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Opinion of the European Banking Authority on matters relating to other financial intermediaries and regulatory perimeter issues

Introduction and legal basis

In November 2014, the EBA published an Opinion and Report on the perimeter of credit institutions setting out the results of the EBA's review of the interpretation of the term 'credit institution' and the prudential treatment of entities carrying out credit intermediation activities outside an individual prudential framework specified in EU law.¹

In view of the need for the regular monitoring of credit intermediation activities outside the traditional banking system, and taking account of other developments, including the European Commission's proposals² to amend the Capital Requirements Directive (Directive 2013/36/EU) (CRDIV) and the Capital Requirements Regulation (Regulation (EU) No 575/2013) (CRR) and the emergence of financial technology (FinTech),³ the EBA has undertaken an up-to-date analysis of issues relating to non-bank financial intermediaries (other financial intermediaries (OFIs)) and the regulatory perimeter (i.e. the scope of EU and national prudential legislation).

The results of the EBA's analysis are set out in a Report attached to this Opinion, which presents an assessment of (i) the use of Articles 2(5) and 9(2) CRDIV, (ii) the prudential treatment of OFIs under national law, (iii) the definitions of 'ancillary services undertaking' and 'financial institution' set out in points (18) and (26) of Article 4(1) CRR, and (iv) Annex I to the CRDIV.

¹ Activities involving: (a) maturity transformation; (b) liquidity transformation; (c) leverage; (d) credit risk transfer; and (e) similar activities.

² The European Commission's legislative proposal to amend the CRDIV is available here: <https://ec.europa.eu/info/node/6089>. The legislative proposal to amend the CRR is available here: <https://ec.europa.eu/info/node/6104>.

³ See, for example, the European Commission's consultation on FinTech: a more competitive and innovative European financial sector (March 2017), https://ec.europa.eu/info/consultations/public-consultation-fintech-more-competitive-and-innovative-european-financial-sector_en, and the EBA's Discussion Paper on its approach to FinTech (August 2017), available here: <https://www.eba.europa.eu/-/eba-publishes-a-discussion-paper-on-its-approach-to-fintech>.

The EBA's competence to deliver an Opinion is based on Article 34(1) of Regulation (EU) No 1093/2010⁴ having regard to its areas of focus, including its mandate to ensure that the taking of credit and other risks are appropriately regulated and supervised (Article 1(5)(e) of that Regulation).

In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors,⁵ the EBA's Board of Supervisors has adopted this Opinion.

Entities excluded from the scope of the CRDIV under Articles 2(5) and 9(2) CRDIV

Article 2(5) CRDIV excludes from the scope of that Directive entities such as central banks and post office giro institutions and, in 20 Member States, various types of specified entities (see points (4) to (23) of Article 2(5)) where, due to the nature of their activities (e.g. national savings banks), it is not considered necessary to subject them to the EU legislation intended to promote a level playing field for the provision of banking services.

The EBA notes that the European Commission has proposed an amendment to Article 2(5) CRDIV in its legislative proposal amending the CRDIV.⁶ The EBA does not comment on the merits of this proposal but observes that Article 2(5) CRDIV remains valid and requires minor amendments as reported by the competent authorities to reflect the need for:

- the omission of two entities (Institut de Réescoute et de Garantie/Herdiscontering – en Waarborginstituut (BE) and undertakings recognised under the Wohnungsgemeinnützigkeitsgesetz (DE));
- the addition of one entity (Kredietunies) (NL); and
- the amendment of one provision so that it reads 'Ontwikkelingsmaatschappij Oost NV' (NL).

As a derogation from Article 9(1) CRDIV, Article 9(2) CRDIV enables Member States to allow entities that are not credit institutions to carry out the business of taking deposits and other repayable funds from the public provided that those activities are subject to regulations and controls intended to protect depositors and investors. The European Commission has proposed

⁴ <https://www.eba.europa.eu/about-us/legal-framework/founding-texts-and-mandates>.

⁵ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 11 December 2011 (Decision EBA DC 001 (Rev5)): <https://www.eba.europa.eu/documents/10180/16082/EBA+DC+001+%28Rules+of+Procedure+EBA-BoS++Rev5%29.pdf/167b40d9-6489-444d-8451-02c309c0f11a>.

⁶ According to the explanatory memorandum for the European Commission's proposal for a Directive amending the CRDIV (<http://ec.europa.eu/info/node/6089>), to facilitate the exemption from the CRDIV/CRR regulatory framework of institutions in other Member States that are similar to the ones already included in the list of Article 2(5) CRDIV, it is proposed that the Commission be empowered to exempt specific institutions or categories of institutions from the CRDIV, provided that they comply with clearly defined criteria.

an amendment to this provision in its legislative proposal amending the CRDIV, which would remove the national discretion to exempt such entities in cases expressly covered by national law.

Based on its findings and observations, the EBA concludes that Article 9(2) CRDIV, in its current drafting, may well continue to have relevance in the regulatory systems of the Member States and any amendment thereto would have to be substantiated by a prior thorough impact assessment beyond the scope of the OFI Report.

In particular, Article 9(2) CRDIV is relied on expressly by four Member States in order to allow certain OFIs (such as saving companies, structured finance vehicles, hire purchase providers, financial intermediaries) to accept deposits and other repayable funds from the public.

In other Member States, no express reliance is placed on Article 9(2) CRDIV but, according to the EBA's analysis, such responses must be interpreted with care as they cover in fact different situations, ranging from cases where the competent authority did not provide express confirmation with regard to possible reliance on Article 9(2) CRDIV to cases where OFIs are exempted under Article 2(5) CRDIV and so reliance on Article 9(2) CRDIV is unnecessary. It also includes cases where no reliance was expressed by competent authorities for certain OFIs based on the fact that the relevant national law expressly excludes the taking/issuing of certain funds/securities from the definition of 'repayable funds'.

On this latter point, it is important to recall the issues surrounding the definition of the terms taking of 'deposits' and 'other repayable funds' and from 'the public'. As discussed in the 2014 EBA Report on the perimeter of credit institutions,⁷ these terms, which are key in delineating the scope of Article 9 CRDIV, are not defined in the CRDIV/CRR thereby leading to a degree of divergence between the Member States as to their interpretation. This leads to some variation in the assessment of whether Article 9(1) CRDIV (which prohibits entities that are not credit institutions from carrying out the business of taking deposits or other repayable funds from the public) may be engaged and therefore whether there may be a need to rely on Article 9(2) CRDIV. In this respect, the 2014 EBA Report concluded that clarification of the terms is desirable.

Beyond the issues of interpretation of the above terms, a question is whether there would be grounds to justify maintaining the option for Member States to grant an exemption from the licensing requirement as a credit institution for certain persons or undertakings that, one way or the other, take repayable funds from the public but for which it would be unduly burdensome to be licensed as a credit institution. A typical case would be the situation of securitisation vehicles issuing bonds to the public, or certain crowdfunding platforms, or even certain corporates which issue bonds to the public (generally under a prospectus compliant with the Prospectus Directive (Directive 2007/31/EU)) and hence take repayable funds from the public.

The EBA concludes that referencing the abovementioned entities in Article 2(5) CRDIV would not be a proper substitute for referencing those entities in accordance with the exercise of the

⁷ The 2014 EBA Report is available here: <https://www.eba.europa.eu/-/eba-publishes-an-opinion-on-the-perimeter-of-credit-institutions>.

Member State discretion conferred by Article 9(2) CRDIV as that article covers a range of entities that do not share the characteristics of those within the scope of Article 2(5) CRDIV.

Prudential treatment of OFIs under national law

The EBA observes that a wide range of OFIs perform credit intermediation activities outside an individual prudential framework specified in EU law (e.g. consumer and corporate lenders, such as factoring companies, leasing companies, consumer/retail/microcredit and guarantee providers; securitisation vehicles; some crowdfunding entities; credit unions and other mutuals).

The prudential treatment of the OFIs varies significantly between the Member States, with some Member States applying CRDIV/CRR-like requirements to some or all OFIs in their jurisdictions, some applying bespoke requirements and some applying no prudential requirements.

For example, consumer and corporate lenders tend to be subject to prudential requirements, but the range and the features of the individual requirements vary substantially. Requirements in relation to controlling persons and supervisory reporting are most common, whereas more quantitative requirements, such as own funds and large exposures limits, are less common. Very few Member States impose requirements in relation to leverage and liquidity. Lending-based crowdfunding is also an area in which variations can be observed, in part as a result of the wide range of business models adopted by crowdfunding platforms, with some Member States having adopted specific national regimes applicable to platform operators and others not (having regard also to the EU regulation that may be applicable depending on the nature of the activities undertaken⁸).

As in the 2014 EBA Opinion and Report, the EBA does not offer any recommendations about the overall scope of the prudential framework established under EU law or about the need for a regulatory intervention at the EU level. However, the EBA asserts that the activities and regulatory treatment of OFIs should continue to be monitored closely, including in conjunction with the European Systemic Risk Board (ESRB) regarding the scale of the activities as part of the regular shadow banking monitoring work, and taking account of evolutions in the provision of financial services (e.g. as a result of financial innovation (FinTech)).

Interpretation of ‘financial institution’ and ‘ancillary services undertaking’ (points (26) and (18) of Article 4(1) CRR)

‘Financial institution’ (the definition of which cross-refers to points (2) to (12) and (15) of Annex I to the CRDIV) and ‘ancillary services undertaking’ are crucial terms in the CRR, in particular for the purposes of establishing the entities that must or may be consolidated within a banking group pursuant to Article 18 CRR.

⁸ For instance, the Second Payment Services Directive (PSD2) (Directive (EU) 2015/2366) and the Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC)/MiFID2 (Directive 2014/65/EU).

The EBA observes that these terms, as set out in points (26) and (18) of Article 4(1) CRR, are prone to inconsistent interpretation across the EU, thereby resulting in possible inconsistencies in the way the consolidation rules under Article 18 CRR are applied. Indeed, this has been confirmed by the fact that these terms have been subject to a number of Q&As⁹ addressed via the Single Rulebook Q&A Tool managed by the EBA.¹⁰ A number of these Q&As have been identified by the EBA, in its reply to the European Commission's request for an overview of possible errors and inconsistencies in the CRR and the CRD observed via the Single Rulebook Q&A tool,¹¹ as raising some fundamental issues requiring clarification in the level 1 text. In this respect, the EBA notes the attempts made by the European Commission, in its legislative proposal amending the CRR,¹² to clarify a number of these issues.

For example, in the definition of 'financial institution', absent a formal definition of the term 'principal activity', questions have been raised about whether a quantitative criteria should be used (e.g. more than 50% of the activities of the entity) or whether a case-by-case determination should be made.¹³ In the same vein, it is unclear from the CRDIV/CRR if the term 'acquiring holdings' has to be understood as implying any kind of holding (including holdings in industrial companies) or only financial holdings (e.g. holdings in a company carrying out activities listed in Annex I to the CRDIV), although the definition of 'financial institution' in the European Commission's proposal to amend the CRR attempts to provide an answer by clarifying that pure industrial holdings do not fall under the definition of 'financial institution' ('other than a pure industrial holding company').

Similarly, in the definition of 'ancillary services undertaking', it is not clear how the reference to 'owning or managing property' and 'managing data processing services' should be interpreted. This has led to an absence of clarity regarding the treatment of, for example, entities managing real estate in relation to development/housing promotion or to real property lease and data processing service companies.¹⁴

On the treatment of special purpose vehicles used to set up securitisations (SPV-Sec), there is a need to clarify whether these should be regarded as carrying out financial intermediation activities and whether they qualify as financial institutions. Given the variety of securitisation arrangements that can be set up, there is unfortunate room for different interpretations of

⁹ See, for example, Q&A [2014_796](#), [2014_857](#), and [2014_1628](#).

¹⁰ The tool is available here: <https://www.eba.europa.eu/single-rule-book-qa>.

¹¹ The EBA's input can be found here: <http://www.eba.europa.eu/-/eba-provides-input-based-on-the-single-rulebook-qa-as-to-the-european-commission-s-crr-crd-review> and <http://www.eba.europa.eu/documents/10180/1543935/%28EBA-2016-D-840%29%202016+08+04+IV+Letter+to+Commisson+-+QA+review+for+CRR-C....pdf/f06b7a66-fb47-4635-8432-97ddd5b648c9>.

¹² <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-850-F1-EN-MAIN.PDF>.

¹³ In this respect, please also see Q&A [2014_796](#), which clarifies the term 'mainly' in the definition of 'financial holding company' under point (20) of Article 4(1) CRR ("financial holding company' means a financial institution, the subsidiaries of which are exclusively or mainly institutions or financial institutions, at least one of such subsidiaries being an institution, and which is not a mixed financial holding company;").

¹⁴ See in addition Q&A

whether SPVs-Sec qualify as securitisation special purpose entities (SSPEs), within the meaning of point (66) of Article 4(1) CRR, or as simple special purpose entities (SPEs). The definition of ‘financial institution’ may raise doubts if SPVs-Sec that are SSPEs qualify as ‘financial institution’ as they do not acquire participations per se and may not be regarded as carrying out any of the activities listed under Annex I to the CRDIV given that the definition of SSPE in the CRR provides that the corporate purpose of a SSPE is limited to the achievement of the securitisation purpose (i.e. “to isolate the obligations of the SSPE from those of the originator”). They are therefore in principle not allowed to carry out any other financial activities. The same consideration could be made with respect to SPVs-Sec that qualify only as a SPE but the result may depend on the individual circumstances so a case-by-case assessment of the activities of the SPE should be made (e.g. whether it is to “acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I” (definition of ‘financial institution’)).

The EBA considers that other factors may also be relevant to the question of whether a SPV-Sec should be consolidated. In this respect, whether or not a securitisation arrangement meets the condition of a significant risk transfer (SRT) under Article 243 et seq. CRR may be a useful criterion to determine if a SPV-Sec should be consolidated.

Taking account of the different possible interpretations to SPVs-Sec that are SPEs or SSPEs, and in view of the range of considerations relevant to the assessment of the status of the entity for the purposes of regulatory consolidation and also to ensure that consolidation requirements are not circumvented based on the assessment that an undertaking is not a financial institution or an ancillary service undertaking,¹⁵ the EBA observes there is a clear need for clarification with regard to these vehicles in the context of consolidation.

Additionally, it is noted that point (3) of Annex I to the CRDIV refers to ‘financial leasing’ only and leaves out ‘operational leasing’ despite both activities bearing very similar features (as such an entity carrying out such activities would not be regarded as a ‘financial institution’¹⁶ and it is unclear whether such an entity could be regarded as an ‘ancillary services undertaking’). Accordingly, the treatment of operational leasing services should be clarified.

Finally, in relation to the definition of ‘financial institution’, it is unclear why certain activities under Annex I to the CRDIV, in particular activities referred to in points (13) (credit reference services) and (14) (safe custody services), are excluded from the definition.

In view of the ambiguities identified in the interpretation of these important terms, the EBA observes that there is a risk that regulatory consolidation rules may be applied inconsistently

¹⁵ In this respect, please see further the [EBA Consultation Paper on draft regulatory technical standards on methods of prudential consolidation](#)

¹⁶ See further Q&A [2014_1644](#) which indicates that Annex I to the CRDIV provides for an exhaustive list of activities. Operational leasing is not included in the list. It follows that an entity that carries out exclusively operational leasing cannot be considered as a financial institution and shall not be included in a consolidated situation (foreseen in Article 18 of Regulation (EU) No 575/2013). The Q&A notes that this does not prevent an entity that, in addition to the operational leasing activities, carries out other activities listed in Annex I points 2 to 12 and 15 of CRDIV to be defined as a financial institution and to be included in a consolidated situation.

across the EU. Accordingly, the EBA urges the European Commission, the European Parliament and the Council to give consideration to further possible amendments to the definition of ‘ancillary services undertaking’ and ‘financial institution’ in order to address the fundamental issues raised in the Report attached to this Opinion, as well as in the EBA’s response to the European Commission’s request for an overview of possible errors and inconsistencies in the CRDIV and the CRR.¹⁷ Such clarifications would promote the level playing field by ensuring the consistent treatment of prudential risks.

Annex I to the CRDIV (activities subject to mutual recognition)

Annex I to the CRDIV sets out the activities subject to mutual recognition i.e. the activities credit institutions and financial institutions are permitted to carry out throughout the EU by establishing branches or through the cross-border provision of services (see further recitals (19) and (20) CRDIV); this list has remained largely unchanged for almost 30 years. As noted above, Annex I is also relevant to the definition of ‘financial institution’.

The EBA observes that Annex I to the CRDIV would benefit from update in order to clarify certain terms and to align with recent EU sectoral measures to ensure that the list of services remains fit for purpose.

In particular, the EBA observes that there are some ambiguities in the scope of specified activities referred to in Annex I. For example, the following could benefit from clarification:

- ‘commitments’ in ‘guarantees and commitments’ (point (6) Annex I);
- ‘industrial strategy’ in ‘advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings’ (point (9) Annex I);
- ‘money broking’ (point (10) Annex I);
- ‘credit reference services’ (point (13) Annex I);
- ‘participation in securities issues and the provision of services relating to such issues’ (point (8) Annex I).

The EBA also recalls the observations and findings set out in the 2014 EBA Opinion and Report on the terms ‘deposits’ and ‘other repayable funds’ which remain valid.

¹⁷ The EBA’s input can be found here: <http://www.eba.europa.eu/-/eba-provides-input-based-on-the-single-rulebook-g-as-to-the-european-commission-s-crr-crd-review> and <http://www.eba.europa.eu/documents/10180/1543935/%28EBA-2016-D-840%29%202016+08+04+IV+Letter+to+Commisson+-+QA+review+for+CRR-C....pdf/f06b7a66-fb47-4635-8432-97ddd5b648c9>.

Again, the EBA urges the European Commission, the European Parliament and the Council to give consideration to a possible overhaul of Annex I to the CRDIV in light of the foregoing.

Next steps

The EBA stands ready to undertake further analytical work on the matters identified in this Opinion and will continue to perform regular monitoring of the regulatory perimeter, including in conjunction with the other ESAs and the ESRB as part of the EU-wide shadow banking monitoring work.