89, on the Single Supervisory Mechanism). What emerges is an approach based on the economic risk of the activity rather than on the formal qualification of the entity or instrument, summarized in the formula "*same activity, same risk, same rules*" (used, among others, by European Commission, *Request to EBA, EIOPA and ESMA for technical advice on digital finance and related issues*, 2 February 2021, where EIOPA stands for the European Insurance and Occupational Pensions Authority, and, in the variant "*same activity, same risk, same regulation*", by FSB, *Global Regulatory Framework for Crypto-asset Activities*, 17 July 2023).

10 The absence of a fiduciary relationship with the holder also helps to exclude that capacity. The EBA places emphasis on that relationship as an element which, together with the contractual terms, determines how repayment

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In short, for purposes of Article 21c, what deposits and the «other repayable funds» comparable to them have in common is not the *existence* of a right to repayment, but the *manner* and *timing* in which its holder may exercise it. Only in those cases can such funds generate locally the systemic risks that the branch safeguard, which applies to both forms of funding, is expressly intended to prevent and manage; and only in those cases do preventive scrutiny and the resulting obligations find coherent justification. This is also consistent with the general EU principle of proportionality, to which the CRD VI recitals mentioned above expressly refer.

One formula, different functions: the unchanged wording of «other repayable funds» — CRD VI did not amend the wording of the existing provisions that already referred to «*other repayable funds*», from the definition of a credit institution to the list of banking activities in Annex I. The need for a closer look therefore arises not from any change in wording, but from the new and onerous legal effect that Article 21c now attaches to the reference, which brings its real purpose and prescriptive scope fully into view.

The formula first appears in the definition of «credit institution», now found in Article 4(1)(1)(a) CRR, where it helps identify the undertaking whose business is «to take deposits or other repayable funds from the public and to grant credits for its own account».[11] Recital 14 CRD, which carries forward through successive texts of European banking legislation a principle already expressed before the First Directive,[12] explains why that definition is broad. The notion of a credit institution must be wide enough to cover forms of funding other than deposits, including «the continuing issue of bonds and other comparable securities» used for the professional granting of credit, so as to prevent avoidance, as European case law confirms.[13]

is expected and may be requested. It is that relationship, grounded in the behavioral expectations typical of bank customers, that characterizes deposits and justifies a differently calibrated scrutiny of behavioral risk. See *infra*, note 16 and § 3.5.2.

11 CRR, cited *supra*, note 1, in particular Article 4(1), point (1)(a).

12 Council First Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17 December 1977, pp. 30–37 ("First Directive"); CRD, cited *supra*, note 1, recital 14.

13 Court of Justice, 11 February 1999, Case C-366/97, *Criminal proceedings against Massimo Romanelli and Paolo Romanelli*, ECLI:EU:C:1999:71, ECR 1999, I-855. The Court brought within "other repayable funds" also financial instruments that, although not intrinsically repayable, are the subject of a contractual agreement for the return

The same formula matters today in the different context of Article 21c CRD VI. That provision identifies the «*core banking services*» whose performance by third-country undertakings may trigger the branch requirement by referring to Annex I CRD, which lists among them taking deposits and other repayable funds.

Before turning to the individual provisions, it should be noted that the expression «other repayable funds» also appears, in the disjunctive form, in Article 9 CRD, which reserves the taking of deposits or other repayable funds from the public to credit institutions. Like the definition of credit institution, that provision delimits banking business and serves to prevent its circumvention. It does not identify the services that trigger the branch requirement, which is the function of Article 21c, and it is therefore

of the sums paid, in the context of the notion of credit institution and of the related prohibition on unauthorized persons carrying on the activity of taking repayable funds from the public combined with granting credit for their own account. On the *Romanelli* judgment, see, among many, G. Cocco, *I fondi rimborsabili nella raccolta abusiva di risparmio. Le direttive comunitarie e la fattispecie incriminatrice dell'art. 130 t.u. in materia bancaria*, in *Diritto pubblico comparato ed europeo*, 1999, pp. 760–769; M. Vereecken, *Seuls des établissements de crédit peuvent recevoir des fonds remboursables du public. Mais que comprend la notion de fonds remboursables?*, in *Euredia*, 1999, pp. 233–236. The ruling belongs to the context of the definition of credit institution and of the anti-avoidance function traditionally associated with the related regime, which aims to prevent unauthorized persons from professionally raising funds from the public for use in granting credit. The interpretive criterion developed there is therefore not capable of automatic transposition to the identification of the "*core banking services*" relevant for a different provision, namely Article 21c CRD VI, which must be carried out in light of the specific prudential function of the branch requirement. The same disjunctive formula appears in Article 9(1) CRD, which requires Member States to prohibit persons or undertakings that are not credit institutions from taking deposits or other repayable funds from the public. The prohibition does not apply to Member States, their regional or local authorities, or public international bodies of which one or more Member States are members, nor to cases expressly covered by national or Union law, provided that the activities concerned are subject to rules and controls intended to protect depositors and investors; national laws making use of that derogation are to be notified to the Commission and the EBA [verify paragraph references]. The provision has received very little elaboration at Union level, including as regards the notification mechanism. Read as a test of mere repayability, Article 9 would prove too much: no corporate issuer in the Union could issue bonds or other debt securities to the public without a specific derogation or a communication to the Commission. It is therefore to be understood, like the definition of credit institution, as aimed at unauthorised banking activity (*abusivismo*), that is, at the professional raising of funds from the public in the manner of a bank by persons who are not banks. Italian criminal law is similar in tone and distinguishes two offences, one concerning the unauthorised taking of savings from the public and the other the unauthorised carrying on of banking business; both are addressed to persons other than banks, and neither helps to interpret «other repayable funds» for the purposes of Article 21c. That the issuance of bonds by a bank, as compared with the same issuance by a corporate, could become criminally relevant would be difficult to justify.

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not examined separately in this paper.

Even at the level of wording, similar but not always identical expressions appear in sources layered over time. They refer variously to the subjective definition of a credit institution, to the objective identification of business activities carried on professionally, and to the relevant banking services.

Moving from one source to another, the disjunctive conjunction gives way to the cumulative one (or/and), the funding-and-lending pairing is replaced by a standalone entry, and the business activity becomes a service.

The potential interpretive uncertainty stems from the fact that the same expression recurs in the legal system in different, only partly overlapping areas. The difficulty grows when criteria and arguments developed in one area are transferred to another automatically, or through adjustments and distinctions that are not always straightforward, despite the distance between the regulatory functions. This should come as no surprise. As legal scholarship has observed of concepts of variable content that statutory definitions do not fix, the same expression may take on a different scope depending on the context in which it is used, without creating any systemic contradiction, provided that each meaning is coherent with the *ratio* and function of the relevant rules.

The EBA's clarifying intervention and the limits of a purely formal interpretation — Where identical or similar formulas appear in neighbouring but distinct contexts, the aim of interpretation is not to give them an artificially uniform meaning *a priori*, but to grasp the function each performs in its own context.

Here, this need arises not only from the absence of a legislative definition of «*deposit*», «*other repayable funds*», and «*from the public*», as the EBA has pointed out, but also from the need to prevent categories conceived to delimit the subjective perimeter of credit institutions from being used, without adequate consideration, in other areas: today, the identification of the «*core banking services*» relevant to the establishment requirement.[14]

14 See *supra*, note 4; on the EBA's observations concerning the absence of definitions of the relevant terms, see EBA, *Opinion of the European Banking Authority on matters relating to the perimeter of credit institutions*, EBA/

The problem is all the more topical given the growing attention the expression is receiving from national legislators, competent authorities, and market participants. If it is not placed in the correct systematic framework, it risks encouraging readings inconsistent with the function of the new regime.

Attempts to contain the scope of «*other repayable funds*» through corrective criteria often prove cumbersome and not fully satisfactory. Such criteria narrow the concept of a repayment obligation or right or, secondarily, require the issue or service to be localised in the territory (for example by reference to capital protection, the centralisation of the instrument, the phases and modalities of distribution or the prudential classification of the liability).

They tend, in fact, to correct *downstream* a premise that is too broad, namely that every repayable instrument is, as such, an «*other repayable fund*», instead of asking *upstream* what function the notion is meant to perform and, therefore, which functional characteristics such funds must have to justify being subject to the new safeguards introduced by the European legislature, which apply equally to deposits.

As the EBA's interventions also show, the decisive factor is not the mere existence of a repayment obligation, whether embodied in a *plain vanilla* bond or a structured note, *capital protected* or not, senior or subordinated. It is the way in which the related right can be exercised, and the resulting capacity of the liability to generate risks that ultimately matter for the financial system.

Delimiting the notion therefore requires identifying those forms of funding whose repayment terms are potentially capable of triggering the vulnerability to which the new safeguard responds.

«Credit intermediation – maturity transformation» as the banking activity-risk relevant for prudential purposes — In the European prudential framework, the aspect of banking activity that has become specifically relevant, following the concrete experience from which the whole *Banking Package* developed, is narrower than the general notion of «credit institution». It is credit intermediation that generates

Op/2014/12, 27 November 2014, and the annexed *Report to the European Commission on the perimeter of credit institutions established in the Member States*, 27 November 2014; see also *infra*, note 51.

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maturity transformation.[15] Only «*maturity transformation*» creates the structural mismatch between liquid or short-term liabilities and illiquid or longer-maturity assets, from which liquidity risk, «*behavioural risk*», and «*run risk*» derive, undermining stability at the local level with potential systemic contagion effects.

Funding that is relevant in this sense is not «*ordinary capital market funding*». Even when considered on its own, that is, in the absence of any lending in the territory, it must have an intrinsic capacity to generate systemic risks. This means that it embodies a right to repayment on demand, without significant penalties or restrictions, and can be identified through so-called «*deposit-likeness*», the EBA's formula for products that are *like deposits but not deposits*.[16] The EBA also looks at the relationship between the holder and the bank. Deposit-like funding sits within a banking relationship with its holder, typically a retail customer, and that relationship shapes both the accessibility of the funds and the holder's behaviour under stress. An ordinary bondholder, by contrast, stands in the ordinary issuer–investor relationship, the same one that binds the holder of a corporate or sovereign bond to its issuer: the bank acts as an issuer, not as the provider of a banking service.

Outside those cases, bank bonds do not in themselves present risk profiles for which the branch requirement, the related *ex ante* authorisation scrutiny, and the measures that follow *ex post* would operate as a necessary and incremental safeguard. The risks specific to issuances are already governed by securities regulation, including the disclosure and conduct obligations imposed on issuers and on the intermediaries involved in the transaction in various capacities. Those safeguards expressly take the banking nature of the issuer into account and are complemented by the intervention powers conferred on supervisory authorities to protect the stability and integrity of the system. Beyond the prudential needs to which the recitals of CRD VI themselves refer, no gap emerges, and none has ever been identified, that the new branch requirement would have to fill.

Equivalence and prudential comparability – Excluding a judgment on the quality of issuers and instruments as a selective filter of access to the capital markets — The more conservative readings rest, in the background, on a concern that third-country bank issuers not backed by sufficiently reliable prudential and supervisory regimes might gain access to the Union's capital markets. From this perspective, the branch requirement would be used to subject the home country's prudential and supervisory framework to a preventive equivalence review, keeping out issuers that do not offer sufficient guarantees of capital strength.

The argument, however, confuses distinct levels. Equivalence in the technical sense is a formal, general assessment of a third country's regime. It is carried out at Union level in the cases provided for by European legislation, and it produces the effects that legislation lays down for the specific case at issue. Under the branch regime, the national authority applies the classification criteria and draws the consequences of the relevant Union assessments of the home country's prudential, supervisory, and confidentiality framework, in order to calibrate the obligations and safeguards that apply to the local presence. It does not take a second equivalence decision, nor does it form a judgment on the solvency

15 P. Bologna, *Banks' maturity transformation: risk, reward, and policy*, Bank of Italy, Temi di discussione No 1159, December 2017; D.W. Diamond, P.H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, in *Journal of Political Economy*, 1983, vol. 91, No 3, pp. 401–419; I. Drechsler, A. Savov, P. Schnabl, *Banking on Deposits: Maturity Transformation without Interest Rate Risk*, in *Journal of Finance*, 2021, vol. 76, No 3, pp. 1091–1143. See also Basel Committee on Banking Supervision, *Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools* and *Basel III: the Net Stable Funding Ratio*, cited *supra*, note 9. In Italian scholarship, see M. Onado, *Economia e regolamentazione del sistema finanziario*, 5th ed., Bologna, il Mulino, 2021; G. Forestieri, P. Mottura, *Il sistema finanziario*, 7th ed., Milan, Egea, 2017; and, from an empirical perspective, G. Ferrero, A. Nobili, G. Sene, *Credit risk-taking and maturity mismatch: the role of the yield curve*, Bank of Italy, Temi di discussione No 1220, April 2019.

16 EBA, *Guidelines on harmonised definitions and templates for funding plans of credit institutions under Recommendation A4 of ESRB/2012/2*, EBA/GL/2019/05, 9 December 2019 (ESRB: European Systemic Risk Board), Annex I (Part II, section 4, para. 4.2, "*Insured and uninsured deposits and uninsured deposit-like financial instruments*", row 030) and template P 02.01, which replace the earlier *Guidelines on harmonised definitions and templates for funding plans of credit institutions under Recommendation A4 of ESRB/2012/2*, EBA/GL/2014/04, 19 June 2014; see already, with reference to the latter, EBA, Single Rulebook Q&A 2016_2714, *Validation rule v4134_m*, final answer published on 3 February 2017, according to which "*If these instruments are deposit-like and sold to retail customers they shall be reported in row 030 of P 02.01*"; for the *Additional Liquidity Monitoring Metrics*, Commission Implementing Regulation (EU) 2024/3117 of 29 November 2024 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Commission Implementing Regulation (EU) 2021/451, OJ L 2024/3117, 27 December 2024 (see *infra*, note 60); EBA, Single Rulebook Q&A 2020_5518 and Delegated Regulation (EU) 2015/61, cited *supra*, note 8; EBA, *Guidelines on the authorisation of third-country branches in accordance with Article 48c(8) of Directive 2013/36/EU*, EBA/GL/2026/08, Final Report of 7 July 2026. Although adopted for specific purposes, these measures make visible a consistent interpretive orientation on the prudential and systemic relevance of forms of funding comparable to deposits.

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of the individual bank.[17]

The branch requirement therefore cannot turn that assessment into a control of the quality of funding instruments through scrutiny of their issuer.

Otherwise, comparability would end up serving as a preventive barrier to access to the capital markets. Through a judgment akin to equivalence, it would give banking supervisory authorities a power of pre-selection that would operate only towards third-country undertakings, and only as bank issuers. Because the branch regime is territorially anchored (an authorisation granted in one Member State is not automatically recognised by the others), the effect would be markedly distortive: the fragmentation that CRD VI seeks to overcome would be reproduced and, indeed, exported from the banking system to the capital markets. Moreover, such interventions, directed at the individual issuer, would discriminate in access to the capital markets on the basis of non-EU origin and banking status, as compared with issuers of a different nature active in those markets (such as sovereign and corporate issuers). That would be potentially in tension with the approach expressed by IOSCO and reflected in a number of EU directives and regulations, under which access to the market rests on disclosure and conduct safeguards rather than on a prior judgment on the issuer. It would also sit uneasily with the principle of non-discrimination that informs the product intervention powers of supervisory authorities, discussed further below.

Comparative perspective — Whatever arguments individual jurisdictions have adopted, it does not appear that, with the exception of Italy, ordinary bank bonds have traditionally been regarded as capable of giving rise to authorisation requirements as a prerequisite for the offer, listing, or marketing of bonds of third-country entities. Deposits, and sight and on demand instruments, by contrast, have always been reserved exclusively to licensed banks. Neither the preparatory works nor the Member States' implementing legislation, including for CRD VI, contain any express elaboration of criteria for identifying relevant forms of funding. This reflects how well established, and how uncontroversial, these issues have historically been.

The discussions now emerging in some jurisdictions start precisely from the traditional exclusion of fundraising embodied in financial instruments from authorisation and regulatory regimes. Although nothing in the text has changed, some argue that this makes it difficult today to identify, as a matter of interpretive technique, how instruments that exceptionally present «*deposit-like*» characteristics could be brought within the perimeter of the branch requirement notwithstanding that «exclusion». The positions Member States took when implementing what Annex I CRD already provided will probably help confirm the earlier approaches, which had taken those exclusions into account. Beyond these debates, the fundamental structure of the European market remains oriented towards continuity with previous practice, and nothing suggests extending «*other repayable funds*» to «*ordinary capital market funding*».

The Italian position: the conservative approach and its context; prospects for overcoming it in light of the new rules — In Italy, regulatory and application practice has traditionally treated prior authorisation by the Bank of Italy for deposit-taking (or compliance with the passporting requirements, as the case may be) as a prerequisite for marketing bonds issued by third-country banks in Italy. This reading gave decisive weight to three factors taken together: the issuer's status as a bank engaged in banking business, the repayability of the instrument, and activity directed at the territory. A bank is the entity that professionally raises funds through deposits or repayable funds in order to use them in the exercise of credit. It was therefore held that a third-country entity that addressed the public by means of bonds or other debt securities carried out in the territory a banking activity, understood as a business activity and reserved to authorised banks. Because no authorisation regime was calibrated on the mere issuance or marketing of financial instruments (that is, on the raising of «other repayable funds»), the licence required was, in practice, the one for taking deposits, even though the issuers concerned did not intend to carry on that activity.

This approach had its own historical justification in a legal system in which the bank was regarded as

17 Under Articles 48a and 48b CRD, as amended by CRD VI, a branch may be considered "qualifying" (*qualifying third-country branch*) and, where the further size and activity conditions are met, be classified as class 2, only if the third country in which the *head undertaking* is established has been assessed by the European Commission as having a prudential and supervisory regime, as well as confidentiality requirements, at least equivalent to those of the Union, and is not listed among the high-risk third countries for anti-money laundering and countering the financing of terrorism. It follows that the equivalence assessment relevant for classification is of Union nature and distinct from the assessment entrusted to the individual national authority, which merely draws the consequences from it for the purpose of calibrating the safeguards applicable to the branch.

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a special undertaking subject to public controls, grounded in Article 47 of the Italian Constitution.[18] That provision entrusts the Republic with encouraging and safeguarding savings in all their forms and with regulating, coordinating, and supervising the exercise of credit. At the time, savings were still perceived as household wealth or liquidity not intended for immediate consumption, and the modern distinction between savings and investment had not yet reached its present regulatory articulation or its corresponding conceptual and regulatory autonomy. In that framework, recourse to banking regulation could appear to be the only coherent and effectively available means of protecting both investors and the market.

The development of law and regulation has since produced two complementary but distinct regulatory frameworks. They rest on the allocation expressed in Article 23, paragraph 4, TUF,[19] under which the regime for investment services and activities operates as a special regime in relation to banking legislation. The cornerstone of this distinction is the very article opening the TUF, which excludes from the category of financial products bank or postal deposits not represented by financial instruments. A deposit is not an investment, because its economic and legal function stops at the custody and availability of liquidity. Bonds, by contrast, belong to the sphere of using capital to generate enrichment and are drawn into the securities-market perimeter even when the issuer is a bank. Symmetrically, the TUB itself refers back to the TUF as regards investment services and activities.

In practice, recourse to banking regulation would be merely nominal: after the issuance, the banking transparency regime of Title VI TUB[20] and the remedies of the ABF[21] would not apply, since investors remain investors in their dealings with the issuer and do not become its banking customers.

Article 21c was transposed through Article 14-*bis* TUB in line with this approach. That provision neither typifies the individual categories of relevant instruments nor introduces automatic consequences based on their formal repayability. It leaves their determination to the interpreter, who is to apply it consistently with domestic and European positive law and the underlying principles.[22]

The TUB now clearly distinguishes the two areas in which the raising of funds with an obligation of repayment or return is relevant.

In the first, the formula helps define the bank and banking business as a whole, identified as the taking of savings from the public (understood as the acquisition of funds with an obligation of repayment, whether in the form of deposits or otherwise) combined with the exercise of credit. This results from several cross-references that must be read together. Article 1, paragraph 2, letter a), defines a bank as an undertaking authorised to carry on banking business; Article 10 identifies that business as the taking of savings from the public combined with the exercise of credit, to which it attributes the character of a business; and Article 11, paragraph 1, defines the taking of savings as «the acquisition of funds with an obligation of repayment, whether in the form of deposits or otherwise».

In the second, Article 14-*bis* TUB refers separately to Article 1, paragraph 2, letter f), numbers 1), 2) and 6), a pre-existing provision of EU origin that reproduces the list of activities eligible for mutual recognition in Annex I CRD. It thereby identifies the core banking activities and services whose performance in the territory by a third-country entity gives rise to the obligation to establish a branch. For present

18 Article 47 of the Italian Constitution; Constitutional Court, Research Service, *La tutela del risparmio. Quaderno di sintesi della giurisprudenza costituzionale* [The protection of savings: summary notebook of constitutional case law], edited by G. Ariolli, October 2008. In scholarship, see G. Visentini, *Credito e risparmio. Risparmio e credito nella Costituzione*, in *Enciclopedia giuridica Treccani*, Rome, 1988; F. Merusi, Art. 47, in G. Branca (a cura di), Commentario della Costituzione, Bologna, Zanichelli, 1980, pp. 153 ss.

19 Legislative Decree No 58 of 24 February 1998, Consolidated Law on Financial Intermediation ("TUF" or "Consolidated Financial Act"), in particular Articles 1, 7-*bis*, and 23(4), as currently in force.

20 Legislative Decree No 385 of 1 September 1993, Consolidated Law on Banking and Credit ("TUB" or "Consolidated Banking Act"), in particular Articles 1(2)(a), 10, 11, 12, and 14-*bis*, as currently in force.

21 Bank of Italy, *Disposizioni in materia di trasparenza delle operazioni e dei servizi bancari e finanziari e correttezza delle relazioni tra intermediari e clienti* [Provisions on the transparency of banking and financial transactions and services and the fairness of relations between intermediaries and customers], measure of 29 July 2009 as amended, Section I, para. 1.1; Article 128-*bis* TUB and the Bank of Italy's Provisions on out-of-court dispute resolution systems concerning banking and financial transactions and services, for the Banking and Financial Ombudsman (*Arbitro Bancario Finanziario*, ABF); Article 32-*ter* TUF and the regulation of the National Commission for Companies and the Stock Exchange (*Commissione nazionale per le società e la borsa*, CONSOB) on the Financial Disputes Arbitrator (*Arbitro per le Controversie Finanziarie*, ACF), adopted by resolution No 19602 of 4 May 2016, as amended.

22 The review of the traditional approach also makes it possible to take into account the solutions adopted in the other legal systems of the Union, consistently with the harmonizing purpose of CRD VI and with the need to preserve uniform competitive conditions among Member States, avoiding regulatory arbitrage.

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purposes, the relevant activity is the «taking of deposits or other funds with an obligation of repayment». The reference in Article 14-*bis* runs directly and only to letter f) of Article 1, paragraph 2. It does not permit a return to the defining provisions mentioned above, or to the interpretations given to them, which, although they refer to other repayable funds and to banking activities, serve distinct purposes.

In the first context, the formula has had, since its historical origin, a broad, anti-avoidance scope, because it serves to identify the bank in its business dimension. In Article 14-*bis*, by contrast, it operates within the different framework of CRD VI. What matters there is not any raising of funds attributable to the bank's business, but the performance of an activity or service considered on its own which, even when detached from the local exercise of credit, is in itself capable of generating territorially relevant (systemic) risks.

On the reading carried out so far, the forms of funding that matter here should embody, by virtue of their structural and behavioural characteristics, an intrinsic riskiness that justifies the territorial safeguard of the branch, preventive scrutiny for access to the market of the Member States, and the resulting obligations. Ordinary capital market instruments, by contrast, do not present that riskiness structurally. They may acquire systemic relevance only in concrete and contingent circumstances.

In short, the two kinds of risk call for different responses. The systemic risk inherent in deposits, and in the instruments treated as equivalent to them for purposes of the same safeguard, is addressed by a preventive measure: the branch requirement. The merely contingent systemic risk of ordinary debt instruments is addressed by a targeted intervention on the product, its distribution, or related financial practices, depending on the instrument's characteristics, spread, concentration, or circulation in the local market.

Capital market regulation, including at the domestic level, responds to these risks in particular through the *product intervention* powers of the competent authorities. In Italy, these include the power conferred on the Bank of Italy by Article 7-*bis* TUF to prohibit or restrict the marketing of financial instruments when necessary to preserve the stability of the national financial system. Its exercise is subject to criteria of proportionality and non-discrimination and to periodic assessments published by the Authority itself.[23]

The question is therefore not whether the traditional approach was justifiable in itself, in light of the rules then in force and their historical interpretation, but whether it can be replicated in the new and radically different legal framework. It cannot. That approach developed in the absence of a harmonised regime for access to the EU banking market by third-country undertakings and before the *Banking Package* and the Basel prudential framework. Today Article 21c gives the expression «*other repayable funds*» a different function, implemented through the new Article 14-*bis* TUB. Declining to replicate the traditional approach in such a different context would be consistent with the interpretation at Union level and with the position adopted in the other Member States. As a matter of domestic law, it would also give effect not only to the wording of the TUB and its cross-references but, above all, to the complementarity between banking law and securities law and, thus, to Article 47 of the Constitution itself, which also calls for identifying the most efficient method of protection according to the characteristics, risks, purposes, and expectations specific to bank savings and financial investment.

In this changed scenario, the Italian approach can be aligned with that of the other Member States directly through a literal and functional reading of Article 14-*bis* TUB and Article 1, paragraph 2, letter f), TUB together. No amendment of primary legislation is needed, and the substantive protection of investors and of the system, which the legal system today adequately provides, is unaffected. Nor is there any need to impose territorial prudential safeguards that the nature of the activity does not justify or that are disproportionate to the risks inherent in it. Such an outcome would also avoid an isolated position within the Union, one liable to harm the competitiveness of the Italian market and the variety of instruments available to investors.

Objective and subjective scope: certificates, structured notes, and issues by non-bank entities, in

23 MiFIR, Articles 40, 41, and 42, and Delegated Regulation (EU) 2017/567, cited *supra*, note 3; Bank of Italy, *Il "potere di intervento" della Banca d'Italia su strumenti finanziari, depositi strutturati e attività/pratiche finanziarie collegate: quadro giuridico, analitico e metodologico* [The Bank of Italy's "intervention power" over financial instruments, structured deposits, and related financial activities and practices: legal, analytical, and methodological framework], April 2023; Bank of Italy, *Potere di intervento: valutazione periodica dei rischi per la stabilità finanziaria al 31 dicembre 2025* [Intervention power: periodic assessment of risks to financial stability as at 31 December 2025], 27 April 2026.

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particular holding companies of banking groups — Whatever position is taken on the scope of «other repayable funds» for purposes of Article 21c CRD VI, some cases must in any event be regarded as falling outside it. On the objective side, certificates cannot be treated as instruments that embody an obligation of repayment or return: they are undisputedly securitised derivatives, not debt securities representing a loan. The issuer's performance consists in paying a settlement amount or redemption amount, determined by the payoff formula according to the performance of one or more underlying assets and calculated on a notional amount, which is a mere calculation parameter and not borrowed money. Likewise, any coupons, premiums, or other periodic or final amounts are linked to the payoff and cannot be characterised as interest, since they serve no remunerative function within a lending relationship. Even the expression capital protection, where it appears in a product's documentation or name, describes in a non-technical sense the economic result of its structure, namely a payment corresponding, in whole or in part, to the amount invested, determined by the payoff formula and any floor mechanisms, and not the discharge of a restitutionary obligation.

Structured notes require separate consideration. Although they may embed derivative components or be linked to the performance of underlying assets, they remain debt securities with an obligation to repay the borrowed capital. Under the functional analysis adopted here, they would be excluded already because they normally lack the characteristics of so-called «*deposit-likeness*», irrespective of any total or partial capital protection. Under the formal approach, which ties the relevance of an instrument to the existence of an obligation of repayment, the classification as an «*other repayable fund*» could instead lapse for structured notes that are not *capital protected*, where the terms of the issue do not ensure full repayment of the capital. But this approach, too, starts from identifying the prevailing nature of the instrument as an investment rather than its function as *funding*, a perspective the *Federal Reserve* has also stressed.[24] Carried to its logical conclusion, it should therefore lead to the exclusion of structured notes from «*other repayable funds*», irrespective of whether, or to what extent, the capital is protected. As to the subjective profile, although Article 21c refers to «third-country undertakings» rather than only to banks, non-bank parent companies of banking groups should not fall within its scope. Such entities must be treated according to their actual nature as *corporate* issuers, consistent, among other things, with the approach established even within conservative Italian practice, which has paid the most attention to these elements. Moreover, the branch requirement presupposes that the undertaking is authorised in its home country to provide the banking services concerned. Non-bank parent companies, often classified for prudential purposes as *clean holding companies*, cannot carry on activities such as deposit-taking, since they are designed to hold no operating liabilities: those sit with the operating subsidiaries, and the creditors of the holding company are structurally subordinated to them.

Outcome reached on the functional delimitation of «other repayable funds»: «deposit-likeness», systemic risks, and the effectiveness of prudential supervision — The notion of «other repayable funds» relevant for purposes of Article 21c CRD VI should be confined to those forms of funding that, while not deposits, display, as the EBA has indicated, characteristics of «deposit-likeness»: that is, forms of funding structurally capable of generating locally relevant liquidity, behavioural, and outflow risks. The EBA's repeated guidance on this point reflects a technical, selective, and functional approach, which gives weight to the accessibility and withdrawability of the funds, to the behavioural expectations of holders, and to their placement within a banking relationship. Mere formal repayability of the instrument is not a selective criterion. Preventive scrutiny, the branch requirement, and the related organisational, capital, and reporting obligations find coherent justification only for those forms of funding. Those obligations range from the programme of operations and the business plan to governance arrangements, booking arrangements, capital and liquidity requirements, reporting, and cooperation between authorities, and through them supervision of the branch identifies, monitors, and governs locally relevant systemic risks. Those requirements have no coherent object, whether functionally or in terms of proportionality, in the mere issuance of bonds, which does not in itself present the characteristics (accessibility

24 Board of Governors of the Federal Reserve System, 12 CFR (*Code of Federal Regulations*) Part 252, Regulation YY, *Total Loss-Absorbing Capacity, Long-Term Debt, and Clean Holding Company Requirements for Systemically Important U.S. Bank Holding Companies and Intermediate Holding Companies of Systemically Important Foreign Banking Organizations*, final rule adopted on 15 December 2016, in *Federal Register*, vol. 82, No 14, 24 January 2017, pp. 8266–8315; see in particular the definition and the exclusion of *structured notes* from the debt instruments eligible for the purposes of the *Total Loss-Absorbing Capacity* (TLAC) and *Long-Term Debt* (LTD) requirements (*Supplementary Information*, sec. II.E.3.a, "*Structured Notes*", p. 8280), on the ground that "*investors in structured notes tend to pay less attention to issuer credit risk than investors in other long-term debt, because investors use structured notes to gain exposure unrelated to the covered BHC*" (where BHC stands for *Bank Holding Company*).

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and withdrawability) of funding functional to «maturity transformation», the linchpin of the prudential architecture of which CRD VI itself forms an integral part.[25] If the only link with the local reality and its real economy were the holding, by investors established in a Member State, of debt instruments issued abroad, the establishment requirement would end up imposing a merely nominal presence, lacking real operational content and reduced to a tick-the-box exercise. That would be incompatible with the need, highlighted by the EBA also in the post-Brexit experience, for the organisational substance of an establishment to be proportionate to the activity actually carried on and the risks generated.

Ordinary capital market instruments remain subject to the regime functionally proper to them, in accordance with the principles of proportionality and subsidiarity. The distinction is decisive. In the forms of funding that Article 21c places alongside deposits, systemic risks are structurally connected to the funding and derive from its accessibility and withdrawability. Such funding is therefore intrinsically capable of generating dynamics against which safeguards such as the establishment of a branch operate preventively. In ordinary debt instruments, by contrast, such risks may emerge only contingently and in concrete cases, depending on the characteristics of the instrument and the issuer, the way the instrument is distributed, and the concentration of its holding. Any systemic risks that such instruments may generate, by reason of their specific characteristics, spread, and circulation, are addressed by conferring significant intervention powers on the authorities, to be exercised in compliance with the principles of proportionality and non-discrimination and as an *extrema ratio*.[26]

Concluding remarks. Savings and investment: different expectations, legal positions, remedies, authorities and techniques of protection — These reflections confirm, from a systematic standpoint, the now established dynamics between capital market law and banking regulation. At European level and in the individual Member States, positive law has progressively shaped the relationship between the two sectors not as parallel or alternative areas but as specific and complementary regimes, each built on protection techniques consistent with the nature of the activity regulated. The distinction between savings and investment is not merely sociological but legal and structural. It governs the allocation of the applicable rules, the competent authorities, and the available remedies, and it is fully aligned with the different significance that the Banking Package and the BRRD attribute to depositors and to holders of financial instruments. When ordinary securities are involved, the protection of investors, the workability of resolution mechanisms, and the stability of the system operate within the capital market perimeter through disclosure, conduct, and product governance obligations, underpinned by far-reaching product intervention and control powers that are conferred also on banking supervisory authorities.

Treating the investor in bank bonds as a figure distinct from the saver does not mean compressing protection. It means articulating remedies differently, in line with the underlying economic expectation. In the most mature systems of private law, protection is built not around eliminating risk but around the proper formation of the decision and the allocation of the consequences of the investment. Comparative experience confirms the point: civil law constantly develops safeguards, claims, and indemnities depending on whether a legal dealing is expected to deliver protection or an enrichment knowingly exposed to market risk.

This approach fits coherently with the regulatory framework of the financial markets, which protects the investor through disclosure and conduct safeguards that also serve prudential and system-stability

25 The conclusion does not exclude that bonds may become relevant in applying the prudential regime to a branch that already exists. Where certain liabilities arising from debt instruments of the *head undertaking* originate in the branch's operations, are booked in its books, or are otherwise attributed to its perimeter under the applicable *booking arrangements*, they may be relevant for the representation of local *funding*, for supervisory reporting, and, within the limits set by the rules, for capital and liquidity requirements. That relevance, however, presupposes a branch that is already operational, local accounting, and criteria for allocating assets and liabilities to its perimeter. It is therefore not possible to reverse the logical sequence by using the rules on the prudential treatment of the liabilities of an already established branch to characterize the mere issuance by the *head undertaking* as the event that gives rise to the establishment requirement. Any local relevance of bonds is an effect of their attribution to the branch's operations, not the premise of its establishment. See EBA/GL/2026/08, cited *supra*, note 16, with regard to the *programme of operations* and *booking arrangements*; Commission Implementing Regulation (EU) 2026/1757 of 20 July 2026 laying down implementing technical standards for the application of Directive 2013/36/EU with regard to the reporting of third-country branches, OJ L 2026/1757, 27 July 2026, applicable from 28 March 2027, adopted on the basis of the draft implementing technical standards (*Implementing Technical Standards*, ITS) submitted by the EBA (EBA, *Final Report — Final draft Implementing Technical Standards on the supervisory reporting of Third Country Branches under the minimum harmonisation regime of Directive 2013/36/EU*, EBA/ITS/2026/01, 5 March 2026), on the supervisory reporting of *third-country branches*; EBA, *Guidelines on instruments available for third country branches for unrestricted and immediate use to cover risks or losses under Article 48e(2)(c) of Directive 2013/36/EU*, EBA/GL/2026/03, Final Report of 2 March 2026, as regards capital endowment.

26 See *supra*, note 23.

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needs. The integration of banking regulation and market regulation thus reflects a logic of complementarity, not overlap, between safeguards and protection techniques.

It is also significant that the outcome of financial regulation, founded on the distinction between savings and investment, finds confirmation in civil-law thinking. Civil law recognises the different significance of expectations for the source and content of the obligation, and it calibrates the protections provided by the legal system according to whether the interaction between subjects gives rise, for the weaker party, to a need for protection (static, aimed at avoiding losses) or for performance (dynamic, aimed at achieving a specific enrichment). Since law is not an exact science, systemic coherence is one of the few verification tools available to the interpreter, and the convergence described here may be a sign that the positions taken are correct.[26-bis]

2. The branch requirement and its purpose within the *Banking Package*: origin, prudential function and relevant risks

2.1. *From fragmented national regimes to the branch requirement: purpose, organisational substance and local supervision*

In the context of a contemporary financial system that is inherently cross-border, the objective of stability coexists with the need to preserve conditions of competition consistent with the internal market and with the global dimension of banking and capital market activities.

The European intervention starts from the recognition that national regimes governing access to, and the conduct of, banking activities and services by third-country entities were heterogeneous, and that this heterogeneity, by preventing effective supervision, put financial stability and market integrity in the Union at risk.[27]

26-*bis* See C. Castronovo, L'obbligazione senza prestazione ai confini tra contratto e torto, in Le ragioni del diritto. Scritti in onore di Luigi Mengoni, I, Milan, 1995, pp. 147 ff., from which the author developed the mature and fundamental distinction between duties of performance, duties of protection and tort, and related expectations underlying the different forms of civil law liability.

27 Recital 17 CRD VI observes that the fragmentation of the national regimes applicable to third-country branches, in the absence of prudential rules and of supervisory cooperation mechanisms at Union level, «puts financial stability and market integrity in the Union at risk», and to that end provides for common minimum requirements on authorisation, prudential rules, internal *governance*, supervision and reporting.

The phenomenon became particularly evident in the post-Brexit scenario, giving rise to regulatory arbitrage and competition between jurisdictions. In practice, the *cross-border* performance of such activities and services had produced inconsistencies in application, gaps in information and supervision, and difficulties in coordination among the competent authorities.[28]

Even where a branch existed, a gap often arose between the economic activity actually carried on in the Member State and the local presence, because assets, capital items and liquidity, as well as critical functions, data and staff, remained centralised at the *head undertaking*, including through *internal booking* models.[29] [30] In that configuration, a *shock* at the parent could spread to local funding and financing channels, causing liquidity strains, interruptions in ongoing activities or outflows,[31] not be-

28 On the preparatory works, see European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU, COM(2021) 663 final, 27 October 2021, and the related impact assessment, SWD(2021) 320 final; EBA, Report to the European Parliament, the Council and the Commission on the treatment of incoming third country branches under the national law of Member States, in accordance with Article 21b(10) of Directive 2013/36/EU, EBA/REP/2021/20, 23 June 2021, which, having noted the growth in the activities of third-country branches in a context of regulatory fragmentation (106 branches in 17 Member States, with total assets of approximately EUR 510 billion as at 31 December 2020, also as a result of Brexit), makes recommendations for the harmonisation of authorisation requirements, of prudential requirements — in particular capital, liquidity and internal governance, including booking arrangements — and of cooperation with home-country authorities.

29 See *supra*, note 8.

30 See *supra*, note 5.

31 On the autonomous relevance of funding capable of generating systemic and outflow risks, see recitals 17 and 19 CRD VI and Article 48f CRD; see *supra*, notes 5, 7 and 8, as well as *infra*, §§ 3.5.1 and 3.5.2. In particular, a local presence is imposed as a condition for effective supervision of the activity carried out within the territory. While this need appears self-evident for lending and the issuance of guarantees, it also arises for the taking of funds, even when separate from the local exercise of credit, where the funding acquired from the public of the Member State is in itself capable of generating systemic risks: as occurs, paradigmatically, with deposits, whose repayability on demand exposes the institution — and, through it, the system — to sudden and simultaneous outflows. Significantly, recital 19 CRD VI calibrates the obligations of branches to the «risk that they pose to financial stability and market integrity» and identifies the acceptance of retail deposits above a certain threshold as an indicator of higher risk, while Article 48f CRD calibrates the liquidity requirement to the branch's «liquidity outflows» (see *supra*, notes 7 and 8). It is therefore against such risks that it must be verified which «other repayable funds» are assimilable to deposits (see *infra*, §§ 3.5.1 and 3.5.2).

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cause the competent authority of the host Member State lacked legal supervisory powers, but because there was no operational structure, and no reference capital base on which to exercise them.

Brexit is only the historical event that made the depth of the existing fragmentation particularly visible. From the European legislature's perspective, the necessary harmonisation of prudential safeguards could be achieved through an approach of *substance over form*, making the conduct of system-critical activities conditional on a real local presence over which effective supervision could be exercised to safeguard stability.[32]

Under CRD VI, therefore, the performance of «*core banking services*» is tied to an authorised establishment with financial and organisational substance commensurate with the nature, size and complexity of the activity carried on and functional to the effective exercise of supervision.[33]

The eminently prudential nature of the requirement emerges clearly: it is built around the need to prevent, monitor and manage risks that may threaten the integrity and stability of the financial system. That is the decisive element for understanding both why only certain basic banking services were identified as critical, and in what circumstances the taking of «other repayable funds» must be subject, like deposits, to a safeguard expressly designed to contain outflow, behavioural and liquidity risks.[34]

2.2. *Business risk and systemic dimension as the foundation of modern banking regulation*

From this perspective, CRD VI forms part of the completion of the implementation of the Basel III international standards. Their prudential logic makes it possible to reconstruct, within that broader context, the activities (*rectius*, services) on which the new branch requirement is founded and which are capable of triggering its application.[35]

32 Recital 5 CRD VI makes the provision of the core banking services referred to in points 1, 2 and 6 of Annex I subject to an «explicit and harmonised requirement for authorisation», namely the establishment of a branch in the Member State, without prejudice to the possibility of operating through a subsidiary.

33 See *supra*, note 7.

34 See *supra*, notes 5, 7, 8 and 31.

35 The *Banking Package* comprises, as seen, both CRD VI and CRR III (both cited *supra*, note 1). CRR III intervenes mainly in the calculation of banks' capital requirements, among other things by revising the methods for calculating risks and introducing the *output floor*; CRD VI develops its organisational and supervisory side, intervening on the powers of the competent authorities, on *governance* arrangements and, as far as is relevant here, on the harmonised regime for third-country branches. The two acts, published in the OJ L of 19 June 2024, complete the implementation in the Union legal order of the final elements of the Basel III framework.

The *Banking Package* is highly technical and is the result of a flood of successive legislative measures, accompanied by numerous preparatory acts and consultations. It follows that reading individual provisions in isolation often fails to capture their full scope. That scope emerges only when they are traced back to the single purpose they share, which allows their prescriptive force to be aligned and an otherwise apparently composite framework to be brought back to coherence.

That framework stems from the recognised structural fragility of banking, which is inherently exposed to liquidity, contagion and systemic destabilisation risks by reason of the distinctive function of maturity transformation carried out through credit intermediation. On that premise, Union law has progressively developed instruments aimed both at preventing and absorbing crises of institutions and at managing their effects in an orderly manner. They are meant to protect a plurality of interests that do not necessarily converge, among them financial stability, the continuity of critical functions, depositors and investors, and public finances, and which therefore require a balance calibrated to each area regulated, so that the cost of failure does not fall on taxpayers.[36]

CRD VI fits squarely into this framework and, in particular, Article 21c considered here, which governs the conditions of access to the Union banking market by third-country entities performing «*core banking services*», together with the related branch requirement.

Although the First Directive already identified, if only in embryonic form, the riskiness inherent in credit intermediation, it is precisely on this point that the evolution of European and international banking law can be appreciated.

The concrete experience of banking crises and the progressive refinement of the prudential *framework*

36 See Council of the European Union, press release of 14 May 2019, and *Amendments to the banking union rules*, both cited *supra*, note 1. These sources link risk reduction measures in the banking sector to strengthening the resilience of the Union banking system and to protecting financial stability, also by reason of the potential repercussions on the real economy.

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have in fact led to a more precise identification of the risk characteristic of banking. That risk is not determined by the mere professional raising of funds from the public for lending (the generic model traditionally underlying, as will be seen, the notion of a bank), but by maturity transformation and the resulting mismatch between the intermediary's assets and liabilities.

According to the well-established economic and financial literature, the characteristic banking activity consists in raising funds, typically on demand, and using them in turn to fund longer-term assets. That mismatch is its distinguishing feature, because the business risk assumed by the credit institution can also take on a systemic dimension and justify the application of specific prudential safeguards. The entrepreneurial risk assumed by the bank, ordinarily borne within the bilateral relationship with its counterparties, may thus spill over to the financial system as a whole. The core of such activity is described as «*borrowing short term and lending long term*», as «*maturity transformation*», and as the conversion of short-term liabilities into long-term assets, with the resulting «*maturity mismatch*» and liquidity risk, which the bank takes on as a business matter but which is potentially relevant for the system.[37]

This regulatory development is consistent with the approach of the economic analysis of law, under which activity and risk are inseparable and identify each undertaking, and under which costs should be allocated to the party best placed to prevent, manage or absorb them.

In this perspective, the characteristic banking activity, above all for prudential purposes, is not identified with generic intermediation between funding and lending, but with the specific model which, through the transformation of short-term liquidity and the mismatch of maturities, generates the qualifying risk to which the related safeguards are tied. Identifying the activity thus makes it possible to identify the risk and, symmetrically, identifying the risk makes it possible to delimit the activity to which the prudential framework refers.[38]

37 See *supra*, note 15.

38 In general methodological terms, on the correlation between risky activity and the allocation of costs to the party best placed to prevent, govern or spread them, see G. Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, in *Harvard Law Review*, 1965, vol. 78, p. 713 et seq.; Id., *The Costs of Accidents*, Yale University Press, 1970. The reference is used here as a general criterion for analysing the activity-risk relationship and not as a source of the specific prudential reconstruction of banking activity, which is based on the Basel

2.3. *«Credit intermediation» and «maturity transformation»: structure of the safeguards and local relevance*

The notion of «*credit intermediation*», consistently used in the Union prudential framework and referred to in the CRD, identifies the economic configuration proper to a banking undertaking insofar as it involves the professional assumption of a qualifying risk, relevant not only at the level of the institution's business, but also at the regulatory level and eventually for the stability of the system. The decisive factor is therefore not the mere theoretical combination of funding and lending, but the business model in which the transformation of liquid or short-term liabilities into illiquid or longer-term assets exposes the intermediary to liquidity strains, including the risk of a run on the bank («*run risk*»), which has proved capable of spreading to the community of depositors and savers and thus to the financial system and real economy. It is only this profile of the general banking activity, that is "peculiar compared to other entrepreneurial activities", that is *in re ipsa* potentially systemic and that grounds the need for prudential safeguards.

Basel III expressly identifies banks as credit intermediaries whose balance sheets reflect structural maturity transformation and a consequent exposure to liquidity strains. Its regulatory framework takes as the qualifying element of banking the combination of certain liabilities and lending assets, in order to address the risks inherent in this operating configuration, which are potentially transmissible and contagious.[39]

In particular, while aware of the simplification involved, the prudential framework developed by the Basel Committee on Banking Supervision comprises, for present purposes, the following complementary safeguards:

- capital requirements, designed to ensure banks' capacity to absorb losses arising from the risks

framework and on European sources. Consistently, the principle «*same activity, same risk, same rules*», recurrent in the work of international and European authorities on financial intermediation, including non-bank intermediation, links the application of regulatory safeguards to the activity actually carried out and to the risk it generates, rather than to the formal qualification of the entity carrying it out or of the instrument used (see *supra*, note 9).

39 See *supra*, note 9.

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they assume;

- liquidity requirements (including the *Liquidity Coverage Ratio* (LCR) and the *Net Stable Funding Ratio* (NSFR)), specifically aimed at mitigating short-term liquidity strains and structural imbalances in funding;

- supervisory review and market discipline, aimed at ensuring adequate *governance*, risk management and transparency.

All the safeguards thus outlined respond to the risks inherent in maturity transformation: capital requirements protect solvency, while liquidity requirements ensure intermediaries' capacity to cope with *stress* situations in which funding becomes unstable or unavailable.

The resolution framework then confirms the distinction between deposit liabilities, which are central to banking and benefit from specific protection, and market liabilities intended to absorb losses.

«*Ordinary capital market funding*» naturally remains relevant in the prudential treatment of an existing branch (once it actually performs relevant activities in the territory, it is operational and has assets and an adequate capital base) where, by virtue of existing *booking arrangements*, the liabilities generated by the issuance are attributed to its operational and accounting perimeter, contributing to the representation of overall exposure, funding structure, liquidity and maturity profile. That prudential relevance of ordinary bond issues operates, however, downstream and presupposes the existence of the branch. It cannot, by inverting the logical relationship between premise and effect, be used to give the mere issuance, where it lacks the characteristics repeatedly highlighted, an autonomous relevance for the arising of the establishment obligation.[40]

«*Maturity transformation*» is not, however, fed indiscriminately by every form of funding. Its prudential relevance emerges when longer-term assets are matched by liabilities characterised by accessibility, withdrawability/callability on demand, and behavioural instability, such as deposits and the forms of funding functionally assimilable to them for that very reason. It is these features, not mere repayability,

40 See *supra*, note 25.

that make funding capable of generating liquidity strains, simultaneous outflows and «*run risk*».[41]

Ultimately, it is the possibility of simultaneous repayment requests against less liquid assets that generates the structural vulnerability justifying the application of the establishment requirement both to deposits and to the other funds with an obligation of repayment which, by reason of their terms and conditions and the behavioural expectations of their holders, display characteristics normally absent from ordinary ways of raising resources on the capital markets.

2.4. *The EBA's position on the function of the branch requirement*

2.4.1. *Branch substance and the object of local supervision*

As regards the function of the branch requirement, the EBA's position has emerged over time from a series of interventions rather than from a single, clearly identifiable and self-contained source. Taken together, however, they confirm that the purpose of the branch requirement is to ensure that services which are genuinely localisable in the territory and not attributable solely to the *head undertaking*, because they are capable of generating locally systemic, liquidity, outflow or contagion risks, can be effectively supervised. That can be achieved only through the establishment of branches with adequate substance, *governance*, *reporting* capacity and accounting transparency, commensurate, in line with a logic of proportionality, with the nature, size and complexity of the activity carried on.

The Authority's reflections in the post-Brexit scenario, and in particular in the opinions on the consequences of the United Kingdom's withdrawal from the European Union, certainly concerned a context different from the one examined here. They were aimed, first of all, at preventing merely formal relocation from allowing firms to benefit from access to the Union market without creating structures

41 The relevance of the banking relationship and of the holder's behavioural expectations also emerges from the prudential treatment of debt securities issued by the institution and held in a *retail account* under Article 28(6) of Delegated Regulation (EU) 2015/61, on which see EBA, Single Rulebook Q&A 2020_5518, both cited *supra*, note 8. The reference is intended only to underline how the prudential treatment of such securities is influenced by the existence of a banking relationship: that relationship contributes to defining the expected behaviour of the holder, which is relevant in determining outflows close to maturity. This confirms that the legal form of the instrument is not sufficient to determine its risk profiles relevant for prudential purposes.

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actually capable of identifying, assuming, managing and monitoring the risks generated by actual local activity.[42]

On the other hand, those opinions also make clear that the establishment of a branch must be justified by significant activity, so as not to reduce the related safeguards to a non-incremental duplicate of the ordinary supervision that the authorities can in any event already exercise over the issuer and the instrument. The branch must not be an organisational structure for its own sake, nor a formal condition of access, but a mechanism that makes effective local supervision possible over the activities, liabilities, relationships and vulnerabilities attributable to its operational perimeter.

Requiring a local presence where the only activity directed at the individual Member State consists of issuances lacking intrinsic features such as to give rise to systemically relevant risks there would end up producing precisely the kind of structure that is formally compliant but, in substance, lacks both a territorial link to justify it and effective operational content. The EBA has repeatedly referred to such a structure as inconsistent with the purpose of local supervision and with the principle of proportionality.

The EBA traces the function of the requirement back to the *ratio* and the needs that suggested its introduction, consistent with the systematic interpretation of the relevant legislation and with its historical justification: to ensure an organisational and supervisory safeguard in respect of services actually provided in the territory of the host Member State, services capable of establishing a «banking» relationship with their recipients and of generating systemic risks at local level, which such a presence makes it possible to identify, monitor and manage.

It is the performance, in the Member State, of a service endowed with that intrinsic relevance, assessable *a priori*, that justifies applying the branch requirement, its establishment and the related safeguards.

42 See *supra*, note 5.

2.4.2. *The EBA Guidelines of July 2026: locally conducted activity, booking arrangements and risks attributable to the branch*

That conclusion finds further confirmation in the *Guidelines* on the authorisation of third-country branches, in particular those published on 7 July 2026. They build the new regime around the branch's *programme of operations*, *business plan*, capital and liquidity requirements, *booking arrangements*, *governance* and supervision of the *head undertaking*, requiring that authorisation be supported by information and prudential conditions suited to ensuring the sound and prudent management of the establishment and, precisely, the supervision of the risks arising from the activities actually carried on in the territory of the Member State.

In this context, it is not immediately evident how an ordinary bond issuance by a banking issuer (a «theoretical» *head undertaking*, since no branch yet exists) could be qualified as an activity carried on locally, where the related liability remains attributed to the parent and cannot be attributed *ex ante*, operationally, in the accounts or for prudential purposes, to the perimeter of the prospective *branch*.

In particular, it is not easy to identify the legal criterion by which the issuance, understood as a «*core banking service*» "provided locally and as such relevant under Article 21c", can be regarded as carried out in the Member State, so as to require a branch there, to which the related liability would be attributed only *ex post*, thereby conversely requiring the presence of assets and liquidity at local level to satisfy it.

The original territorial connection, so to speak, cannot be inferred and legally constructed as deriving, in itself, from the law governing the instrument, from the place of central custody and clearing, or from the mere fact that the issue is intended also for, often among others, local investors. Nor does recourse to the place where the distribution activity is carried out seem conclusive. On the one hand, any self-placement by the issuer would already presuppose an operational presence and distribution activity in the territory, thus lying on a different plane from the mere issuance of the instrument and being relevant under MiFID.

On the other hand, where distribution is carried out by independent third-party intermediaries, the branch requirement would end up being linked to the existence of the issuance as such, rather than to the activity or services actually carried on by the issuer in the territory of the Member State. The

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requirement would operate, in other words, by virtue of the banking nature of the foreign issuer alone, which acts as a mere "product company" of an instrument recorded in its own accounts as its liability and made available in the territory (with the consequence that the issuance would be characterised as the taking of funds, whether distributed in primary or secondary market transactions).

Another point to consider is whether the rules on lapse or withdrawal of authorisation, in particular the time limits for failing to commence or ceasing activity, can be reconciled with a reading under which mere bond issuance, and its marketing to investors located in the Member State or in any event reachable in its territory, is a sufficient condition for triggering the obligation to establish a branch there.[43]

The same critical issues arise, *a fortiori*, in the case of international or multi-jurisdictional issuances. The fact that a security is offered, traded or held in several Member States, through intermediaries and market infrastructures, does not mean that the issuing bank provides an autonomous banking service in each of them. Otherwise, a single issuance would require as many branches as there are Member States in which the security circulates, in the absence of a passport for third-country branches. Each of them would, moreover, lack a distinct object of supervision, since the liability should remain in the intention and market practice single and attributed to the foreign issuer (*head undertaking*) and its allocation among the various States would depend only on the location of investors in the primary market phase (and, as noted, in the formalistic view that attaches relevance to the issuance itself as a repayable liability, also in the secondary market phase).

The *Guidelines* give central importance to *booking arrangements*, to the identification of the assets and liabilities attributable to the branch and to the supervision of the risks imputable to it, on the premise that the *branch* is a centre of activity and risk actually subject to the host authority's supervision. Those rules, however detailed, operate downstream: they govern the recording and prudential treatment of assets and liabilities originated, booked or otherwise attributed to the operations of a branch that has already been established. It is within that perimeter that any bonds attributable to it matter for capital endowment, liquidity and *reporting*. They cannot, therefore, be used retroactively to localise *ex ante* the issuance itself by the *third-country (theoretical head) undertaking* and to demonstrate the territorial prerequisite that is supposed to justify setting up the branch.[44]

It nevertheless emerges clearly once again that the prudential requirements with which the new regime is associated, including those on *capital endowment*, liquidity and classification of the branch, as well as the *reporting* obligations governed by Implementing Regulation (EU) 2026/1757,[45] are functionally linked to the systemic risks generated by the banking activities carried on, and by the liabilities territorially attributable to, the *branch*. They respond, in particular, to the risk that assets and liquidity are centralised at the parent and do not remain available to meet liabilities, outflows and maturity mismatches attributable to local operations, in a direct relationship with the holders of deposits or of securities assimilable to them in this sense. They therefore presuppose activities and risks already identifiable at local level and do not serve to create the territorial link and connection required by Article 21c.[46]

Read in this perspective, the EBA's position confirms that formalistic interpretations are unsuitable and supports the conclusion that neither the mere issuance, offer or admission to trading of bonds, nor

43 See Article 48d CRD and Article 14-*bis* TUB, on failure to commence or cessation of the authorised activity. The difficulty is twofold. On the one hand, a single issuance could make the establishment of a branch necessary as a prerequisite, while the subsequent absence of new transactions within the time limits laid down by the provision would raise the issue of retaining the authorisation, even though bond funding is inherently discontinuous, depending on the issuer's funding needs and on market conditions. On the other hand, if the marketing and accessibility of the securities within the territory constituted bank funding irrespective of the activity carried out by issuers, or of the acquisition of new funding, it would remain to be determined what constitutes the activity to be commenced, continued or ceased (new issuances, the securities remaining with local investors, or their circulation on the secondary market, including at the initiative of third-party intermediaries?). Retention of the authorisation would thus end up depending, alternatively, on the frequency of transactions, on the duration of the instruments held by local holders or on the conduct of parties other than the issuer. If, instead, the presence of securities still outstanding were sufficient, the duration of the authorised activity would end up coinciding with that of the bond issue, rather than depending on the actual exercise of a banking service within the territory. This uncertainty highlights the difficulty of applying the branch regime to the mere issuance of financial instruments, where their qualification as «*other repayable funds*» depends solely on repayability and there is no territorial connection with the activity carried out by the issuer.

44 See *supra*, note 25.

45 Implementing Regulation (EU) 2026/1757, EBA/ITS/2026/01 and EBA/GL/2026/03, all cited *supra*, note 25. The Regulation and the *Guidelines* complete, respectively, the uniform framework for supervisory reporting and that of the instruments available for the capital endowment requirement of third-country branches.

46 See *supra*, note 8.

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their distribution, can in themselves justify imposing the branch requirement, since those activities do not generate the kind of continuing banking relationship, local operational infrastructure or territorially anchored risk that the requirement is meant to address. Any risks remain those proper to capital market instruments and are governed as such by the relevant regime, which specifically takes into account the issuer's banking nature, enabling investors to appreciate their scope and the competent authorities to monitor and manage them.

2.4.3. E*quivalence and prudential comparability: scope and limits of their use as a filter for access to the banking system and the capital markets*

2.4.3.1. *Comparability as a criterion for calibrating safeguards, not for pre-screening third-country bank issuers and their financial instruments*

The concern underlying certain particularly conservative readings of the notion of «*other repayable funds*» arises precisely from the idea that «issuers» from third countries should not be allowed access to forms of funding from the public of the host State if they are not backed by prudential and supervisory regimes similar to those of the Union, and do not offer guarantees deemed sufficient to assess their actual soundness or capitalisation and the related riskiness of their instruments.

Through the branch requirement, the third-country bank issuer would in fact be subjected to the authorisation scrutiny of the host State's authority and, in the event of a negative outcome, barred from entering the territory and distributing its ordinary issuances.

This approach requires, however, clarification of the nature and object of the scrutiny thus triggered: the national authority applies the criteria for classifying the branch and draws the consequences of the relevant Union assessments of the home country's prudential, supervisory and confidentiality framework, without taking a second equivalence decision or forming a judgment on the issuer's solvency. In this respect, the EBA materials converge with sufficient clarity on two aspects in particular.

First, when prudential equivalence matters in Union law, it operates in the cases and according to the procedures specifically provided for by Union legislation, through a formalised and general assessment of a third country's regime, intended to produce the effects laid down by the European legislation that provides for it. When regulatory and supervisory equivalence is meant to operate as a prudential concept, the EBA addresses it through a distinct analytical framework, designed to support the formal decisions provided for by Union law.

Second, the branch regime is consistently described by the EBA as an architecture of minimum harmonisation and territorially anchored supervision, so that the authorisation granted by an individual State is not intended to be automatically recognised by the other Member States. In its July 2025 Report, adopted pursuant to Article 21c(6) CRD,[47] the Authority did not treat the new branch regime as a tool for assessing the overall adequacy of third countries' prudential regimes, nor did it recommend amending Article 21c to create a broader channel of access based on such concerns. It concluded instead that the available evidence did not justify amending the provision.

The application of the classification criteria in the authorisation process therefore serves an entirely different function: the national authority draws the consequences of the relevant Union assessments in order to determine the branch's classification and to calibrate the intensity of the prudential regime applicable to the local presence. It does not adopt a second, this time national, decision on the equivalence of the third country's regime.

The fact that the regime of the jurisdiction in which the *head undertaking* is established has been assessed at Union level as equivalent in terms of prudential regulation, supervision and confidentiality is one of the criteria relevant to the qualification and classification of the branch itself, together with the other conditions laid down by the legislation. It thereby affects the intensity and breadth of the requirements to which the *branch* is subject, including as regards *governance*, capital endowment, liquidity, *reporting* and supervisory practices.[48]

The comparability of the home-country regime operates as a criterion for calibrating the safeguards applicable to the branch, and cannot be used as an indirect indicator of the individual bank's capital

47 EBA, *Report to the European Parliament, the Council and the European Commission on the exemption of third country undertakings from the requirement to set-up to EU financial sector entities*, EBA/REP/2025/21, July 2025, adopted pursuant to Article 21c(6) CRD.

48 See *supra*, note 17.

strength.

The assessment therefore does not in itself have as its object the individual bank's financial position, which is relevant for assessing its possible capacity to meet its obligations, nor the creditworthiness or economic quality of the instruments it issues.

It is precisely in light of this distinction, between the Union equivalence decision, the national application of the criteria for classifying the branch, and the judgment on the individual bank's solvency, that the interpretation proposed here can be coherently reconstructed. It does not see in the branch requirement a further tool for scrutinising the quality of funding instruments or of the issuer, a scrutiny that is not conceivable even in theory for European bank issuers or issuers of a different nature.

Otherwise, the comparability of the home-country regime, a criterion for modulating the breadth of the safeguards applicable to the local presence, would end up serving as a preventive barrier and a means of selecting only non-European issuers of a banking nature and the instruments admitted to the capital markets, something the regime governing *third-country branches* does not appear to allow.

Interventions of that kind, directed at the individual issuer, would discriminate in access to the European and local capital markets on the basis of non-EU origin and the entity's banking nature, as compared with other issuers, European or non-bank, active in the same markets, such as sovereign and corporate issuers. That would be potentially in tension with the principle of non-discrimination that informs, among other things, the exercise of the *product intervention* powers conferred on supervisory authorities.[49]

2.4.3.2. *Territoriality of authorisation, absence of a European passport and limits on cross-border activity*

The new Union regime for third-country branches is informed by a strict principle of territoriality of authorisation and of the related activity, so that assessments made by authorities at local level are not automatically recognised within the Union. CRD VI in fact rules out that a branch authorised in one

49 See *supra*, note 23.

Member State can become a platform giving the third-country bank access to the entire single market, by requiring the branch's activity to remain confined to the territory of the host State in which it is established.

The *ratio* of the rule is twofold: to prevent *jurisdiction shopping* and to preserve each Member State's control over the performance, in its own territory, of banking services by third-country entities that may generate relevant risks in that territory.

The exceptions provided for in Article 21c CRD VI, in particular for intragroup or interbank transactions and for cases of *reverse solicitation*, also remain circumscribed and do not allow generalised *marketing* or cross-border performance of banking services in the internal market.

2.4.3.3. *Cooperation with the home-country authority and prudential comparability*

From this perspective, the themes of comparability of the home country's prudential framework and of cooperation with its competent authority are interconnected. On the one hand, Article 21c CRD VI does not establish a general prudential equivalence test as a precondition for market access. On the other hand, the legislation gives autonomous weight to cooperation between the host State's authority and that of the third country, as a prerequisite for effective supervision of the risks generated locally.[50]

Consistently with this approach, the Directive requires, before authorisation is granted or in any event before the branch begins operating, adequate cooperation arrangements between the authorities concerned, aimed at supervisory coordination proportionate to the nature, size and complexity of the branch's operations.

These are instruments of administrative cooperation, typically *Memoranda of Understanding* or equivalent arrangements, intended to govern the exchange of periodic information, notification of significant events, inspection cooperation and coordination in a crisis.

The centrality of these cooperation mechanisms confirms that the branch regime does not rest on an

50 Recital 18 CRD VI, on the need for structured cooperation between the competent authorities of the host Member State and those of the home country.

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alleged general and abstract equivalence of the third country's legal system, but on specific safeguards and interactions designed to make local supervision effective over the banking activity carried on in the territory in the course of its operations.

3. «Other repayable funds»: the notion of credit institution, banking activity, «*credit intermediation*» and «*core banking services*»

The formula «other repayable funds» appears, with non-negligible variations, in three principal provisions: in Article 4(1)(1)(a) CRR, where it helps define the credit institution as an undertaking whose business is to take «deposits or other repayable funds» "from the public and to grant credits for its own account", a definition to which recital 14 CRD also refers; in point 1 of Annex I CRD, which, among the activities subject to mutual recognition («*List of activities subject to mutual recognition*»), lists «taking deposits and other repayable funds» as an autonomously relevant activity, with no further reference to the granting of credit; and, finally, in Article 21c CRD VI, which, by referring to the activities in Article 47(1) CRD and, through it, to points 1, 2 and 6 of the same Annex, makes their performance by third-country undertakings conditional on the establishment of a branch. The heading of Article 21c and recital 5 CRD VI describe them as «core banking services».

The expression also appears, in the same disjunctive form used in the definition of credit institution, in Article 9 CRD. That provision is not examined separately here, because it belongs to the same area as the definition of credit institution: it delimits banking business, reserving it to credit institutions, and prevents its circumvention. It does not identify the services that trigger the branch requirement, which is the function of Article 21c.

In the passage from one provision to the next, the disjunctive conjunction gives way to the cumulative one, the funding-and-lending pairing breaks down into a standalone entry, and the business activity becomes a service.

The pre-existing provisions, the definition of credit institution and Annex I, were not amended by CRD VI. What changes is the use they are now called upon to serve. Conceived, and for decades interpreted, to delimit the subjective perimeter of the banking undertaking and the mutual recognition of activities (not without some mixing with the interpretations developed in the first area), those same formulas are now used by Article 21c to identify the services whose performance by third-country undertakings requires, subject to certain identified exceptions, the establishment of a branch. It is this new legal effect that calls for a different perspective. The expressions used must therefore be reread in light of that function, in order to clarify why a single, new establishment requirement was devised for the taking of deposits and of other equally repayable funds, and what the two types of funds subject to an obligation of repayment have in common, so as to bring both within the same safeguard and justify its application.

The question can be put at the outset in its fundamental terms: whether the notion relevant for Article 21c includes, like deposits, and by the mere fact of the repayability that it shares with them, any financial instrument, or whether a historical, systematic and functional reading of the formula excludes ordinary bank bond funding. The answer, which should already emerge from the analysis so far, is the latter. This explains why understanding the relevant notion in this context had to be preceded by a reconstruction of the function of the branch: only by identifying the gap the new requirement is meant to remedy and the needs it must concretely address can one determine which «other repayable funds» matter, like deposits, for purposes of Article 21c, and for what reasons.

From this perspective it is also understandable why certain readings, while starting from the shared aim of containing the scope of the provision, arrive at solutions that are not always straightforward, linear or consistent with one another. They attempt to correct downstream the outcomes of an approach flawed upstream, both because it is formalistic, deducing the potential relevance of an instrument from its mere repayability, and because it allows meanings of the expression that arose in different contexts and for different purposes to overlap. To that overlap can largely be attributed the divergences in interpretation among Member States that the EBA noted in connection with the notion of credit institution.[51] It is therefore necessary to reconstruct the scope of the formula first in historical and systematic terms, following its evolution from the notion of credit institution to banking activities and services, and then, more closely, at the literal level. The analysis then turns to the EBA's interventions that have

51 EBA, *Opinion* EBA/Op/2014/12 and the annexed *Report* on the perimeter of credit institutions, both cited *supra*, note 14, where the Authority notes a certain degree of variation among Member States in the interpretation of the notion of credit institution, owing to the absence of a definition of key terms such as «*deposit*» and «*other repayable funds*», and invites the Commission to consider possible clarifications.

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clarified its meaning in functional terms, identifying the profile (so-called «*deposit-likeness*») that links deposit-taking to funding through certain financial instruments and that would justify in fact also the legislature's choice to introduce new safeguards applying to both forms of funding characterised by an obligation of repayment, since both are intrinsically capable of generating the same risks, against which those new safeguards protect the integrity and stability of the system.

3.1. *The subjective definition of credit institution and the banking business model*

The expression «*other repayable funds*» appears first of all in the definition of *credit institution* (now in Article 4(1)(1)(a) CRR), where the institution is identified as the undertaking whose business is to take deposits or other repayable funds from the public and to grant credits for its own account («*take deposits or other repayable funds from the public and to grant credits for its own account*»), setting out the conditions necessary for an undertaking to be legally qualified as a credit institution. As clarified by Union case law and by the EBA, the undertaking must carry on both activities, namely «taking deposits or other repayable funds from the public» and «granting credits for its own account», which form an inseparable functional pair under which the funds taken from the public must, for the most part, be used to grant credit.

The provision was originally conceived to identify the elements that make up, in general, the banking *business* carried on professionally by an institution and to prevent avoidance, as confirmed in particular by the recital of the First Banking Directive, now reflected in recital 14 CRD, which stresses that the scope of supervisory measures must be «as wide as possible» and cover funding taken not only through deposits but also «in other forms, such as the continuing issue of bonds and other comparable securities». The Court of Justice read it in this sense in the well-known *Romanelli* judgment.[52]

Recital 14 emphasises the need to prevent an institution from circumventing banking legislation simply by claiming that it does not take «deposits» in the strict sense, a typical hypothesis in cases of unauthorised activity, where the funding rarely takes the form of a deposit. Where an entity raises funds from the public through the continuing or habitual issuance of bonds in order to finance its credit-granting activity, that funding is legally relevant as «other repayable funds» for purposes of qualifying as a credit institution. A broad interpretive scope prevents entities active in so-called «*shadow banking*» (a contemporary expression unknown when the provisions considered here were first conceived),[53] from raising financial resources from the public, systematically intended for credit-granting in the European Union, without holding the necessary banking authorisation. The true purpose of the provision is therefore to bear on the overall activity of credit intermediation, rather than to regulate autonomously the characteristics of funding in itself.

In this sense, the reference to the continuing issue of bonds and other comparable securities («*continuing issue of bonds and other comparable securities*») makes it possible to extend the relevant funding beyond deposits. On the one hand, it reaches instruments that, by structure, accessibility and repayability, replicate their substantive characteristics. On the other hand, it reaches bonds and other comparable instruments as alternative forms of funding raised professionally and on a non-occasional basis from the public and intended, again professionally, for credit-granting for the entity's own account. These profiles lie within the same *ratio*: to ensure that banking regulation is not circumvented through instruments formally different from deposits but capable, depending on the case, either of replicating their substantive characteristics or of performing a continuing funding function within the funding-and-lending pairing.

Depending on which profile is given greater weight, the same legal reference has thus made it possible, on the one hand, to ground in many legal systems a banking reservation not only for deposits in the strict sense but also for instruments that, although formally different, replicate their substantive characteristics and constitute sight and on demand funding. On the other hand, it has made it possible to justify, in Italy, an extension of the perimeter of banking funding also to forms of funding not neces-

52 See *supra*, note 13.

53 The expression «*shadow banking*» is commonly attributed to P. McCulley, *Teton Reflections*, PIMCO *Global Central Bank Focus*, September 2007, and entered regulatory vocabulary following the 2007-2008 financial crisis. The Financial Stability Board defines it, broadly, as «*credit intermediation involving entities and activities (fully or partly) outside the regular banking system*»: FSB, *Shadow Banking: Strengthening Oversight and Regulation*, cited *supra*, note 9. See also European Commission, *Green Paper. Shadow Banking*, COM(2012) 102 final, 19 March 2012; EBA/GL/2015/20, cited *supra*, note 9. In the FSB's more recent vocabulary, the expression has been replaced by «*non-bank financial intermediation*» (NBFI). It is, therefore, a category developed some three decades after the First Directive, in which the anti-avoidance function of the formula «other repayable funds» already found expression.

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sarily assimilable to deposits, where professionally raised from the public and functionally intended for financing activity. In other words, since a bank is defined as an entity that raises funds from the public in order to use them for lending, any form of funding suited to constituting funding for credit activity was traditionally drawn, in Italian supervisory practice, into the regulated activity reserved to banks (and independently subject to an authorisation or passport requirement), because banks were identified according to a broad conception designed to prevent circumvention of the reservation.

3.2. *«Credit intermediation» and «maturity transformation» as the banking activity-risk specifically relevant in the Banking Package*

Indeed, the very funding-and-lending pairing on which the Union notion of credit institution rests is not an undisputed interpretive datum. Already in its interventions on the perimeter of credit institutions, the EBA had noted significant divergences among Member States in interpreting the definition of *credit institution*, due in particular to the very absence of a positive definition of central notions such as «*deposit*», «*other repayable funds*» and «*from the public*», divergences capable of affecting the uniform application of Union law and the convergence of supervisory practices.[54]

This difficulty concerns not only the wording of the definition but also its coordination with the functional evolution of the prudential system, in which what matters is not generic banking activity of funding and lending, but specifically «credit intermediation» characterised by «maturity transformation», liquidity transformation, leverage and transfer of credit risk.

This explains the EBA's insistence on the need to clarify the relevant expressions. Such clarification now makes it possible to avoid categories used to delimit the perimeter of banking activity underlying the notion of *credit institution* being applied automatically in the different context of Article 21c to situations that do not present the same risk profiles relevant for prudential purposes. In that context, as the analysis so far shows, the central profile is «*credit intermediation*» founded on «*maturity transformation*», the fulcrum around which the prudential framework turns.

54 See *supra*, notes 14 and 51.

3.3. *Historical development of the context in which «other repayable funds» is used: from the notion of credit institution to banking activities and services*

If in the traditional notion of *credit institution*, a product of the First Directive and of the case law of the Court of Justice, the relevant banking activity can be read, for anti-avoidance purposes, as the raising of funding generically understood and its use for the exercise of credit, in the modern *Banking Package* the legislature's attention is focused on the type of funding which, combined with the granting of credit, underlies banks' intrinsic vulnerability and is capable of turning business risk into a critical issue for savers, for the system and for the real economy itself.

Alongside the broad conceptual category of the funding-lending relationship, there has emerged the prudential notion of a specific form of credit intermediation and thus of the funding instrumental to it, developed by the ECB, the EBA, the FSB and within the Basel *framework*. It is not intended to describe the banking *business* generically, nor does it in itself redefine the notion of credit institution.

In this sense, the later development of European banking law changes the perspective: the point is not to redefine what a credit institution is, but to identify which component of the institution's activity generates the risks that justify, and that experience has shown to make necessary, the safeguards progressively developed through the *Banking Package*, the Basel *framework* and, most recently, CRD VI. It is around this specific element of the banking *business* and its related risks, identified, as seen, by European and international authorities as «*maturity transformation*», «*liquidity transformation*», «*leverage*», «*behavioural risk*», «*run risk*» and potential systemic contagion effects, that European prudential regulation is largely built for the protection of savers, the system and financial stability.

The context in which the provisions and requirements of Article 21c CRD VI were conceived therefore requires treating as «*other repayable funds*» only the instruments that are relevant in light of the function justifying the activation of the prudential safeguards provided by the new regime both for deposits and for other forms of funding.[55]

55 Within the definitional framework of the credit institution, the formula contributes to identifying banking activity in general, as a combination of funding and lending; in Article 21c CRD VI, by contrast, it is relevant as a component of a «*core banking service*» considered on its own, whose provision by a third-country undertaking may justify

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It is the objective functional difference, confirmed at the technical level by the positions taken by the EBA and reviewed herein, that rules out that the mere repayability of a bond instrument is in itself sufficient to justify introducing specific prudential measures such as the branch requirement.

The possibly different scope of the expression «*other repayable funds*» in the two contexts in which it is used appears consistent with the Union system: broader in the definition of credit institution; narrower in the context of the *Banking Package* and, in particular, of Article 21c CRD VI, where only those forms of funding matter that are capable, by their characteristics and the relationships they generate, of triggering territorially relevant liquidity, behavioural and outflow risks. This reading is also consistent with the principles underlying the strict banking reservation, common to the Member States, relating to the taking of deposits or of other sight and on demand instruments substantially assimilable to them.

It follows that, for purposes of Article 21c CRD VI, there is no need to establish whether prudential developments have also affected the general definition of *credit institution*. It is enough to note that it is undisputed that the regime for third-country branches is aimed, under recitals 5, 17 and 19 CRD VI, at addressing risks to financial stability and market integrity, and relates to the performance of «*core banking services*» that are intrinsically capable of generating them and that therefore require eminently prudential safeguards.

The EBA's positions and the related technical indications bring into focus forms of funding that, while taking bond form, present characteristics such as to make them assimilable to deposits for purposes of applying the prudential requirement and that, in that sense, may be described, and called, as «*deposit-like*». They therefore sit within a banking relationship with the customer, may be held in a *retail account* and are capable of feeding the liquidity, behavioural and outflow risks proper to deposit funding. Only where those elements are present, in accordance with the principle of proportionality, can the prudential regime be justified, including, today, the more invasive obligation to establish a branch, with the related *governance*, *reporting* and control safeguards, preventive scrutiny and subsequent supervision, functional to managing the risks so identified.

a territorial prudential safeguard — of which the branch requirement is the instrument — even where no lending activity is carried out locally.

3.4. *The expression «other repayable funds» in literal interpretation: Article 4 CRR, Annex I CRD and Article 21c CRD VI*

The historical and systematic reading adopted so far has already shown how the same expression takes on a different scope depending on the area in which it is used. A mere textual exegesis leads, moreover, to convergent conclusions. The two differences of wording noted at the outset, the different conjunction and the shift from activity to service, merit closer examination, although neither is decisive: the interpretation proposed remains valid even if those differences are given no autonomous interpretive significance, or if they do not appear in the wording of the national implementing legislation or carry the same textual weight there.

Deposits and/or other repayable funds

From the formula «*deposits or other repayable funds*», used in Article 4(1)(1)(a) CRR to define credit institution, one moves to the formula «*taking deposits and other repayable funds*» of Annex I CRD, headed «*List of activities subject to mutual recognition*». Article 21c, in turn, refers to that Annex (through Article 47(1)) and thus to the cumulative wording, but qualifies the relevant case as a «*core banking service*».

As regards the first aspect, as anticipated, the different conjunction is not in itself a decisive criterion, nor does it seem appropriate to overstate its prescriptive weight.

However, where a formalistic and literal interpretation of the expression is preferred, founded for that very reason on the automatic relevance of the «repayability» of the instrument, one should consistently, applying the same interpretive canon, also take account of this textual difference between the two formulas. A reconstruction that is at once more meaningful and more faithful to the wording could even lead to the view that other repayable funds do not matter in isolation and merely because they are repayable, but because they are placed alongside deposits, or alongside forms of funding that are in any event capable of generating simultaneous or behavioural outflows in *stress* situations.

Such a conclusion also accounts for the previous authorisation regime. Annex I does not contemplate an activity, and thus an authorisation title or mutual recognition, referring autonomously to «*other*

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repayable funds», but a single entry that brings together the taking of deposits and the taking of other repayable funds, so that the related authorisation could only refer jointly and in the abstract to both forms of funding.

This approach also allows Italian authorisation practice to be reread. On the one hand, that practice had adopted a formalistic approach based on the mere repayability of the instrument. On the other, it had given identical scope, regardless of context, to the «taking of deposits or other funds with an obligation of repayment» in Article 1, paragraph 2, letter f), number 1), TUB and to the taking of savings, defined by Article 11, paragraph 1, TUB as the «acquisition of funds with an obligation of repayment, whether in the form of deposits or otherwise», which, under Article 10, together with the exercise of credit constitutes banking activity. An authorisation requested or granted as an authorisation to take deposits thus ended up operating even where the activity planned in the territory did not consist of deposit-taking at all, but exclusively of issuing bond financial instruments that were not sight and on demand funding and were not, by their characteristics, capable of generating simultaneous or behavioural outflows in *stress* situations. This very circumstance shows that the authorisation element, formerly, and the branch requirement, today, are not necessarily suited to giving autonomous prudential relevance to bond issuance alone, where it is not accompanied by deposit funding, although issuance was traditionally regarded, formally, as the *sufficient* condition for triggering the authorisation obligation.

Since neither the prudential purpose of the legislation nor the wording of the formula «*taking deposits and other repayable funds*» can be ignored, the functional position, which stresses the diversity of meanings of the expression in the context of the definition of *credit institution* and in that of identifying the activities relevant for prudential purposes, does in fact give weight to this aspect too.

The phrase «deposits and other repayable funds» in fact further emphasises the proximity of the two terms: not full assimilation, but a substantive closeness of the other, equally repayable funds to deposits, otherwise their pairing at the level of definition would not be understood. What matters, therefore, are deposits and the forms of funding close to them or, in the EBA's formula, *like deposits but not deposits*[56], that is, repayable liabilities, typically short-term, capable of generating liquidity vulnerabilities and outflow risk («*run risk*»).

It is understood that the outcome would not change if the wording used were disjunctive. Even then, in the context of Article 21c, only those forms of funding would matter that, by their characteristics and function, are capable of generating the risks proper to deposit funding. The use of the conjunction «and» (and not "or" as in the credit institution definition) merely makes more evident, at the textual level, a pairing that the prudential function of the legislation would in any event require. Giving it weight thus merely restores internal coherence to the same literal approach that is invoked in an extensive sense.[57]

From banking activity to banking service: the bank-customer relationship and the position of the issuer

The second relevant aspect is that Article 21c CRD VI does not look at banking activity in a generic sense, since the provision specifically governs the performance of banking services, as is clear from its heading («Requirement to establish a branch for the provision of banking services by third-country undertakings»), from paragraphs 2 and 3, and from recital 5 CRD VI.

The conceptual point is significant, even though it must be acknowledged that, in the European legislature's expressions, «activities» and «services» are used in a way that is not always rigorous and at times interchangeable. Article 21c itself refers, in paragraph 1, to the «activities» in Article 47(1) and, in paragraphs 2 and 3, to «service or activity», while Annex I lists, alongside activities in the strict sense, items that are genuine services (such as payment services, the safekeeping and administration of securities, or the hire of safe deposit boxes). The point therefore rests not on the nominal datum alone, but on the structure of the case. A service presupposes a performance rendered in the context of a functional relationship with its recipient. The legal system consistently distinguishes the position of an issuer of financial instruments from that of a service provider, all the more so when the same entity

56 See *supra*, note 16.

57 In the Italian-language version of Annex I CRD, the item is rendered with a disjunctive formula («*raccolta di depositi o di altri fondi rimborsabili*», i.e. «taking deposits or other repayable funds»), taken up by the national legislature in Article 1, paragraph 2, letter f), number 1), TUB («*raccolta di depositi o di altri fondi con obbligo di restituzione*», i.e. «taking deposits or other funds subject to a restitution obligation»), to which Article 14-*bis* TUB refers. For the reasons set out in the text, the divergence between the language versions does not affect the conclusions reached.

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could, in the abstract, hold both roles. That distinction emerges, among other places, in the rules of private international law, in consumer law, and in the alternative dispute resolution regimes for banking and financial disputes, where the saver, consumer or investor, even a retail one, cannot normally avail themselves, against the issuer as such, of the fora and remedies reserved to them, if the issuer does not also provide a service to them.[58]

The relationship between issuer and investor, even when the issuer is a bank, normally remains analogous to that established with any *corporate*, sovereign or regulated issuer. It does not, for that reason alone, become a service (similarly, when the issuer is a financial intermediary, the transaction does not in itself make the investor a *MiFID client* in the absence of the provision of an investment service).

The relationship that *product governance* rules establish between issuer and investors is of a different nature: here too no service is provided, the bank acting solely as issuer or *manufacturer* (see also *infra*, §§ 4.2.4 and 5.1). Hence, when the third-country bank acts as a mere issuer, and there is no qualified (banking) relationship with investors, the absence of the branch requirement would not entail a weakening of protection. Alongside the *disclosure* on the instrument arising from the issuer's banking nature, *product governance* rules apply, which are a structural and organisational safeguard in the various phases of designing and distributing the product. Issuers, where subject to *product governance* obligations as *manufacturer*, define the product's characteristics, *target market* and distribution strategy and make the necessary information available to intermediaries. Where the third-country *manufacturer*, or another member of the same group, is not directly subject to those obligations, Union intermediaries distributing the product must in any event obtain sufficient information to understand its characteristics and *target market* and apply the relevant MiFID rules on conduct, suitability or appropriateness, and distribution. Obligations and responsibilities are thus allocated according to the role actually performed through safeguards that are anything but marginal, without turning the mere issuance into a service or imposing a local prudential presence lacking operational content.

Nor, for that matter, does the reference to «activities» (in Annex I CRD, in Article 21c(1) CRD VI or in Article 14-*bis* TUB, through Article 1, paragraph 2, letter f), TUB) remove the need for a relationship over and above the one normally established between the holder of the instrument and its issuer. The terminology is inherited from the list of activities eligible for mutual recognition and does not affect the structure of the case relevant for the branch requirement.

As will be seen (*infra*, § 3.5), the EBA has expressly and repeatedly given weight, for purposes of recognising the «*deposit-likeness*» of instruments other than deposits, to the existence of a qualified relationship with the holder, and to the latter's expectations and resulting behaviour, which place the holder in a position different from that of a mere investor from the public.[59]

3.5. *«Other repayable funds» in the European sources and in the EBA's technical and functional interpretation*

3.5.1. *«Deposit-likeness» and the prudential classification of funding sources*

From a review of the European sources and, in particular, of the EBA's interventions, including through draft technical standards subsequently adopted by the Commission, there emerge, in regulatory and interpretive acts of differing nature, indications which, read together, make it possible to reconstruct a teleological approach to the notion of «*other repayable funds*». These are for the most part acts adopted for specific purposes, which matter here not as a reference to the relevant rules but as indicators of the interpretation underlying those concepts and categories.[60]

58 Court of Justice, 28 January 2015, Case C-375/13, *Harald Kolassa v Barclays Bank plc*, ECLI:EU:C:2015:37, according to which an investor who has acquired from a third-party professional a security issued by a bank, in the absence of a contract concluded with the issuer, cannot rely against the latter on the consumer forum under Article 15(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001, pp. 1-23, nor on the forum in matters relating to a contract under Article 5(1)(a) of the same Regulation; the possibility of bringing an action for prospectus liability under Article 5(3) remains unaffected.

59 See *supra*, note 16.

60 The acts referred to do not govern the case covered by Article 21c, but are relevant as indicators of the criterion by which European sources and the EBA qualify, for prudential purposes, liabilities assimilable to deposits. Among them, the *Guidelines* are the instrument in which the Authority's interpretation takes its most complete form. They are adopted by the EBA under Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331 of 15 December 2010, pp. 12-47. Competent authorities and financial institutions must make every effort to comply with the *Guide-*

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What emerges is a technical, functional and non-formalistic reading, attributable to a common criterion: a liability other than a deposit is treated as equivalent to the latter and made subject to the same new safeguard, not by reason of its mere repayability, its legal form or its accounting classification, but because, although embodied in a financial instrument, it presents characteristics similar to those of deposit funding (accessibility of liquidity, sensitivity to holders' behaviour under *stress* and placement within a banking relationship with them) which make it suitable to serve, like deposits, as funding for maturity transformation and, for that very reason, to generate intrinsically systemic risks, including at local level.

Particularly significant in this perspective is the classification of funding sources that the EBA uses in the *reporting* templates and instructions for *funding plans* (the so-called taxonomy), that is, the categories into which institutions must divide their funding. Beyond their specific technical and reporting context, these categories make the underlying interpretive orientation visible. In the instructions in Annex I to *Guidelines* EBA/GL/2019/05, the section on template P 02.01 is expressly devoted to insured and uninsured deposits and to uninsured deposit-like financial instruments («*insured and uninsured deposits and uninsured deposit-like financial instruments*»). The instructions describe the latter as instruments similar to deposits but not deposits (*like deposits but not deposits*) and placed with retail customers («*sold to retail customers*»).

This terminology matters in at least three respects. First, it confirms that the category that is prudentially relevant is not tied to the generic repayability of the instrument, or to its possible bond nature, but to the ways in which that repayment operates: that is what its «*deposit-likeness*» consists of. Second, the reference to *retail customers*, an expression that, in the prudential lexicon, points to a natural-person or SME counterparty (see the notion of *retail deposit* in Article 411(2) CRR), read together with the distinct weight given to the *retail account*, is consistent with an analysis rooted in the existence of a bank–customer relationship, that is, a functional relationship between the institution and the customer providing the funding, and in the behavioural expectations that follow from it in the event of *stress*. Third, it shows that the extension beyond deposits is understood by the EBA as functionally justified and circumscribed.

The category of *deposit-like financial instruments* in fact makes it possible to bring within the information perimeter of *funding plans* instruments that, although not deposits in the strict sense, are treated as assimilable to them because they must be regarded as sufficiently comparable in economic substance, behavioural profile, accessibility and connection with a relationship embedded in a *business* model based on raising funds from saver-customers. The obligation of repayment, which these instruments share with ordinary debt securities, is therefore not the distinguishing element. What distinguishes them, rather, is their aptitude to "behave" as deposit funding. What can be drawn from this is not a generalised equation between financial instruments and deposits, but confirmation that prudential assimilation is reserved, whatever the form, for those liabilities that are functionally close to deposits and share their riskiness, also by reason of the existence of a relationship with the party that provided the funding and of the associated relationship of trust, from which the holders' behavioural reactions follow.

The *liquidity monitoring* framework moves in the same direction. The *Additional Liquidity Monitoring Metrics* capture funding by counterparty, by product type and by maturity, with specific attention to concentrations. Their reporting instructions already treat funding with *open maturity*, including *on*

lines; competent authorities must also state whether they comply or intend to comply with them and, if not, give reasons for their position (*comply or explain*). In particular: (i) the *Guidelines* EBA/GL/2019/05 (cited *supra*, note 16), together with the related instructions (Annex I) and *reporting* templates (Annex II), are relevant for the category of uninsured deposit-like financial instruments, reported in template P 02.01 together with deposits and distinct from market funding sources; (ii) the *Additional Liquidity Monitoring Metrics*, now contained in Implementing Regulation (EU) 2024/3117, cited *supra*, note 16, adopted on the basis of draft technical standards developed by the EBA (templates C 66-C 71), are relevant for the classification of funding by counterparty and by product type and for the maturity ladder; the introduction of a template dedicated to behavioural information (C 66.02) is proposed in EBA, *Consultation Paper — Revisions to the ITS on supervisory reporting (Commission Implementing Regulation (EU) 2024/3117)*, EBA/CP/2026/07, 10 April 2026, Module 1, *Liquidity and asset encumbrance*, in the context of the consultation closed on 10 July 2026; (iii) Q&A 2020_5518 and Delegated Regulation (EU) 2015/61, both cited *supra*, note 8, are relevant for the principle according to which debt securities issued by the institution and maturing within thirty days are subject, under Article 28(6), to an outflow rate of 100% irrespective of their accounting treatment, unless they are sold exclusively in the retail market and held in a *retail account*, in which case they may be treated in the relevant category of retail deposits: what is decisive, therefore, is neither the legal form nor the accounting classification of the instrument, but the combination of the *retail* channel and the account relationship (see § 3.5.2); (iv) the *Guidelines* EBA/GL/2026/08 (cited *supra*, note 16) are relevant for the information required at the authorisation stage — including the *programme of operations*, *business plan* and *booking arrangements* — as an indicator of the fact that the object of supervision is the activity carried out locally and the risks attributable to the branch (see *supra*, § 2.4.2). None of these acts links the prudential relevance of a liability to its mere repayability.

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sight deposits, as maturing overnight, and assume withdrawal at the first possible date where an *early withdrawal* clause applies. The EBA's consultation paper EBA/CP/2026/07 (April 2026), which proposes a new template dedicated to behavioural information (C 66.02), shifts attention further to the *behavioural maturity* of liabilities. Similarly to the *deposit-like financial instruments* category used in *funding plans*, these formulas do not introduce a classification based on the legal form of the instrument, but identify a prudential category built on the liquidity and behavioural characteristics of the liability and, together with them, on the relationship established with the holder.

Read together, these acts converge: in none of them is the obligation of repayment, in itself, sufficient to ground a prudential treatment analogous to that of deposits. What matters, instead, is the expected behaviour of the liability, the channel through which it is placed, and the relationship linking the institution to the creditor.

The result is a distinction between forms of *funding* that are relevant in terms of intrinsic risks for the system and in that sense «*deposit-like*» for banking law and regulation purposes, and «*ordinary capital market funding*», which remains within the perimeter proper to the capital markets. This is consistent with the notion of «*credit intermediation*» on which the *Banking Package* is built and, as seen, with the distinct scope that the formula takes on in the definition of *credit institution* in Article 4 CRR and recital 14 CRD. Other repayable funds do not, therefore, constitute, even in the technical documentation produced by the EBA, an undifferentiated and unlimited category capable of encompassing any instrument that carries under its legal terms an obligation of repayment or that has bond nature.

3.5.2. *Qualified banking relationship as a factor of «deposit-likeness»*

Among the indicators of relevance that emerge from the technical, and not merely formal, reading of the sources offered by the EBA's interventions, the relationship established with the final investor deserves separate examination.

That relationship matters on two distinct but converging levels: as an element of the performance of a service or the carrying on of a relevant activity, which presupposes a functional relationship with its recipient (*supra*, § 3.4), and as a factor of «*deposit-likeness*», because it combines the features of the instrument with the expectations and behaviour proper to a *customer relationship*. Accessibility of funding, withdrawability on demand or callability, exit optionality and possible outflow behaviour under *stress* become relevant when the instrument is embedded in a qualified relationship with its holder at local level.

It is this relationship, founded on the reliance and trust characteristic of the banking relationship, that makes «*behavioural risk*», «*run risk*» and outflows conceivable, and comparable to those of deposit funding. And it is still this relationship, and not the mere existence of an obligation of repayment, that allows the instrument to be assessed as a «*deposit-like*» form of funding: close to deposits in the means of access to the funds and in the likely behaviour of holders in scenarios of liquidity strain, and capable of generating, at the prudential level, similar needs for safeguards, where these can also be identified *ex ante* in the territory of the individual Member State.

Conversely, the parties remain unconnected in this respect when the normal relationship established between them is the ordinary one between issuer and investor. Where a third-country bank merely issues bonds, without providing banking or investment services to final investors in the host Member State and without a local customer base, it acts as a mere issuer or product company, in a position functionally analogous to that of a *corporate*, sovereign or supranational issuer. The relationship with the investor is not without significance, but it is not a *customer relationship* capable of generating any behavioural and outflow risks (proper to deposits). In ordinary wholesale market funding, the relevant behavioural response is therefore ordinarily not a withdrawal of funds before maturity, but a decision not to roll over or reinvest in new instruments of the same issuer once the existing instruments mature.

This functional approach to the relationship with the final investor emerges in particularly significant terms from the reference to the *retail account* in Article 28(6) of Delegated Regulation (EU) 2015/61, as clarified by Q&A 2020_5518. Debt securities issued by the institution and maturing within thirty days, to which a 100% outflow rate normally applies, may be treated in the relevant retail deposit category where they are instead sold exclusively on the retail market and held in a *retail account*. The significance of that reference lies not so much in the technical rules of the exception, which is limited to purposes of the *Liquidity Coverage Ratio*, as in the systematic criterion it reveals: an instrument formally attributable to the capital markets may be treated, prudentially, in a manner assimilable to a deposit when it no longer operates as an ordinary investment product but is embedded in a banking relation-

ship that suggests, behaviourally and therefore prudentially, its assimilation to a savings product.

So understood, the *retail account* takes on value not as a mere technical means of custody but as an indicator of the functional transformation of the relationship: the holder of the instrument is not regarded as an investor holding a security in an investment account, but as a person with whom there is a relationship, and reliance, of a banking nature.

The line of distinction is clear: the *retail account* matters not because it identifies a mere accounting location, but because it makes it possible to distinguish between, on the one hand, financial instruments ordinarily held in the investment chain proper to the capital markets (through securities accounts, intermediaries, distribution chains and market infrastructures) and, on the other, instruments that, although formally financial instruments, are embedded in a banking relationship, thereby taking on a function close to deposits in terms of accessibility, relationship and aptitude to generate withdrawal dynamics (then technically assimilated in the calculation of the ratios) in situations of liquidity *stress*.

It is in this key that the point also takes on weight for the interpretation of «*other repayable funds*»: not as a category suited to drawing in every bank bond, but as an indicator of the need to distinguish between «*ordinary capital market funding*» and instruments that, although presented formally as securities, operate, by reason of their characteristics and the relationships established, substantively as banking savings products.

From this different perspective too, the EBA's indications confirm on the merits the conclusions already reached, as well as the need to adopt interpretations of the legal categories used that are not formal but functional. What, in the context of Article 21c, deposits and the other repayable funds placed alongside them and made subject to the same safeguard have in common is not the obligation of repayment, which is common to any form of funding raised as borrowed money (*borrowed money*), including the ordinary bond issuance, whether bank or *corporate*, and even where repayment is conditional or subordinated. Nor is it the local use of the funding for the exercise of credit, which matters, if anything, in the definition of credit institution.[61] It is the way in which the related right can be exercised: on demand, without significant penalties or restrictions, by a plurality of holders who, being embedded in a qualified relationship, tend under *stress* conditions to behave as depositors. That is where «*deposit-likeness*» lies, and it is for this reason that the ordinary bond issuance, lacking both such repayment arrangements and the relationship existing at local level with the holder, remains outside it and is subject to the safeguards proper to the capital markets (*infra*, §§ 4.2.5 and 5).

4. The comparative analysis, with particular reference to the Italian experience

4.1. *Models of application in the legal systems of the Union*

CRD VI forms part of an intervention aimed at strengthening the harmonisation of the supervisory framework and, ultimately, at fostering the full integration of the internal market in banking services, reducing regulatory fragmentation among Member States and the related distortions of competition, in the context of implementing the international standards defined by the Basel *framework*. Understanding the possible readings of the notions relevant for Article 21c cannot therefore dispense with an examination of the solutions adopted within the Union.

Whatever arguments individual legal systems have used to identify what a credit institution is, it does not appear that, with the exception of Italy, the mere issuance of bank bonds has traditionally been made subject, as such, to an *ad hoc* authorisation as a prerequisite for their marketing, whereas a res-

61 The comparability between deposits and other forms of funding varies, moreover, according to the context in which it becomes relevant. Historically, bank funding coincided with deposit-taking; it may, however, take different forms, as shown by the *Romanelli* judgment, which brought within other repayable funds also instruments subject to a contractual agreement to return the sums paid (see *supra*, note 13). In the definition of credit institution, where the activity considered consists of raising funds from the public in order to use them for lending, the reservation and the anti-avoidance function of the notion — expressed by recital 14 CRD and emphasised by Union case law and by the EBA — may justify a broad reading of it, capable of encompassing any form of funding destined for lending, including the *continuing* issue of bonds: comparability with deposits would here derive from the common systematic destination of the funding to lending activity. In the prudential context of Article 21c, by contrast, the relevant aspect is not the destination of the funding to lending activity, but the risk it is capable of generating.

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ervation has been adopted for deposits and for sight and on demand instruments.[62]

This makes the different approaches and underlying reasoning hard to compare, already on the historical level. In many legal systems, in fact, the absence from the preparatory works or from the implementing legislation adopted from time to time (and, most recently, also as regards CRD VI) of any express elaboration of criteria for distinguishing between forms of *funding* that are or are not relevant for regulatory purposes reflects the historically established neutrality of those questions within the relevant regulatory frameworks.

The important and clear factor is, rather, the practical one, beyond the technical form used: since the First Banking Directive, the mere issuance or distribution of debt instruments, and more generally of forms of funding embodied in financial instruments, has historically been kept outside the perimeter of activities reserved to banks.

In the practice of European legal systems, with the exception of Italy, bond issuance has not in itself been, nor is it, subject to prior authorisation regimes, still less made conditional on obtaining deposit-taking authorisation as a prerequisite and condition precedent for the offer, *listing* or marketing of the bonds, even where the issuers are banks and the issuance is therefore a physiological form of funding for credit activity. The distinction between ordinary «*market funding*» and *core* banking activities

62 The German experience is emblematic in this respect. The definition of *Einlagengeschäft* in § 1(1), second sentence, no. 1, of the *Kreditwesengesetz* (KWG) brings within the reserved activity not only the acceptance of deposits, but also that of «other unconditionally repayable funds of the public» (*anderer unbedingt rückzahlbarer Gelder des Publikums*). In order to prevent such a broad formula from drawing into the banking reservation the issuances of any undertaking, the legislature expressly excluded from it cases in which the claim for repayment is embodied in securities (*sofern der Rückzahlungsanspruch nicht in Inhaber- oder Orderschuldverschreibungen verbrieft wird*). The same concern was expressed, at Union level, in the consultation launched by the EBA in 2021 on the draft *Guidelines on a common assessment methodology for granting authorisation as a credit institution under Article 8(5) of Directive 2013/36/EU*. In its response, Deutsche Börse Group described as disproportionate and inappropriate the extension » to financial instruments having the intrinsic feature of repayability, including bonds and other comparable securities issued on a continuing basis, observing that it could have adversely affected capital market financing and led to issuers of corporate bonds being qualified as credit institutions; see EBA, *Consultation Paper* EBA/CP/2021/07, 10 March 2021, para. 52, and the related response by Deutsche Börse Group. Para. 52 was nonetheless retained, with merely formal changes, in the final *Guidelines* (EBA/GL/2021/12, 11 November 2021): the indication contained therein, however, concerns the notion of credit institution, and not the identification of the «*core banking services*» relevant for the purposes of Article 21c (see *supra*, § 3.3).

and services is therefore common to the prevailing application solutions in the Member States, in which the category of «*other repayable funds*» has not been given an extensive scope such as to include the financial instruments ordinarily issued by European and non-European banks. Such an extension was not required by the longstanding European legislation or, today, by Union law, and is not justified by the prudential framework of the *Banking Package*.

In some jurisdictions a discussion has emerged that originates precisely in the traditional, generalised exclusion or exemption of financial instruments from the authorisation regimes proper to banks. That discussion is largely theoretical and technical-interpretive in scope. It has neither the purpose nor the effect of bringing all repayable financial instruments within the notion relevant for Article 21c. It aims, more simply, to identify the criterion that would bring within the relevant perimeter, despite the exclusion or exemption generally provided for financial instruments, only those that exceptionally present «*deposit-like*» characteristics. The topic and the attention paid to it by the competent authorities nonetheless remain marginal. Since forms of funding substantially assimilable to deposits and represented by financial instruments could already fall within the entry in point 1 of Annex I CRD, the solution should be sought in the regulatory and application work developed in implementing that provision.

As noted, CRD VI did not amend the wording of the pre-existing provisions that already referred to «*other repayable funds*», from the definition of credit institution to the list of banking activities in Annex I CRD. Nor do the implementing legislation adopted contain provisions pointing to an extension of their scope of application beyond the historically adopted position. There are therefore no elements suggesting a change in the approaches traditionally followed in the other Member States, nor, therefore, that ordinary bond issuances are relevant for purposes of the branch requirement by virtue of the formal fact of their being repayable. The renewed attention now devoted to the subject has nonetheless encouraged heterogeneous readings, sometimes not fully consistent with the Union framework, which makes it appropriate to bring the debate back to the systematic and functional criteria illustrated so far.

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4.2. *Italian practice: authorisation to take deposits and bank bonds*

As is well known, the approach that has characterised application practice in the Italian legal system with respect to bank issuances has seen in prior authorisation, or compliance with passporting requirements, as the case may be, for deposit-taking a prerequisite for their sale in the territory. That approach operated regardless of the concrete ways the instruments were made available in the domestic market: both where the issuer took an active role, proceeding directly to the public offer, to *private placement* transactions or to admission on Italian trading venues, and where the issuer carried out no activity and the instruments were sold to customers by third-party intermediaries (for example in international transactions through *dealers* of EMTN programmes). In the latter case, the factual verification that the relevant regulatory conditions were met, including any authorisation, was placed at the level of the intermediaries' activity, without in itself entailing operational obligations or relations with the public and investors for the issuer.

It is worth briefly recalling the domestic statutory legal framework, since it allows the peculiarities of the Italian approach to be understood and, at the same time, its possible overcoming to be assessed in light of the evolution of the relevant rules. The opening article of the TUB defines a bank as «an undertaking authorised to carry on *banking business*». Article 10 specifies that «the *taking of savings* from the public and the exercise of credit constitute banking business», restating that it has «the character of a business» and is reserved to banks. Article 11 then provides that, for purposes of the TUB, the «*taking of savings*» means «the acquisition of funds with an obligation of repayment, whether in the form of deposits or otherwise», and sets out the perimeter of the relative reservation, specifying in paragraph 4 that the prohibition on taking savings from the public does not apply, among others, to companies that raise funds under the Civil Code through bonds, debt securities or other financial instruments, or to other cases expressly permitted by law, in compliance with the principle of the protection of savings. Finally, Article 12 governs the issuance of bonds by Italian banks under a special regime, positioned between civil-law rules and sector-specific banking legislation.

In the new framework introduced by CRD VI, Article 14-*bis* TUB subjects to the establishment of a branch the carrying on, in the territory of the Republic, by a third-country institution, of one or more of the activities listed in Article 1, paragraph 2, letter f), numbers 1), 2) and 6): respectively, «the taking of deposits or other funds with an obligation of repayment», «lending operations» and «the issuing of guarantees and commitments».[63]

In transposing Article 21c CRD VI, Italian law did not specify the instruments that qualify as «other funds with an obligation of repayment» referred to in Article 1, paragraph 2, letter f), number 1), thus leaving to the interpreter the task of reconstructing that category using the ordinary tools of interpretation, in light of the new Union framework and its historical origin and legal and factual developments, the prudential function of the branch requirement and the systematic allocation between banking regulation and capital market regulation, also under domestic law and the related constitutional significance of savings and credit.

The analysis conducted so far makes it possible to affirm that the notion of «*other repayable funds*» should not be reconstructed, as also emerges consistently from the EBA's interventions, according to a formalistic criterion based solely on the «repayability of the instrument» or, in the TUB's language, the «restitution obligation» (while "repayment funds" is used in a different context), but through a technical and functional approach that takes account of the different scope the formula takes on in the definition of credit institution and in the prudential context of the *Banking Package* and Basel III, in which CRD VI sits. In the first area, as an element of the funding-and-lending pairing, the formula may be given, for purposes of Articles 1, 10 and 11 TUB read together and also in light of recital 14 CRD and Article 47 of the Constitution, a broad and anti-avoidance scope: to prevent an entity from carrying on credit-granting activity professionally while systematically raising funding from the public, including through forms other than deposits, and thereby evading the rules proper to credit institutions.

In the different area outlined by Article 14-*bis* and Article 1, paragraph 2, letter f), number 1), TUB read together, the point is instead not to delimit the figure of the credit institution through a general identification of banking business, but to regulate a «*core banking service*» considered autonomously, the performance of which in the territory of the Member State can justify a particularly incisive prudential safeguard such as the establishment of a branch, preventive scrutiny and the resulting obligations. On the reading proposed here, also in light of the EBA's technical indications, that prudential relevance

63 See *supra*, note 20.

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derives from the instrument's «*deposit-likeness*», that is, from its withdrawability, from the bank-customer relationship it presupposes or establishes, and from its aptitude to generate potentially systemic local risks, even where no credit activity is carried on in the territory.

The fact that the TUB contains distinct and not perfectly overlapping provisions referring to the taking of deposits or other funds with an obligation of repayment or return eases the interpreter's task. Read together, Articles 1, paragraph 2, letter a), 10 and 11 TUB define the bank and overall banking activity as a business founded on the taking of savings from the public and the exercise of credit. Article 14-*bis* TUB, by contrast, makes a direct and specific cross-reference to Article 1, paragraph 2, letter f), number 1), and not to Articles 10 and 11: it thus identifies the taking of deposits or other funds with an obligation of repayment as a banking activity or service considered autonomously, whose performance in the territory by an entity of a third State may trigger the branch requirement. That specific and direct cross-reference does not, therefore, allow the general notion of the taking of savings, or the interpretations developed to delimit banking activity as a whole, and contained in a different set of provisions to be automatically transposed into the new context. The provision referred to must be interpreted within the limits of the circumscribed cross-reference made and in light of the different prudential function performed by Article 14-*bis* and of the shift, already relevant at Union level, from banking activity to banking service, understood at least in a functional sense as an indicator, as the EBA has indicated, of the existence of a banking relationship. This distinction is consistent with the Italian legal system, which keeps separate the issuer-investor relationship from that between an intermediary, banking or financial, and its customer. For purposes of Article 14-*bis* TUB, the taking of other funds with an obligation of repayment matters not as a generic component of banking business but as a service/activity considered autonomously, detached from the granting of credit in the territory and capable, only where its functional conditions are met, of triggering a specific territorial prudential safeguard.[64]

64 In domestic law, this reconstruction is grounded in the direct cross-reference made by Article 14-*bis* TUB to Article 1, paragraph 2, letter f), number 1), TUB, which is distinct from the general notions of banking activity and of collection of savings under Articles 10 and 11 TUB. The allocation between banking regulation and securities regulation confirms that protection follows the nature of the transaction and of the relevant risk; see *supra*, § 3.4, and *infra*, §§ 4.2.2 and 4.2.3. The comparative data lead to the same conclusion: the question is not whether the instrument embodies a repayment obligation — at par, below par or conditional — or qualifies as a bond, whether structured or *plain vanilla*, but whether the raising of financial resources generates risk profiles connected with

4.2.1. *Origin and function of the traditional Italian approach*

Since the First Banking Directive, the notion of «deposits or other repayable funds» has been used in the definition of credit institution to identify a business model based on the professional raising from the public of funding to be used for the exercise of credit. In that context, the formula served a broad, anti-avoidance function: to prevent recourse to forms of funding other than deposits from allowing evasion of the supervision proper to credit institutions.

The approach that developed in the Italian legal system — although rooted in the national legal tradition and consistent with the First Directive — is characterised by having brought within the relative banking reservation also forms of *funding* carried out through capital market instruments.

The decisive feature of this reading lay in giving combined weight to the issuer's banking nature, the repayability of the instrument and activity directed at the Italian territory. Since a bank is, in the European and domestic definition, the entity that professionally raises deposits and repayable funds from the public and uses them in the exercise of credit, Italian practice held that, when a third-country bank addressed the Italian public through bonds or other repayable instruments, even though it granted no credit there, it professionally carried on «banking business» in the territory, under Articles 10 and 11 TUB read together, and therefore had to hold the relevant authorisation.

In the absence of an authorisation calibrated on the mere issuance or marketing of financial instruments, the authorisation required was, in practice, the one for taking deposits, although the issuers concerned did not intend to carry on that different activity. The later evolution of the Union framework,

the banking nature of the issuer that are locally relevant and capable of being addressed. As has been seen, these are the liquidity, outflow and contagion risks proper to «*credit intermediation*» based on «*maturity transformation*»: it is such risks, and not maturity transformation as such, that the *Banking Package* is called upon to prevent, monitor and manage. No further aspects emerge, by contrast, deriving from the mere banking nature of the issuer that could acquire local relevance for the purposes of imposing territorial prudential safeguards, since the risks proper to market instruments are already governed by more specific measures according to a logic of proportionality and subsidiarity. The exclusion of mere bond issuance from the scope of application of the branch requirement does not, therefore, create a gap in protection; rather, it avoids transforming banking prudential regulation into a generalised filter on access to the capital markets. Funding through bond issuances may contribute, among other things, to rebalancing maturities and reducing «*maturity mismatch*» risk.

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culminating in CRD VI, makes recourse to that deductive process more nuanced: Article 21c CRD VI may also be relevant for third-country undertakings not necessarily qualified as credit institutions in their home country.

The Italian solution stood, from the outset, in discontinuity with the approaches taken by all other Member States. Although starting from the same European notion of credit institution, they did not extend the banking reservation or give autonomous relevance to «*other repayable funds*» so as to include the raising of financial resources through market instruments, neither in the context of the definition of credit institution nor in that of the activities in Annex I CRD. The longstanding approach had, in the Italian context, its own historical and systematic justification. It sat in a legal system in which the bank was regarded, above all, as a «special undertaking», subject to authorisation and to pervasive public controls by reason of the function it performed. That approach found immediate foundation in Article 47 of the Italian Constitution, which, on the one hand, entrusts the Republic with encouraging and safeguarding savings in all their forms and, on the other, confers on it the power and duty to regulate, coordinate and supervise the exercise of credit. Bank bond issuances, as a physiological form of funding, were the subject of special rules, including exemptions from the offer prospectus and derogations from the ordinary civil-law regime.[65]

Savings were still perceived predominantly in a phenomenological sense, as wealth or liquidity not intended for immediate consumption, and their protection served a broader, unifying systematic function. In a framework in which the modern distinction between savings and investment had not yet reached its present legal articulation and the related degree of conceptual and regulatory autonomy, recourse to the existing banking regime could appear the only coherent and effectively available instrument for ensuring the protection of investors and of the market.

The context has, however, progressively changed, both factually and legally.

At the factual level, bank bonds have taken on an increasingly autonomous function as compared with traditional deposit funding. They are not only funding for credit activity, but instruments for managing the institution's financial structure and for generating margin and profitability, and have also been recognised, at both European and international level, including by the Basel Committee, as instruments that contribute to a more resilient funding structure by extending the maturity of liabilities and reducing the «*maturity mismatch*» typical of the combination of deposit funding and lending.[66] At the same time, the crises affecting the banking system have clearly shown that the risk proper to banking based on credit intermediation lies in «*maturity transformation*», and that this risk, in its business and potentially systemic dimension, is found only in relation to deposit or «*deposit-like*» forms of funding, and not in the mere issuance of ordinary capital market instruments.

This has contributed to a progressive distinction, which has proved crucial, between the public of saver-depositors and that of investors, holders of equity or debt financial instruments, which scholarship has also explored extensively.

As a matter of law, this evolution has been reflected in two complementary regulatory frameworks: on the one hand, banking and prudential law, aimed at safeguarding characteristic banking activity, the

65 See Article 12 TUB, which, in order to facilitate banks' recourse to bond funding and the management of the related loans, derogates from significant aspects of the civil-law rules on bonds. Under paragraph 3, the issuance of non-convertible bonds or bonds convertible into securities of other companies is resolved upon by the management body, and Articles 2410, 2412, 2413, 2414, first paragraph, no. 3, 2414-*bis*, 2415, 2416, 2417, 2418 and 2419 of the Civil Code do not apply: derogations are thus made, in particular, from the rules on the competence to resolve upon the issuance (Article 2410 of the Civil Code), from the quantitative limits on issuance commensurate with the issuer's net assets (Article 2412 of the Civil Code) and from the entire set of rules on the organisation of bondholders, namely the meeting, the challenge of its resolutions and the common representative (Articles 2415-2419 of the Civil Code). The derogations extend to financial instruments subject to the rules on bonds laid down in the Civil Code, including the senior non-preferred debt instruments (*strumenti di debito chirografario di secondo livello*) referred to in Article 12-*bis* TUB (paragraph 4-*bis*). On the distinction between savings in the economic-naturalistic sense, bank savings and financial investment, and on the need to articulate constitutional protection according to the different technical forms of deploying wealth, see G. Visentini, *Credito e risparmio. Risparmio e credito nella Costituzione*, and Constitutional Court, Research Department (Servizio studi), *La tutela del risparmio*, both cited *supra*, note 18, esp., as regards the latter, the sections devoted to financial instruments and equity investment.

66 At European level, see ECB, *Bond funding of euro area banks: progress in the issuance of loss-absorbing instruments*, Financial Stability Review, November 2018, noting, in the context there examined, that a more diversified bond issuance could point to increased resilience to idiosyncratic shocks through a broader investor base. At international level, see Basel Committee on Banking Supervision, *Basel III: the Net Stable Funding Ratio*, October 2014, which seeks to promote a stable funding profile and limit overreliance on short-term wholesale funding; see also the Basel Framework, which assumes, for NSFR purposes, longer-term liabilities to be more stable than short-term liabilities.

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stability of the intermediary and liquidity, outflow and contagion risks; on the other, capital market law, aimed at governing the issuance, offer, distribution and circulation of financial instruments, also giving weight to the *disclosure*, information and conduct profiles connected with the issuer's banking nature and also functional to the needs of resolvability and stability of the system.

It is in light of this evolution that the scope of Italian practice on «other repayable funds» must now be re-examined, distinguishing the context of the definition of credit institution and of the related business activity from that in which the branch requirement arises. In the latter, «*maturity transformation*» and the only forms of funding capable of feeding it matter as central elements of the architecture of the *Banking Package*, as well as of domestic law, in line, as will be seen, with a mature and by now well-established reading of the very constitutional principle of the protection of savings, whose implementation requires also identifying the most effective safeguards according to the nature of the interests involved.

4.2.2. *Allocation between the TUB and the TUF: applicable rules, authorities and remedies*

From this perspective, whether the issuance, offer or marketing of debt instruments falls within the notion of «other funds subject to a restitution obligation» under Article 1, paragraph 2, letter f), number 1), relevant for purposes of Article 14-*bis* TUB, cannot be resolved automatically on the basis of the mere presence of a repayment obligation embodied in the instrument, without regard to the purpose and function of the branch.

The cornerstone of the regulatory architecture is the TUF, which identifies the perimeter of investment through the definition of financial products and excludes from that category bank or postal deposits not represented by financial instruments. The opening article of the TUF in fact draws a clear distinction between banking products and investment instruments, confining deposits within the perimeter of the TUB.

This choice is structural: a deposit is not qualified as an investment because its economic and legal function is not the pursuit of a return but the safekeeping, custody and availability of liquidity.

Conversely, financial instruments, including bonds and other debt securities, are drawn into the TUF perimeter precisely because they belong to the sphere of employing capital for purposes of enrichment, and not to the logic of mere preservation of value, even where the issuer is a banking entity. On this basis rests the allocation expressed in Article 23, paragraph 4, TUF, which provides that the regime for investment services and activities operates as a special regime in relation to banking legislation. Rules protecting banking customers apply to deposit products and relationships, as governed by Title VI TUB, from which investment products are, symmetrically, expressly excluded.

From the constitutional standpoint, the reference to savings in Article 47 of the Constitution does not require every allocation to be brought within the perimeter of banking regulation. The constitutional provision uses a broad non-technical formula, capable of encompassing savings «in all their forms». It is precisely that breadth, however, that requires protection to be framed according to the nature of the transaction, the relationship and the relevant risk, and not through an indiscriminate attraction of every form of funding or investment into banking law. The allocation between banking regulation and capital market regulation thus constitutes a way of implementing the constitutional principle itself, in which identifying the safeguards best suited to the specific needs underlying the different uses of wealth allows for their more rational and efficient protection.

In contemporary legal systems, «savings» in the naturalistic sense have in fact emerged in differentiated technical forms, consistent with different expectations: on the one hand, the preservation of wealth, tied to the availability of the sums, the protection of value and the banking relationship with the intermediary; on the other, the expectation of an increase in one's patrimonial sphere, through the employment of capital in securities as capital market products and the conscious assumption of the risk that characterises the related performance. Both forms fall within the constitutional protection of savings, but they are safeguarded through different rules, authorities and remedies, according to a logic of proportionality, subsidiarity and coherence with their economic and legal function.

Even when the financial instrument is issued by a bank, the specific profiles connected with the nature of the issuer, possible exposure to *bail-in*, resolvability and the structure of liabilities do not, in themselves, require the instrument to be attracted by banking regulation. Those profiles are now considered and safeguarded through mechanisms of capital market law: at the level of information to the market and the investor or their protection through business conduct rules, through the prospec-

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tus, *disclosure*, PRIIPs and the rules on investment services; and, at the more properly systemic level, through the BRRD framework and, where the conditions are met, the intervention powers conferred on the competent authorities.[67]

From this perspective, the allocation of competences does not leave uncovered the risk profiles possibly connected with the banking nature of the bonds. Investor protection is entrusted to the TUF and to CONSOB's supervision. The profiles of orderly functioning, integrity and, in relevant cases, stability of the system are also safeguarded through the powers conferred on the Bank of Italy. The allocation does not, therefore, serve a merely classificatory function, but distributes protective functions, competent authorities, disclosure obligations, conduct rules and intervention powers in a way that is consistent with the nature of the activity regulated and the risk actually generated.

In coherent implementation of this arrangement, the Provisions on transparency of banking and financial operations and services expressly refer to Article 23, paragraph 4, TUF and clarify that the banking transparency regime does not apply to investment services and activities or to the distribution of financial products with investment purposes, citing as examples precisely «bonds and other debt securities». As also clarified in practice, Title VI TUB does not apply to financial instruments, which for simplicity are identified in regulatory interactions as those carrying an ISIN. This legal provision is symptomatic: it makes visible that, even where the issuer is a bank, the bond is not treated as a funding «banking product» for purposes of the banking transparency regime, the national legislature having considered the regime provided by the TUF and, more generally, by securities law and regulation to be sufficient and adequate.

The same consideration is reflected at the level of specific remedies, which do not apply to banks acting in their mere capacity as issuer, i.e. without providing any banking or financial service. Disputes relating to banking transactions and services fall within the scope of the Banking and Financial Ombudsman (*Arbitro Bancario Finanziario*, ABF), while those relating to investment services and activities and to the placement of financial instruments fall within the perimeter of the Financial Disputes Arbitrator (*Arbitro per le Controversie Finanziarie*, ACF) established at CONSOB, where the provision of an investment service can be identified. The complaints regime provided by the PRIIPs rules may instead become relevant, to be indicated in the KID where the issuer, even without providing any service, acts as *manufacturer*. This circumstance further confirms the clear distinction between the provision of a service to the investor and the mere role of issuer or *manufacturer* of the financial instrument, to which specific product obligations may refer without that in itself amounting to (or creating by virtue of law) a service relationship, which normally does not exist in the cases considered here.

The banking nature of financial instruments and the repayment obligation embodied, assumed in the abstract as an authorisation prerequisite, do not automatically entail the application of the protections and remedies proper to banking relationships and banking products and activities. On the contrary, when actual operations concern bonds or other repayable financial instruments, these are governed as investments, and not as savings products, and remain within the scope of securities and capital market regulation.

4.2.3. *Strict and relative banking reservation: prudential relevance for purposes of the branch requirement*

The traditional approach started from the combined consideration of the issuer's banking status and of the general entrepreneurial business activity it carried on as a whole.

The transposition of CRD VI now makes evident the distinction between that definitional level and the one underlying the new branch requirement. Article 14-*bis* TUB does not refer to the general definition of the taking of savings in Article 11, nor to the overall banking business outlined in Article 10, but directly identifies the relevant activities and services through the separate cross-reference to Article 1, paragraph 2, letter f), numbers 1), 2) and 6), linking their performance within the territory to the establishment obligation. It follows that the broad, anti-avoidance scope attributable to other repayable funds in the context of the definition of credit institution does not automatically coincide with the scope relevant for purposes of Article 14-*bis*. In the latter, consistently with the *Banking Package* and

67 Prospectus Regulation and Delegated Regulations (EU) 2019/980 and 2019/979, as well as MAR, all cited *supra*, note 3; Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352 of 9 December 2014, pp. 1-23 («PRIIPs», from *Packaged Retail and Insurance-based Investment Products*); as well as MiFID II, cited *supra*, note 3.

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the prudential function of CRD VI, what matters are the forms of funding that are intrinsically capable of generating the risks proper to «*maturity transformation*», that is, the aspect of banking activity that has become specifically relevant in the legal framework in which CRD VI sits.

In the context of CRD VI, the relevance of the taking of deposits and other repayable funds must be assessed in light of the specific aspect of credit intermediation that the new regulatory framework intends to safeguard: not any acquisition of repayable funding, but only funding that fits the typical model, characterised by the raising of liquid or short-term liabilities and by the transformation of maturities and liquidity, and which is therefore capable, even when considered on its own, of triggering systemic risks, including at local level. Being subject to the same requirement thus indicates that such forms of funding are comparable in the impact they can have on aspects relevant for banking regulation; it does not indicate a merely formal, civil-law commonality in the obligation of repayment. The branch requirement and the related territorial safeguards are therefore justified in respect of instruments that, although not deposits, behave like deposits in terms of the risks intrinsic to them, namely liquidity, behavioural and outflow risks, which they are structurally capable of generating.

Scholarship, including in studies published by the Bank of Italy, confirms this approach, identifying precisely in the transformation of maturities and liquidity the characteristic trait of the *business* risk which, by reason of the integration of the banking system with the real economy, can take on a systemic dimension at local and international level. In particular, those studies observe that the fundamental function performed by banks is the transformation of maturities, which, if excessive, becomes critical for financial stability, since it can threaten not only the soundness of individual banks but also that of the entire system, as the global financial crisis showed, in which structural weaknesses in funding were among the principal causes of bank failures (see *supra*, § 2.2). In this scheme, deposits and the forms of funding functionally assimilable to them constitute the core of typical banking liabilities, capable of fuelling risks to the stability and integrity of the system and of defining the natural perimeter of prudential intervention.

The distinction between *lato sensu* funding through saving, on the one hand, and investment instruments, on the other, reflects a structural difference of economic function and risk, recognised by the Italian legal system. Article 11 TUB defines as a banking activity the collection of savings and the latter as the acquisition of funds with an obligation of repayment, but expressly specifies that the prohibition on taking funds from the public does not apply to companies that acquire funds through bonds, debt securities or other financial instruments. At the same time, the same article provides that, even where funding is permitted to non-bank entities, forms of sight and on demand funding (*a vista*) and those linked to generally spendable means of payment remain in any event precluded. The Bank of Italy's Provisions make this distinction even clearer, defining precisely the notion of sight and on demand funding, understood as repayable on demand without notice or with notice of less than twenty-four hours, and confirming its strict reservation.[68]

With specific reference to the branch obligation, Article 14-*bis* TUB, implementing Article 21c CRD VI, which qualifies the relevant activity as a service, refers to Article 1, paragraph 2, letter f), number 1), namely to «the taking of deposits or other funds subject to a restitution obligation». The cross-reference does not, therefore, operate, even indirectly, to the overall definition of credit institution, to the collection of savings–exercise of credit, or to the general notion of credit institution or banking activity, nor to that of the taking of savings (in Article 11, paragraph 1, as the «acquisition of funds with an obligation of repayment, whether in the form of deposits or otherwise»). The disjunctive wording of Article 1, paragraph 2, letter f), number 1), which reproduces that of the Italian version of Annex I CRD, does not affect the conclusions reached: as noted (*supra*, § 3.4), here too, for purposes of the branch requirement, only those forms of funding matter that are capable, by their characteristics and function, of generating the risks proper to deposit funding. From the literal and systematic standpoint of domestic law, the two distinct provisions and their respective references to repayability and restitution obligations may legitimately be interpreted in light of their different *ratio* and function: in the context of Article 14-*bis*, the identification of the activities and services capable of triggering the branch requirement must be traced back to the need to contain the risks identified, also on the basis of empirical evidence, in the *Banking Package*, of which CRD VI forms part, and to the corresponding Union interpretation that has accompanied the introduction of the new requirement.

68 Bank of Italy, *Disposizioni per la raccolta del risparmio dei soggetti diversi dalle banche*, measure of 8 November 2016, in force since 1 January 2017, Section II, para. 2. The Provisions regard as «sight» funding that which is repayable at the depositor's request immediately or with notice of less than twenty-four hours, and confirm that it is reserved to banks.

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4.2.4. *Limits emerging from practice: deposit-taking authorisation based on mere bond issuance*

At the practical level, the experience gained with regard to third-country banks has shown that the absence of structured cooperation arrangements with the supervisory authorities of the home country (MoUs) has, on several occasions, been a decisive obstacle, preventing outright the granting of authorisations to non-EU banks, even when the planned activity was limited to access to the capital markets through the issuance of repayable financial instruments.

In practice, needs of cooperation and confidentiality have in fact significantly affected the paths of market access and the operating conditions of third-country banks. In the new framework outlined by CRD VI, those needs take on still greater weight, because the branch requirement is called upon to operate as an instrument of effective supervision, and not as a mere formal compliance exercise.

The CRD VI regime on third-country branches is in fact conceived as intrinsically cooperative: it presupposes effective information exchanges, coordination and structured collaboration with the authorities of the home country. In the absence of those prerequisites, the territorial presence required is not suited, in itself, to guarantee effective control over the activity carried on.

In the framework outlined by the European legislature, the requirement to establish a branch responds to the need to safeguard activities actually carried on in the territory of the host Member State. The territorial presence is therefore functional to ensuring the activation and effectiveness of the prudential and organisational safeguards connected with the activity carried on by the third-country bank. Outside that scope, where anchored to the mere «presence» of financial instruments on the market, it risks turning into a formal safeguard lacking incremental content.

In this respect, the practice, developed in particular after Brexit, has shown that basing the authorisation requirement, in the form of deposit-taking authorisation, today in that of the branch requirement, on the activity of issuance alone does not allow a coherent application of the relevant regime. The relationship between banking authorisation and the rules actually applicable to the only activity the issuer carries on towards the public proves, in this sense, particularly revealing.

In some cases, deposit-taking authorisation was requested by and granted to third-country institutions precisely because of their wish to direct their bonds to the Italian market, since that activity was regarded, in the abstract, as suited to amounting to a form of funding reserved under banking legislation. Funding through debt instruments thus became the fulcrum around which the qualification of the activity carried on as a business activity of a banking nature was built.

The practice developed confirmed that inconsistency: after authorisation was granted, the activation of the mandatory complaints-handling and alternative dispute resolution safeguards proper to banking operations was ruled out by reason of the nature of the activity actually carried on, consisting in the mere issuance of financial instruments identified by ISIN and, as such, subject to the TUF and to capital market regulation, rather than to the transparency rules of Title VI TUB.

Concrete experience shows a discontinuity between the authorisation prerequisite formally assumed and the actual nature of the activity carried on.

In those circumstances, banking authorisation was intrinsically lacking in operational content, and drawing the issuer into a «banking» perimeter solely by reason of bond issuance alone appeared merely nominal. The issuance, regarded upstream as a banking activity sufficient to trigger the authorisation obligation, did not in fact, once authorisation was granted, take on any relevance for the application of banking regulation, since, as set out above:

- issuance by the foreign issuer cannot, in itself, be territorially localised in Italy merely because the instruments are offered, distributed, traded, held in central custody or held by investors located there;
- mere issuance does not amount to the performance of a banking service to investors, nor does it establish a qualified relationship with them;
- the TUF and European capital market rules apply to the transaction and the instruments issued, and not the banking rules provided for by the TUB;
- information to investors and the market is that derived from the prospectus, the MAR regime and, where applicable, the PRIIPs KID, regimes which specifically take into account the issuer's

banking nature as well, and not that provided for by Title VI TUB on banking transparency;

- the structuring, approval and distribution of the product remain subject to incisive *product governance* safeguards and, in the distribution phase, to the relevant MiFID rules;
- the complaints-handling and alternative dispute resolution safeguards proper to banking operations do not apply: the bank cannot activate the relevant system in relation to mere issuance, and the investor, who does not become a banking customer of the issuer, cannot avail themselves of the ABF (the ACF can be relevant only as against an intermediary that has provided an investment service, while any complaint obligations connected with the PRIIPs rules remain unaffected where applicable);
- supervision of the issuance, the prospectus and information to the domestic market is exercised by CONSOB;
- any intervention by the Bank of Italy in respect of the risks actually generated by the instruments is not based on the prudential powers provided for by the TUB in relation to the authorised activity, but on the specific *product intervention* power conferred on it by Article 7-*bis* TUF.

In short, an asymmetry emerges between the premise and the effects of the authorisation: bond issuance was characterised as banking activity in order to draw the foreign issuer into the related authorisation regime but, once authorisation was obtained, it was the object neither of banking regulation nor of the related obligations, supervisory powers and remedies. The very activity that had given rise to the authorisation obligation thus fell outside the scope of the TUB and the powers of the banking supervisory authority, remaining entirely subject to the TUF and to capital market regulation, under CONSOB's supervision.

That the issuance falls outside the scope of banking regulation does not, of course, rule out the exercise of the powers specifically provided for by capital market regulation. In particular, as mentioned, Article 7-*bis* TUF confers on the Bank of Italy the power to prohibit or restrict the marketing, distribution or sale of financial instruments and structured deposits, as well as certain related financial activities or practices, when necessary to preserve the stability of the national financial system, including by reason of the spread, circulation or concentration of their holding, in compliance with the principles of proportionality and non-discrimination. The concrete relevance of such risks is the subject of assessments periodically published by the Authority itself in the exercise of its intervention power.[69]

4.2.5. *Implementation of CRD VI, evolutionary interpretation and competitiveness of the Italian market*

The Italian experience shows that authorisations based on the mere issuance of formally repayable instruments might lead to a presence «in name» but not in fact: either there is a banking service, with a related «banking» relationship and a risk that is locally relevant for prudential purposes, or the banking safeguard remains empty of content. That structural incoherence highlights that, under the new regime of Article 21c CRD VI, automatic application of the branch requirement deriving from mere issuance or mere distribution of financial instruments may prove inconsistent with the purposes of the legislation, insofar as organisational safeguards must be assessed, as the EBA has clarified, in light of the substance of the activity carried on and their actual significance in terms of systemic and prudential risk.

The same incoherence emerges, in the new regime, from the difficulty of reconciling the prerequisite for the branch obligation with the time limits provided for failure to commence or cessation of the authorised activity, which appear hardly rational and hard to apply where that activity is identified with the mere issuance or marketing of financial instruments addressed to, or held by, investors located in the territory (see *supra*, § 2.4.2, Article 48d CRD and Article 14-*bis* TUB).

Even so, the caution underlying the traditional approach, and the possible institutional reluctance to abandon it or, better, not to replicate it in the new and different context, can be understood. In the background of that approach lies, in fact, the concern that third-country bank issuers, not supported by prudential and supervisory regimes substantially comparable to those of the Union and therefore not necessarily embedded in regulatory frameworks capable of ensuring an adequate level of capital strength, might turn directly to the domestic *retail* market. That caution had, in its historical genesis, an intrinsic intelligibility. But it is precisely that framework that has progressively changed. The parallel

69 See *supra*, note 23.

evolution of banking law and capital market law, together with the *ratio* of CRD VI itself and the regime on equivalence, no longer allows an extensive reading of the notion of *core banking activities* (*rectius*, *services*) to be regarded as the only form of protection. The distortive effect, rather, is that a merely formal reading of the notion of «*other repayable funds*», combined with an overly broad application of the concept of equivalence, ends up turning a regime conceived to regulate access to the banking sector into a filter on entry to the capital markets, altering the functional allocation between prudential regulation and investment regulation that characterises the European and domestic legal system.

A change of perspective would be fully compatible with the current European and national regulatory framework and, indeed, more consistent with the purposes of the new CRD VI regime, with the evolution of Union and domestic legislation, and with new Article 14-*bis* TUB. It would also enhance the functional allocation between banking law and capital market law and the latter's recognised aptitude to respond also to the stability and resolvability needs of the credit system through specific safeguards, as shown by the BRRD framework, the rules on *self-placement* and, for present purposes, the *product intervention* powers.

Such a refinement of interpretation would therefore represent not a rupture or a step back in protection, but the recognition of the complementarity and efficiency of the instruments now offered by banking law and capital market law, along an evolutionary trajectory that other authorities, at national level, have already experienced over time in reconsidering, in a more targeted way, forms of protection originally introduced domestically in a still incomplete regulatory context. In this regard, one may recall both CONSOB's revocation of its earlier resolutions on the distribution to *retail* clients of illiquid or complex products and the reform of the TUF that abolished the liability of the placement manager:[70] in both cases these were precautions put in place at national level and later considered no longer necessary in light of the changed regulatory framework, largely of European derivation, already capable of ensuring an adequate level of protection.

70 CONSOB, Notice of 3 February 2022, withdrawing communications No 9019104 of 2 March 2009 on the distribution of illiquid financial products and No 0097996 of 22 December 2014 on the distribution of complex financial products to *retail* customers; Law No 21 of 5 March 2024, Article 9, paragraph 1, letter b), which repealed Article 94, paragraph 7, TUF on the prospectus liability of the intermediary responsible for the placement.

The possible alignment of the domestic approach with the approach taken by other Member States, supported by the evolution of the relevant legislation, would not require amendments to primary legislation, nor would it affect the substantive protection of investors and of the system, which the legal system now adequately provides without any need to impose territorial prudential safeguards not justified by the nature of the activity carried on and the risks connected with it.

Brought back to unity, the foregoing considerations show that overcoming the traditional approach does not mark a break with the system but represents, rather, its coherent development. The branch safeguard finds justification where the risks that recitals 5, 17 and 19 CRD VI place at the foundation of the new regime materialise, namely those locally relevant systemic and outflow risks which the fragmentation of national regimes, in the absence of effective supervision, made concretely possible. It is in light of those risks that, among funds with an obligation of repayment, the funding relevant for purposes of Article 21c CRD VI, and therefore of Article 14-*bis* TUB, which implements it and to which the interpretive considerations in this paper therefore extend, must be identified. In the technical and functional reading developed within the EBA, they characterise only the «*deposit-like*» forms of funding, that is, liabilities that, although embodied in financial instruments, reproduce the qualifying traits of deposits (accessibility and withdrawability of the funding, sensitivity to holders' behaviour under *stress* conditions, placement in a banking relationship, of which holding in a *retail account* is an eloquent indicator), and ordinary forms of funding on the capital markets remain outside it. Mere bond issuance does not, for that reason alone, constitute the performance of a banking service: the bank raises resources on the market like any other issuer. Article 11 TUB confirms this *a fortiori*, since it allows non-bank companies to raise funds through bonds and other financial instruments, reserving to banks the forms of sight and on demand funding (*a vista*; *supra*, § 4.2.3). Although placed in a different regulatory area, that provision confirms, at the systematic level, that the repayable nature of the instrument is not sufficient to turn its issuance into reserved banking activity. Such instruments are no more capable of generating systemic risks *ex ante* when issued by a bank than when the issuer is a non-bank company: in both cases, credit and insolvency risk remains a business risk, knowingly assumed by investors, priced by the market and governed by the rules on issuance and distribution. By contrast, in «*credit intermediation*» founded on «*maturity transformation*», the risk assumed by the bank does not remain confined to its business sphere and to that of its creditors but, by reason of

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the mismatch of maturities, vulnerability to outflows and the integration of banking activity with the real economy, is intrinsically capable of spreading to the financial system and beyond the circle of the parties directly involved. This is the qualifying risk that justifies the specific prudential safeguard. Nor is it a coincidence that, in the other Member States, mere bond issuance does not take on relevance as an autonomous banking service attributable to the «*other repayable funds*» relevant for purposes of Article 21c. Such an interpretation is already fully allowed by current law: Article 14-*bis* TUB does not specify the relevant instruments and identifies the relevant activity or service through a direct reference to Article 1, paragraph 2, letter f), number 1), without passing through the notions in Articles 10 and 11 just recalled. Article 23, paragraph 4, TUF, for its part, entrusts investment instruments, even when issued by banks, to capital market regulation as the special regime. It is, finally, in line with the most mature interpretation of Article 47 of the Constitution: the protection of savings «in all their forms» does not postulate drawing every employment of wealth into the orbit of banking regulation, but demands that it be framed consistently with the nature of the transaction and of the risk (*supra*, § 4.2.2). Savings, both in the form of liquidity entrusted to the bank and in that of investment knowingly exposed to market risk, thus remain entrusted to the rules that are functionally proper to them: «*deposit-like*» funding to the perimeter of Article 14-*bis* TUB and the branch requirement; ordinary debt instruments to capital market regulation and to the intervention powers recognised to the authorities, including banking supervisory authorities. It is in this articulation of safeguards, and not in the indiscriminate extension of banking regulation, that the constitutional protection of savings, pursued also through the allocation of functions between the Consolidated Banking Act and the Consolidated Financial Act, now finds its most complete implementation.

Such an outcome would, at the same time, avoid a *unicum* in the Union context, with negative impacts on the competitiveness of the Italian market and on the variety of instruments to which investors can direct their financial resources.

5. Subsidiarity and complementarity of the safeguards of banking and capital market regulation

5.1. *Self-placement, BRRD safeguards, disclosure obligations and MiFID as the response of capital market regulation to prudential and resolution needs*

The historical experience of the placement of bank bonds with the bank's own customers — both as *MiFID clients* and as depositors and current account holders, that is, bank customers in the technical sense — constitutes a particularly instructive precedent. It shows how, faced with critical issues that emerged in the direct bank-customer relationship and with their concrete repercussions on resolution, the European legal system did not react by strengthening the powers of the banking supervisory authority or by extending banking product legislation, notwithstanding the peculiar circumstance of a European banking entity present in the territory (and already subject to supervision) which, taking advantage of its deposit-taking authorisation, placed its own securities with its customers. On the contrary, the phenomenon was addressed by strengthening the MiFID rules at the distribution stage and coordinating them with the resolvability needs of the issuer.

This phenomenon historically represented a «borderline» case of offers addressed to account holders, in which the bank combines the roles of issuer and distributor and, so to speak, «shifts funding from deposit to investment».

Only later, in European terminology, was this practice expressly defined as *self-placement*. The joint EBA/ESMA *Statement* expressly characterises the practice and highlights two inseparable profiles: (i) significant investor-client protection concerns at the point of sale; and (ii) a significant impact on the concrete application of the resolution *framework*, since the widespread presence of *retail* holders of liabilities potentially subject to *bail-in* makes the design and execution of the resolution strategy more complex, having fuelled a significant number of mis-selling cases.[71]

71 As noted by the EBA and ESMA, in too many cases the initial sale of bank liabilities to *retail* investors and the related disclosure practices did not comply with investor protection requirements, giving rise to a significant number of *mis-selling* cases; since, in the event of *bail-in*, the BRRD does not differentiate the treatment of eligible liabilities according to the nature of the holder, the significant presence of *retail* holders must be taken into account by resolution authorities in resolution planning and in assessing possible impediments to resolvability (EBA and ESMA, *Statement* EBA/Op/2018/03, cited *supra*, note 3). The risk of *mis-selling* litigation in fact affects the reso-

The European response is particularly instructive for present purposes. Faced with a phenomenon that arises *primarily* in the relationship between bank and depositor-customer and produces significant effects on resolution, the legal system did not strengthen the banking transparency regime or extend banking product regulation. In application of the principle of subsidiarity, it instead had recourse to the safeguards proper to the capital markets, refining them and coordinating the MiFID rules on the distribution phase with the resolvability needs pursued by the BRRD. In this perspective, Article 44a BRRD too takes as its operational linchpin the suitability assessment provided for by MiFID II, supported by *product governance* and by disclosure on *bail-in* or product *ranking* risks. Although they contribute to protecting *retail* investors, these instruments are expressly stated to be functional first and foremost to the resolvability of the issuing bank and confirm that the related needs can be governed through market regulation, without extending banking product or supervisory safeguards.

The experience of *self-placement* shows, moreover, that the qualifying element lies not in the issuer's banking nature alone, or in the repayability of the instrument, but in the pre-existing relationship with the customer, the reliance built up within it and the trust placed in the depositary bank. It is by leveraging that *relationship* and trust that the bank can steer the liquidity customers hold in deposit form towards its own financial instruments.

The weight that the pre-existing relationship and the related reliance carry in this context provides further confirmation, and helps explain why the EBA's later work, based on concrete experience, also treated such a relationship as a key element of *deposit-likeness* (*supra*, § 3.5.2).

5.2. *Product intervention by banking supervisory authorities in respect of systemic risks generated by market instruments*

The relevance and regulatory qualification of bank bonds issued by third-country entities cannot be founded exclusively on their repayability. Deposits and bonds belong to distinct legal areas, built on complementary assumptions, purposes and protection techniques: the former are anchored in the static protection of savings and in the banking relationship; the latter in the protection of investment and in the proper identification, understanding and management of risk. Recognising this distinction does not mean disregarding the peculiarity of bank issuances, but identifying the safeguard that is coherent with the activity actually carried on and with the risk generated.

When the activity consists in issuing financial instruments and is not accompanied by activities locally suited to establishing a relationship with the public and to generating the systemic risks identified as characteristic of banking activity, the needs of protection and stability are met by rules built on the product, on information, on distribution and on circulation (including the *product governance* rules, on which see *supra*, § 3.4), as well as by the intervention powers conferred on the authorities. The issuer's banking nature remains relevant, but does not, for that reason alone, justify requiring a territorial presence which, as is known from the outset, would lack operational content: the authorisation would be sought for a branch that, by the third-country bank's own declaration, will carry on no activity other than issuing.

As happens with, for example, *corporate* issuances, risks to the host Member State's system could certainly emerge, and in appropriate cases such risks may take on a dimension that is significant for local integrity and financial stability.

MiFIR expressly lists, in Article 1, *product intervention powers* among its subject matters and, in Articles

lution strategy already *ex ante*: where eligible liabilities are widely held by *retail* investors and there is a concrete risk of claims, the resolution authority may be induced to exclude them, in whole or in part, from the application of *bail-in*, relying on the discretionary exclusions under Article 44(3) BRRD — in particular where this is necessary to avoid widespread contagion or value destruction — with the consequent reallocation of losses to other creditors or to resolution financing arrangements and a reduction in the effectiveness of *bail-in* as a loss-absorption tool. The scale of the phenomenon in the Italian experience is evidenced by the establishment of the Solidarity Fund (*Fondo di solidarietà*; Article 1, paragraphs 855 et seq., Law No 208 of 28 December 2015) and of the Savers' Compensation Fund (*Fondo indennizzo risparmiatori*; Article 1, paragraphs 493 et seq., Law No 145 of 30 December 2018), the latter intended to compensate holders of shares and subordinated bonds of banks placed in compulsory administrative liquidation for the harm suffered as a result of the «massive breaches of the obligations of information, diligence, fairness, objective good faith and transparency» laid down by the TUF. On the phenomenon of *self-placement* and the related aspects of investor protection, investment services regulation and bank resolution, see P.-H. Conac, *Mis-selling of Financial Products: Subordinated Debt and Self-placement*, study requested by the ECON Committee of the European Parliament, PE 618.994, June 2018; L. Enriques, M. Gargantini, *The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case*, in *The Italian Law Journal*, 2017, vol. 3, no. 2, pp. 485-510; D. Busch, *Self-placement, dealing on own account and the provision of investment services under MiFID I & II*, in *Capital Markets Law Journal*, 2019, vol. 14, no. 1, pp. 4-15; U. Malvagna, A. Sciarrone Alibrandi, *Misselling in Self-placement and Bank Resolution under BRRD2*, in *European Company and Financial Law Review*, 2020, vol. 17, no. 5, pp. 522-557.

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40, 41 and 42, confers on ESMA and EBA and on national competent authorities powers of intervention in their respective areas, making it possible to prohibit or restrict the *marketing*, distribution or sale of the financial products concerned, as well as certain financial activities or practices, when they give rise, in addition to significant concerns for investor protection or market integrity, to a threat to the stability of all or part of the Union's financial system or of at least one Member State.[72]

Union law shows that, in such cases, the relevant regulatory safeguard relies on intervention powers set within market regulation and built to operate on the product, its circulation and the related market practices, and on the corresponding riskiness, as well as on the issuer's risk and its *creditworthiness* and the *payout* characteristics, including where, by reason of the amount and concentration of holdings, those elements may pose a risk to the stability of the system as well as to investors.[73]

In other words, where the risk identified consists in a systemic risk at local level deriving from market instruments as such, the Union legal system makes available to the authorities, including central and local banking authorities, specific and proportionate intervention powers, to be exercised in compliance with the principle of non-discrimination, calibrated on the phenomenon to be addressed and modulated progressively, which may extend as far as a prohibition or restriction of distribution only, among other things, as an extreme measure.

At Italian level, for example, this reading finds coherent confirmation, beyond Article 7-*bis* TUF, in the approach followed by the Bank of Italy on *product intervention*, where the focus of the analysis is placed precisely on the risks to the stability and integrity of the national system that may derive from the dissemination, circulation and local holding of certain financial instruments, and not on building prudential banking supervision over the issuer as such.

In this framework, in compliance with the principles of subsidiarity and proportionality and with a view to complementarity, the authorities responsible for supervising the markets have their own instruments for protecting investors, and local banking supervisory authorities exercise targeted powers over the stability and integrity profiles of the system which, to be activated, certainly do not require the presence of a branch.

PART II — «*OTHER REPAYABLE FUNDS*» AND CASES ONTOLOGICALLY OUT OF SCOPE. *CERTIFICATES* AND SECURITISED DERIVATIVES, STRUCTURED NOTES AND ISSUANCES BY NON-BANK ENTITIES, INCLUDING *HOLDING COMPANIES* OF BANKING GROUPS

6. Objective and subjective limits of the notion of «*other repayable funds*»

For completeness, some final reflections are needed on the objective and subjective scope of the expression «other repayable funds», valid irrespective of the position taken on its scope for purposes of Article 21c CRD VI.

6.1. *Certificates and securitised derivatives*

It may be useful to delimit, first, the objective scope of the instruments potentially relevant, in order to avoid the establishment requirement, mediated by the repayable nature of the product, being envisaged in relation to cases that, by structure and economic and legal function, are not instruments to which an obligation of repayment or return can ontologically be attributed, such as *certificates*.

This follows from the undisputed circumstance that, even in the definitions formally adopted at legislative, institutional and regulatory level, these products are configured as *securitised derivatives*. They are not debt securities that find their justification in a "financing consideration" and therefore embody obligations of re-payment and of payment of interest as, respectively, the restitution and remuneration of capital taken as a loan (*borrowed money*). The payments due under *certificates* are in fact determined on the basis of the performance of the price of an underlying asset, on which the investor and the is-

72 Delegated Regulation (EU) 2017/567 confirms and develops the same approach, specifying the criteria and factors relevant for the purposes of intervention and showing that regulatory attention may legitimately focus, among other things, on the size of the issuance, the breadth of distribution, the range of holders, local circulation and the potential impact on the market and on the financial system concerned (see *supra*, note 23).

73 These are, therefore, powers conferred on the competent authorities of all Member States to address risks to market integrity and system stability arising from capital market instruments and their dissemination. In order to exercise such powers, there is no need to impose on the issuer a permanent local prudential presence, endowed with its own *governance* and subject to territorial supervision. Nor do such risks, in themselves, justify the surreptitious introduction of a filter on entry into the capital markets linked to the regulatory framework of the issuer's home country.

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suer, in a non-technical sense, «bet». Consistently, there is no capital (*principal amount*) but a notional value (*notional amount*) used solely as a calculation parameter. The final payment takes the form of a *settlement amount* or *redemption amount*, and not of repayment of borrowed capital. Nor is any payment of interest provided for as remuneration of lent capital, but rather one-off or periodic payments, such as more or less conditional coupons, premiums or amounts linked to the payoff (*payoff-linked amounts*).

Beyond the nomenclature used, expressions referring to «*capital protection*» or to *guaranteed* instruments describe, in a non-technical way, the potential economic result of the transaction, that is, the return of the amount invested on the basis of the *payoff* formula, which may provide for *floor* mechanisms and options.

For tax purposes, in the experience of individual legal systems, the flows generated by *certificates* are not treated as interest but as financial income deriving from investment instruments (with the possible resulting recognition of the offsetting of losses, as in the Italian legal system). The structural difference between securitised derivatives and debt securities, based on the absence of lent capital and of an obligation of its return or repayment, means that *certificates* cannot be regarded, and are not regarded by market participants, as «repayable funds» for which an obligation of «repayment» exists.[74]

74 Delegated Regulation (EU) 2019/980, cited supra, note 3, Annex 17; Bank of Italy, *Il «potere di intervento»*, cited *supra*, note 23, Appendix D; Borsa Italiana S.p.A., Rules of the markets organised and managed by Borsa Italiana, resolved upon by the Board of Directors on 21 July 2026 and approved by CONSOB by determination No 173 of 8 September 2026, and the related Instructions, in the versions in force from 19 October 2026; Rules of the SeDeX market (*Securitised Derivatives Exchange*) and the related guidelines, in force from 19 October 2026; CONSOB Regulation No 11971 of 14 May 1999 as subsequently amended. For the Italian tax aspects, see Articles 67, paragraph 1, letter c-quater), and 68, paragraph 5, of Presidential Decree No 917 of 22 December 1986, Consolidated Income Tax Act (TUIR), and, for the administered savings regime, Article 6 of Legislative Decree No 461 of 21 November 1997; see also the training material published on the website of the Italian Association of Certificates and Investment Products (*Associazione Italiana Certificati e Prodotti di Investimento*, ACEPI), *Casi pratici di applicazione dei certificati nei portafogli in consulenza — I certificati alla prova del cambiamento*, section «La fiscalità dei Certificati».

6.2. *Structured notes and non-capital-protected instruments*

A different reflection is required for structured notes which, although they may embed derivative components or be linked to the performance of underlying assets, remain debt securities with an obligation of repayment, at par or otherwise, of the capital lent. Without prejudice to the position maintained here on the characteristics that debt instruments should present in order to be drawn into the notion of «*other repayable funds*», even under the formalistic interpretation (not shared here), if greater weight were given to the nature of investment as compared with the function of savings, such instruments should in any event not be included within the scope of either the historical conservative regime or that of CRD VI, since their funding function carries attenuated weight.

Significant in this sense is the *Federal Reserve*'s observation that, as compared with *plain vanilla* instruments, «*investors in structured notes tend to pay less attention to issuer credit risk than investors in other long-term debt, because investors use structured notes to gain exposure unrelated to the covered BHC*»: the *funding* aspect is thus less relevant.[75]

According to other interpretations, which perhaps start from the same consideration of the prevalence, in some cases, of the investment component over the mere function of raising funding, the dividing line should nevertheless be identified not generally in the economic nature of the transaction but in the characteristics of the security and, in particular, in the presence of an actual obligation to repay the capital. In this perspective, only securities that give the investor certainty of repayment of the capital originally contributed, according to the terms and conditions of the loan and the related *payoff*, could be considered «*repayable funds*», whereas that qualification would lapse where the capital is exposed, in whole or in part, to investment risk and the terms of the issue do not ensure its return. If, however, the decisive criterion is taken to be the investment function of the instrument, and not the legal existence of the right to repayment (whether or not conditional or subordinated), that reasoning must be applied consistently to structured notes as well, excluding them from the notion of repayable funds irrespective of any total or partial protection of the capital lent.

75 On this point, see *supra*, note 24.

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6.3. ***Banks, holding companies and the subjective prerequisite of the branch requirement***

On the subjective side, the use of the general formula «third-country undertaking» responds to the aim of bringing within the scope of prudential supervision any non-EU entity that carries on an activity which, if carried on in the territory of the Union, would presuppose authorisation, whether as a credit institution or, more precisely, for the specific activity concerned. Under the legislation and practice common to the various national legal systems, the opening of a bank branch, with the clarifications set out below, necessarily presupposes that the applicant can be qualified as a bank (*credit institution*) in the home country or is authorised there to carry on the activities or services concerned.[76] That subjective precondition has always been a necessary element of the authorisation regime (including the rules on cross-border activities), which operates exclusively towards entities having banking *status* or authorised to carry on such activities. Consistently, neither the previous nor the current regime should allow the opening of a bank branch by parent *holding companies* that are not themselves banks or entities authorised to perform the same services in the home country, regardless of whether those entities head a banking group supervised on a consolidated basis.

In parallel, European sector legislation has historically excluded from the prohibition on taking savings from the public the issuance of bonds, debt securities and other financial instruments by issuers of a corporate nature. It followed that, not even in Italy, where in other respects a conservative approach prevailed, did the issuance of bonds by *corporate* entities, including foreign issuers and non-bank *holding companies* of banking groups, require banking authorisation.

This approach has been applied consistently also with reference to systemically important third-country *holding companies*, as in the case of United States issuers which, from the early 2000s, entered the European financial market as issuers of debt instruments through their *holding companies*, on the basis of prospectuses drawn up under the domestic rules applicable *ratione temporis*. In that context, and in particular in the period before the harmonisation of the Prospectus Directive, in some Member States bank issuers benefited from a specific exemption from the obligation to publish a prospectus, whereas for non-bank *holding companies* the correct characterisation of the issuances as *corporate* funding and not as banking activity was verified in advance, including through discussions with the competent market supervisory authorities, with the consequent application of prospectus publication obligations, since they could not be treated as banking entities, whether for the purposes of any authorisation to conduct their activities or as issuers entitled to benefit from the prospectus exemptions.

This framework also reflects the indispensable structural principle that a branch has no separate legal personality, being an organisational projection of the activity authorised in the home country. The structure outlined is consistent with Union law, in particular with Article 21c CRD VI, read together with Articles 47 et seq. of the same Directive.

In the prudential framework, so-called *clean holding companies* at the head of banking groups are designed not to take deposits or equivalent funds and are the entities used for issuing liabilities intended to absorb losses at group level, structurally subordinated to the liabilities of the operating companies and, where the requirements are met, *TLAC-eligible*.[77] For these specific issuers it would therefore have been entirely impossible to obtain confirmation from the third country of the existence of authorisations there to take deposits. That architecture, functional to the structural subordination of the

76 The subjective precondition operates, moreover, differently depending on the service: under Article 47(1) CRD, as replaced by CRD VI, lending and the issuance of guarantees and commitments are relevant only if provided by a third-country undertaking that would qualify as a credit institution if it were established in the Union; the taking of deposits and other repayable funds is relevant, by contrast, whatever the undertaking carrying it out, but the establishment of the branch nonetheless presupposes that the undertaking is authorised to provide the service in its home country (see *supra*, note 4).

77 Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012, OJ L 150 of 7 June 2019, pp. 1-225, with particular regard to Articles 72a et seq. CRR on own funds and eligible liabilities requirements and on the TLAC framework; Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150 of 7 June 2019, pp. 296-344, including the minimum requirement for own funds and eligible liabilities (*Minimum Requirement for Own Funds and Eligible Liabilities*, MREL). These sources set out the framework for the non-operating and structurally subordinated liabilities issued by resolution parent entities. For the specific US *clean holding company requirements*, see also Board of Governors of the Federal Reserve System, *final rule* on TLAC, long-term debt and *clean holding companies*, cited *supra*, note 24.

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liabilities of this specific category of *holding*, is a pillar of the resolution *framework* that has never been called into question, either at Union level or in individual national legal systems.

Taken together, these elements confirm that the branch establishment requirement retains an eminently subjective dimension, anchored to the status of the entity and to its authorisation to carry on banking activity or to provide the related services, and cannot be extended automatically to entities which, although part of supervised banking groups, operate as non-bank holding companies and as issuers of market instruments. That conclusion is consistent with the interpretation historically adopted in Italy: under the new regime too, such corporate holding companies may have recourse to the capital markets like any corporate issuer, without being subjected either to an authorisation or branch requirement which, by their very operating status, they could not satisfy, or to the application of company-law limits laid down in individual European legal systems and referring (and referable only) to their respective domestic issuers.[78] The same reflections, in light of the Italian experience, should continue to apply to other issuers of a non-bank nature or carrying on activities or providing services that are not in themselves subject to prudential supervision, such as SPVs or comparable entities. Nor can the mere role of guarantor assumed by a banking entity draw into the scope of "*other repayable funds*" the guaranteed bond issued by an entity of a different nature or the related guarantee, since neither constitutes a form of funding of a banking nature.

78 Such limits include, for example, those laid down in Italy by Article 2412 of the Civil Code. The inapplicability of those limits to foreign issuers is supported, convergently, by private international law, by the Bank of Italy's operational practice, which has never subjected such issuers to the limits laid down for Italian companies, and by the very institutional interpretation underlying the reforms initiated in 2012, which were also motivated by the need to remove the competitive disadvantage resulting from the application of those limits to domestic issuers alone. The Bank of Italy's measure of 8 November 2016, *Disposizioni per la raccolta del risparmio dei soggetti diversi dalle banche*, Section I (*Disposizioni di carattere generale*), paragraph 4 (*Destinatari della disciplina*), should be read in the same perspective. It provides that "These provisions apply to persons resident in Italy and, insofar as compatible, to non-residents in respect of funding activities carried out in Italy". In identifying the addressees of the rules it contains, the measure allows one to go beyond the wording of Article 11(4) TUB, which, in preserving funding raised by companies under the Civil Code through bonds, debt securities or other financial instruments, refers textually to Italian companies only. It in fact extends to foreign persons, to the extent of compatibility, the possibility of carrying out such funding in Italy, thereby allowing it to be regarded as not reserved even when carried out by foreign corporate issuers. By contrast, the measure makes no reference to the possible application of the provisions of the Civil Code, which by definition refer only to Italian companies: provisions which, in light of the systemic, applied and institutional elements outlined above, must be regarded as incompatible with the subjection of foreign issuers to them. Nor, moreover, could a national banking supervisory authority impose on a foreign company the company-law limits of another legal system, this being a matter reserved to the *lex societatis*, whereas Article 2412 of the Civil Code applies by definition only to Italian companies.
On the law applicable to companies (the *lex societatis*, i.e. the law governing the company and regulating, among other things, its capacity and powers), see Article 25 of Law No. 218 of 31 May 1995 and, for companies from Member States, Articles 49 and 54 TFEU and the judgments of the Court of Justice of 9 March 1999, Case C-212/97, *Centros*; 5 November 2002, Case C-208/00, *Überseering*; 30 September 2003, Case C-167/01, *Inspire Art; 25 April 2024*, C-276/22, *Pres. Larsen, Rel. Jürimäe*; Consiglio Nazionale del Notariato, Study No. 283-2015/I, «*Il trasferimento della sede sociale all'estero e la trasformazione internazionale*; and S.M. Carbone, *Lex mercatus e lex societas tra principi di diritto internazionale privato e disciplina dei mercati finanziari*», in «*I Quaderni europei*», *Working Paper 2008/n.* 4, October 2008. On the distinction between the *lex societatis* and the law governing the contractual relationship embodied in the security, see Regulation (EC) No. 593/2008 (Rome I), which excludes company-law matters from its scope (Article 1(2)(f)); and F.M. Mucciarelli, *Società estere con amministrazione o sede sociale in Italia e libertà di stabilimento: la giurisprudenza della Corte di Giustizia nasce da errori, equivoci e curiosi fatti di cronaca rosa*, in «*Giurisprudenza Commerciale*», 2024, Vol. 51, Issue No. 5, pp. 936-942.
On the 2012 reforms of Article 2412 of the Civil Code, see Article 32(26) of Decree-Law No. 83 of 22 June 2012 (*Misure urgenti per la crescita del Paese*), converted into law, with amendments, by Law No. 134 of 7 August 2012 (*Gazzetta Ufficiale* No. 187 of 11 August 2012, Ordinary Supplement No. 171), which replaced the fifth paragraph of Article 2412; Consiglio Nazionale del Notariato, Study No. 143-2014/I (Atlante–Ruotolo), *Le modifiche ai limiti all'emissione del prestito obbligazionario (il nuovo comma 5 dell'art. 2412 c.c.)*; and, for the preparatory materials, Camera dei deputati, Servizio Studi, Dossier No. CL164 of 5 July 2012 on Decree-Law No. 83/2012 (A.C. 5312).

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