Consultation Response

Draft bill for a Banking Directive Implementation and Bureaucracy Relief Act (BRUBEG)

9 September 2025

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the ***Referentenentwurf eines Bankenrichtlinienumsetzungs- und Bürokratieentlastungsgesetzes (BRUBEG).***

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76, and on the German Bundestag Transparency Register, registration number R001235.

We summarise below our high-level response to the consultation, which is followed by more detailed observations.

Executive Summary

Thank you for your letter of 20 August 2025 inviting comments on the draft bill implementing 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, branches from third countries and environmental, social and governance risks and Directive (EU) 2024/1174 of the European Parliament and of the Council of 11 April 2024 amending Directive 2014/59/EU and Regulation (EU) No. 806/2014 with regard to certain aspects of the minimum requirement for own funds and eligible liabilities and to relieve credit institutions of bureaucracy (Banking Directive Implementation and Bureaucracy Relief Act – BRUBEG).

AFME welcomes this opportunity to comment on the draft bill. Our comments focus on the provisions of the draft bill that relate to the transposition into German law of new **Articles 21c and 47** of Directive 2013/36/EU (CRD) added by Directive (EU) 2024/1619 (CRD6) as these are of particular importance to our members.

AFME also welcomes the Ministry's stated intention to implement CRD6 on a "1:1 basis", especially as recital (5) to CRD6 states that the provision of core banking services "should be made conditional on an explicit and harmonised authorisation requirement in Union law" specifying that undertakings established in a third country which seek to provide such core banking services in the Union should at least establish a branch in a Member State authorised in accordance with the requirements set out in CRD6.

To that end and in the interest of clarity, we advocate **amending the draft bill to explicitly reflect the provisions set out in CRD6, rather than relying on existing provisions or interpretations of the German Banking Act (*Gesetz über das Kreditwesen* – KWG)** that may give rise to uncertainty as to the scope and application of the revised law.

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In summary, **AFME proposes that the draft bill should be amended:**

- to provide explicit exceptions from the requirement for third-country undertakings to obtain approval under § 32(1) KWG (or a waiver under § 2(5) KWG) when providing core banking services to which new Article 21c applies on a cross-border basis where the services are provided to credit institutions or undertakings in the same group or are services relating to MiFID services (to reflect the corresponding exceptions in new Article 21c(2)(b) and (c) and (4) CRD);

- to make clear that the revocation of existing waivers under § 2(5) KWG does not affect the rights and obligations of the parties under existing contracts (at least those entered into before 11 July 2026 – to reflect new Article 21c(5) CRD);

- to make clear that BaFin must not revoke any existing waivers under § 2(5) KWG in respect of core banking services before 11 January 2027 (to reflect the third sub-paragraph of Article 2(1) CRD6); and

- to provide that a branch is treated as "CRD third country branch" if the undertaking that has established the branch (but not a parent company of that undertaking) would be a CRR credit institution if it had its registered office in the EU and the branch carries out at least one of the activities set out in point 2 (lending) or point 6 (guarantees and commitments) Annex I CRD (to reflect new Article 47(1)(a) and (3) CRD).

AFME considers that these amendments would help create a **level playing field** for the provision of banking and investment services across the EU.

We would welcome an opportunity to discuss our comments with you and to answer any questions you may have any on them.

In this letter, references to "core banking services" are references to the services to which new Article 21c(1) CRD applies in accordance with new Article 47(1) CRD, i.e.:

- any of the activities referred to in point 2 (lending) and point 6 (guarantees and commitments) of Annex I CRD where carried on by a third country credit institution – these activities correspond to the banking business referred to in point 2 (credit business) and point 8 (guarantee business) of § 1(1) KWG;

- the activity referred to in point 1 (deposit-taking) of Annex I CRD where carried on by any third country undertaking – this activity corresponds to the banking business referred to in point 1 (deposit business) of § 1(1) KWG.

Fully implementing the exceptions in new Article 21c CRD

AFME considers that the **draft bill should be amended explicitly to provide exceptions from the requirement for third country undertakings to obtain approval under § 32(1) KWG** (or a waiver under § 2(5) KWG) when providing core banking services on a cross-border basis where:

(a) ***services provided to credit institutions:*** the services are provided to a credit institution (reflecting new Article 21c(2)(b) CRD);

(b) ***intragroup services:*** the services are provided to an undertaking of the same group as that of the third country undertaking (reflecting new Article 21c(2)(c) CRD); and

(c) ***MiFID-related services:*** the services are services or activities listed in Annex I, Section A, to Directive 2014/65/EU (MiFID), including any accommodating ancillary services, such as related deposit taking or the granting of credit or loans the purpose of which is to provide services under that Directive (reflecting new Article 21c(4) CRD).

However, we consider that the **amendments implementing new Article 21c(4) CRD should make clear that the exemption for the provision of MiFID-related services covers core banking services** the purpose of which is to provide any of the investment services in Section A, Annex I MiFID or the ancillary services set out in Section B, Annex I MiFID, including safekeeping and administration of financial instruments for the account of clients, such as custodianship and related services (in line with our understanding of new Article 21c(4) CRD). Corresponding changes should be made to the provision implementing the corresponding exemption for MiFID-related services in new Article 47(2) CRD (see new § 53c(1) KWG sentence 2 added by point 40 of Article 2 of the draft bill).

Third country undertakings providing core banking services on a cross-border basis should also be able to rely on the new exceptions implementing new Article 21c(2)(b) and (c) and (4) CRD when those services are provided in connection with the provision of other services, such as MiFID investment services or ancillary services, pursuant to a waiver under § 2(5) KWG. Separately, AFME would welcome guidance from BaFin clarifying that, where a third country undertaking is providing cross-border investment services or ancillary services covered by MiFID to a client pursuant to a waiver under § 2(5) KWG, the third country undertaking may also provide core banking services closely connected to those investment services or ancillary services pursuant to that waiver.

We welcome the acknowledgement in the explanatory memorandum accompanying the draft bill that:

> For certain core banking services (in particular, deposit and credit operations, subject to limited exceptions), a branch office must be set up, as these cannot be provided directly from a third country. This does not include, amongst others, services for credit institutions and services relating to certain investment services. Existing contractual relationships until July 2026 will be protected.

This appears to indicate that the draft bill is intended to give effect to the exceptions set out in new Article 21c CRD.

However, the explanatory memorandum also states that:

> In accordance with the applicable legal situation, banking and financial services provided on a cross-border basis from abroad to Germany are subject in principle to the approval requirement of § 32 paragraph 1 sentence 1 KWG; this has been confirmed by the Federal Administrative Court (BVerwG, 22.04.2009 - 8 C 2.09). In this respect, there is therefore no need to change § 32 KWG.

Therefore, we are concerned that, unless the draft bill is amended, third country undertakings may require approval under § 32(1) KWG (or a waiver under § 2(5) KWG) where providing core banking services to credit institutions or members of their own group or core banking services related to MiFID services, even though new Article 21c CRD provides exceptions from the requirement for third country undertakings to establish a branch in these cases.

The KWG does not include existing exemptions that fully cover these cases:

(a) ***Services provided to credit institutions.*** In accordance with BaFin's administrative practice, taking deposits from German credit institutions is not regarded as taking deposits "from the public" and

therefore is not regarded as deposit business requiring approval under § 32(1) KWG (or a waiver under § 2(5) KWG). Likewise, granting loans to credit institutions as deposits does not require a licence under § 32(1) KWG (or a waiver under § 2(5) KWG). Therefore, we consider that the draft bill should make clear that third country undertakings can provide all core banking services, including lending and guarantees and commitments, to credit institutions on a cross-border basis without establishing a branch as envisaged by new Article 21c(2)(b) CRD.

(b) ***Intragroup services.*** In accordance with BaFin's administrative practice, taking deposits from members of the deposit-taker's own group is not regarded as taking deposits "from the public" and therefore is not regarded as deposit business requiring approval under § 32(1) KWG (or a waiver under § 2(5) KWG). In addition, point (7) of section 2(1) KWG provides that undertakings which conduct banking business "exclusively with their parent company or their subsidiaries or sister companies (emphasis added)" are not considered credit institutions. However, that exemption is more limited than the exemption in new Article 21c(2)(c) CRD which is not limited to cases where third country undertakings provide core banking services "exclusively" to members of their own group. As a result, contrary to the express provisions of new Article 21c(2)(c), a third country credit institution might (under the draft bill) be required to establish a branch where conducting credit business or guarantee business on a cross-border basis with or for members of their own group if they are also conducting other banking business (e.g., because they are conducting credit business or guarantee business with credit institutions). Therefore, we consider that the draft bill should make clear that third country undertakings can provide all core banking services, including lending and guarantees and commitments, to members of their own group on a cross-border basis without establishing a branch as envisaged by new Article 21c(2)(b) CRD.

(c) ***MiFID-related services.*** There are no exemptions in the KWG or administrative practice corresponding to the exception in Article 21c(4) for MiFID-related services. The draft bill does include a provision implementing the corresponding exemption for MiFID-related services in new Article 47(2) CRD (see new § 53c(1) KWG sentence 2 added by point 40 of Article 2 of the draft bill). However, that provision only limits the scope of application of the rules set out in new § 53ca to § 53cq KWG applicable to CRD third country branches. As a result, third country undertakings providing cross-border core banking services in connection with the provision of MiFID services could not (under the draft bill) rely on the exemption set out in the provision implementing new Article 47(2) CRD, even if they are providing those core banking services for the purposes of providing cross-border MiFID services pursuant to a waiver under § 2(5) KWG. Also, as already noted, we understand that the exception in new Article 21c(4) CRD covers the provision of core banking services the purpose of which is to provide any investment services or ancillary services referred to Section A or Section B, Annex I MiFID). Therefore, we consider that the draft bill should make clear that third country undertakings can provide all core banking services on a cross-border basis in connection with MiFID investment or ancillary services without establishing a branch as envisaged by our understanding of new Article 21c(2)(b) CRD.

In contrast, while the draft bill does not include provisions amending the KWG to explicitly incorporate the exception for ***'reverse solicitation'*** set out in Article 21c(2)(a) CRD, BaFin's established administrative practice, reflected in its guidance notices (*Merkblätter*), has long recognised that cross-border banking business and financial services conducted or provided by third country undertaking at a client's own initiative do not require approval under § 32(1) KWG (or a waiver under § 2(5) KWG). This is because under German law, a license requirement is only triggered if the regulated activity is conducted "in Germany". BaFin does not

consider a cross-border activity to be conducted "in Germany" if the service provider has not targeted the German market.

Nevertheless, we consider that it is **helpful for legal certainty if the bill or its explanatory memorandum clearly affirmed the continued relevance of BaFin's guidance notes for third-country undertakings**. This would help ensure that the current administrative practice remains applicable and predictable for all banking and business and financial services (not just core banking services).

We consider that this could be achieved by adding an amendment to the KWG providing that § 32(1) KWG does not apply to an institution domiciled in a third country insofar as it conducts banking business or provides financial services in Germany by way of the cross-border provision of services at the exclusive initiative of the client (compare point 2 of new section 53cc(5) KWG added by the draft bill with respect to the provision of services by CRD third country branches in other Member States). Such an amendment would provide clear statutory underpinning with respect to the BaFin's administrative practice in relation to banking business and financial services generally and should not be limited to the core banking services covered by new Article 21c(1) CRD.

Protecting existing contracts

The draft bill amends § 2(5) KWG to prohibit BaFin granting new waivers under that section to the extent that the waivers are inconsistent with the requirements of new Articles 21c and 47 CRD and to require BaFin to revoke existing waivers under that section insofar as new Article 21c requires the establishment of a domestic branch office for the transactions in question (see point (aa) of paragraph 4(c) of Article 2 of the draft bill). We consider that the **draft bill should be amended to make clear that the revocation of existing waivers does not affect the rights and obligations of the parties under existing contracts**, at least to the extent required by new Article 21c(5) CRD.

We consider that the proposed provisions in the draft bill do not require BaFin to revoke existing waivers under § 2(5) KWG in a way that would affect the ability of third country undertakings to continue to rely on those waivers in so far as they permit the undertaking to provide services to credit institutions or undertakings in the same group or services relating to certain investment services within the scope of the exceptions in new Article 21c CRD. The provisions of the draft bill only require BaFin to revoke existing waivers insofar as new Article 21c requires the establishment of a domestic branch office for the transactions in question.

Timing of revocation of existing waivers

As already noted, the draft bill amends § 2(5) KWG to prohibit BaFin granting new waivers under that section to the extent that the waivers are inconsistent with the requirements of new Articles 21c and 47 CRD and to require BaFin to revoke existing waivers under that section insofar as new Article 21c requires the establishment of a domestic branch office for the transactions in question (see point (aa) of paragraph 4(c) of Article 2 of the draft bill). We consider that the **draft bill should be amended to make clear that BaFin must not revoke any existing waivers under § 2(5) KWG in respect of core banking services before 11 January 2027.**

Article 28(1) of the draft bill provides that Article 2, including the provisions amending § 2(5) KWG, enters into force on 11 January 2026. However, the third sub-paragraph of Article 2(1) CRD6 provides that Member States shall apply the measures necessary to comply with the amendments set out in Article 1, points (9) CRD6 one year later, from 11 January 2027 (Article 1, point (9) CRD6 amends CRD by adding new Article 21c).

New § 64c(5) KWG added by point 42 of Article 2 of the draft bill partially delays the application of new §§ 53c to 53cq KWG until 11 January 2027 (reflecting the third and fourth sub-paragraphs of Article 2(1) CRD6). However, the draft bill does not contain corresponding provisions making clear that existing waivers under § 2(5) KWG can continue until 11 January 2027.

Scope of definition of third country branch

The draft bill provides that a branch of a third country undertaking is a "CRD third country branch" subject to the new rules applicable to those branches if the "head office" would be a "CRR credit institution" if it had its registered office in the EU and the branch carries out at least one of the activities set out in point 2 (lending) or point 6 (guarantees and commitments) Annex I CRD (see point (1) of sentence 1 of new § 53c(1) KWG). We consider that the **draft bill should be amended so that this provision only applies where the undertaking that has established the branch (but not a parent company of that undertaking) would be a CRR credit institution if had if it had its registered office in the EU and the branch carries out at least one of the specified activities.**

The definition of 'head office" added by the draft bill covers both the third country undertaking that has established the branch and the intermediate and ultimate parent companies of that undertaking, if applicable (new § 53c(2) KWG). Therefore, the current drafting of point (1) of sentence 1 of new § 53c(1) KWG creates a risk that a German branch of a subsidiary of a third country CRR credit institution would be treated as a CRD third country branch even if the subsidiary establishing the branch would not itself be a CRR credit institution if it had its registered office in the EU.

The drafting of point (1) of sentence 1 of new § 53c(1) KWG is currently inconsistent with new Article 47(1)(a) and (3) CRD which only treat a branch which carries on the activities set out in point 2 or 6 Annex I CRD as a third country branch where that branch is established by an undertaking that itself would be a credit institution if it were established in the EU.

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