

EBA/OP/2020/15

18 September 2020

Opinion of the European Banking Authority on elements of the definition of credit institution under Article 4(1), point 1, letter (a) of Regulation (EU) No 575/2013 and on aspects of the scope of the authorisation

1. Introduction and legal basis

In the context of the development of guidelines specifying a common assessment methodology for granting authorisations to credit institutions, under Article 8(5) of Directive 2013/36/EU as amended by Directive EU 2019/878 (Capital Requirements Directive – CRD), divergent interpretations of the notion of credit institution have again emerged across the European Union (EU). These varied interpretations, which depend on national implementations, as well as a lack of clarity and potential inconsistencies in the relevant provisions of Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR) and of the CRD, affect the uniform application of EU law and the convergence of supervisory practices. The European Banking Authority (EBA), therefore, would again like to draw attention to this crucial matter, which lies at the heart of EU banking regulation. The occasion is provided to recall previous analyses carried out by the EBA whereby divergent interpretations of the elements of the definition of credit institution across the EU have been examined and illustrated and the previous EBA advice to the Commission to remedy this issue. Reference is made to the reports and related opinions to the Commission developed in the context of the monitoring of the regulatory perimeter, namely the EBA Report on the perimeter of credit institutions established in the Member States (2014 EBA Report on regulatory perimeter)¹, and the EBA Report on other financial intermediaries and regulatory perimeter issues (2017 EBA Report on OFIs)².

¹ See also the related Opinion (EBA/Op/2014/12), also of 27 November 2014, available at <https://eba.europa.eu/eba-publishes-an-opinion-on-the-perimeter-of-credit-institutions>

² See also the related Opinion (EBA/Op/2017/13), also of 9 November 2017, available at <https://eba.europa.eu/eba-publishes-an-opinion-and-report-on-regulatory-perimeter-issues-relating-to-the-crdiv-crr>

The EBA competence to deliver an opinion is based on Article 16a(1) of Regulation (EU) No 1093/2010³, as part of the EBA's tasks to contribute to the establishment of high-quality common regulatory and supervisory standards and practices.

In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors⁴, the Board of Supervisors has adopted this opinion, which is addressed to the Commission.

2. General comments

1. The definition of credit institution is set out in Article 4, point (1), letter (a)⁵ of the CRR, providing that:

‘ “credit institution” means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account’

This definition has been in use in EU law since the First Banking Directive (Directive No 77/780/EEC); thereafter, it has been moved into the CRR, thus becoming directly applicable into national law. As set out in the EBA's previous reports and Opinions, elements of the definition – namely ‘the business of which’, ‘deposits’, ‘other repayable funds’ and ‘from the public’ – remain subject to different interpretations in the absence of EU-level definitions and in the light of the previous implementation of these terms into national law, regulations or application in supervisory practices.

2. It should also be noted that, against the maximum harmonisation approach set out in the CRR, a minimum harmonisation approach is still enshrined in the CRD in respect of the requirements for granting an authorisation as a credit institution. Pursuant to Article 8(1) of the CRD, they are determined by the Member States without prejudice to those set out under Articles 10–14 of the CRD, relating to the programme of operations, structural organisation and governance arrangements; economic needs; initial capital; effective direction and place of the head office; and shareholders and members, respectively.
3. A truly common notion of credit institution, which is authorised under the CRD, is an indispensable premise to a uniform regulation of market access, to a levelled playing field of prudential regulation and ultimately to EU market integration of banking and financial services. The current lack of harmonisation of key elements of the notion of credit institution is therefore

³ 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, 15.12.2010, p. 12).

⁴ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

⁵ For purposes of this opinion, only the definition set out in letter (a) of point (1), Article 4(1) is considered, whereas the new definition set out in letter (b) of the same provision is outside the scope of this opinion.

in contradiction with the very essence of the Single Rulebook, as set out in previous EBA advice to the Commission on this important issue.

4. In the light of this, the EBA reiterates its advice to the Commission to give consideration to the clarification of the notion of 'credit institution' set out in Article 4(1), point (1), letter (a) of the CRR.

3. Specific comments

3.1 Considerations on the business of credit institutions under Article 4(1), point (1), letter (a) of the CRR

5. Under the definition set out in Article 4(1), point (1), letter (a) of the CRR, compliance with both legs of the notion of credit institution is required to meet the relevant definition. Both activities of 'taking of deposits or other repayable funds from the public and granting credit for its own account' have to be performed by the entity for it to qualify as a credit institution. Clarifications could be made in the Level 1 text as regards the manner in which these activities are exercised, which should be regular and systematic and not occasional or ad hoc.
6. In addition, clarifications would be helpful as regards (a) the list of activities set out in Annex I of the CRD that are entitled to mutual recognition, (b) some aspects relating to the scope and process to grant the authorisation as a credit institution and (c) the extent and types of commercial activities that credit institutions can carry out.
7. With regard to point (a) of the previous paragraph, it is noted that – as underlined in the 2017 EBA Report on OFIs – the list of activities set out in Annex I of the CRD has been unchanged for 30 years and would benefit from updating to clarify certain terms and to align the CRD with recent EU sectoral measures to ensure that the list of services is comprehensive and fit for purpose⁶. The EBA reiterates the need to remedy ambiguities in the scope of specified activities and to align Annex I with the recent EU sectoral legislation as well as with market developments.
8. With regard to point (b) of paragraph 6, divergent approaches exist across the EU as regards the scope of the authorisation as a credit institution granted by the competent authority. While the large majority of Member States provide for 'universal' authorisations covering all the activities set out in Annex I of the CRD and potential further banking activities pursuant to national law, other Member States issue authorisations that are limited in scope to the activities set out in the programme of operations (which can include both activities set out in Annex I of the CRD and further banking activities set out in national law). As a consequence, authorisation as a credit institution has a different scope in the various jurisdictions, and different processes have to be set up whenever the entity envisages expanding its area of activities. In the first case, depending on the applicable national law, the entity can start a new activity autonomously or

⁶ 2017 EBA Report on OFIs, p. 60.

subject to a prior supervisory measure/clearance; in the second case, the existing credit institution is required to submit a new application for authorisation of the new activity. In the light of the divergences across the EU, clarification in the CRD as regards the scope of the authorisation would be opportune.

9. In respect of the issue in point (c) of paragraph 6, relating to the commercial activities that can be carried out by a credit institution, it could be better clarified that the extent to which such entities can engage in commercial activities should be in line with the approach taken in Article 89 of the CRR relating to risk-weighting and the prohibition of qualifying holdings outside the financial sector. This provision sets out limits to qualifying holdings in undertakings other than a financial sector entity, or to carrying out activities considered to be the direct extension of the bank, ancillary activities, or factoring, leasing, the management of unit trusts, the management of data processing services or any other similar activity.

3.2 Notion of ‘deposits or other repayable funds from the public’

10. As illustrated in the 2014 EBA Report on regulatory perimeter, the notions of ‘deposits or other repayable funds from the public’ still present divergences throughout the EU. Given the absence of amendments in the Level 1 text since the adoption of that report, the conclusions set forth therein are still valid and fully referred to in this Opinion⁷.

a. ‘Deposits’

11. With regard to the notion of ‘deposit’, it is worth recalling the core components for a general definition identified in the 2014 EBA Report on regulatory perimeter that it would be advisable to include in the Level 1 text, notably that ‘deposit’ is a sum of money, received from third parties – either legal or natural persons – in the course of carrying out the activity by way of business, repayable on demand or at a contractually agreed point in time (but otherwise repayment of the principal is unconditional), with or without interest or a premium.
12. Along the lines of the EBA 2014 Report on regulatory perimeter⁸, it would also be worth clarifying that the exclusions to the notion of eligible deposit and the repayment obligation by the deposit guarantee scheme as set out in Article 5(1) of Directive 2014/49/EU on deposit guarantee schemes do not affect the notion of ‘deposits’ for the purposes of the referred notion of credit institution under the CRR and of granting the authorisation as a credit institution.

b. ‘Other repayable funds’

13. With regard to the expression ‘other repayable funds’, in the light of the conclusions set out in the 2014 EBA Report on regulatory perimeter, it would be worth the Level 1 text clarifying that they are financial instruments that possess the intrinsic characteristic of repayability, as well as ‘those which, although not possessing that characteristic, are the subject of a contractual

⁷ See EBA Report on regulatory perimeter, pp. 4–12.

⁸ See EBA Report on regulatory perimeter, p. 7.

agreement to repay the funds paid⁹. It should also be specified that such a notion includes bonds and other comparable securities such as negotiable certificates (not nominative) of deposits, provided that these are continually issued by the credit institution. The concept of continuous issuance could also be better clarified.

c. 'From the public'

14. As a general remark, deposits or other repayable funds are considered to be taken *from the public* when they are received as a business from legal or natural persons other than the credit institution.

15. While most national regimes do not define the expression 'from the public'¹⁰, others provide restrictive interpretations, which may be further articulated and detailed in varied manners in national laws and regulations. These national implementations may be linked to minimum solicitation or collection thresholds, or to the condition that deposits or other repayable funds are not collected within restricted closed circles of natural and legal persons having a close relationship with the credit institution (e.g. of an employment or personal nature). Laws and regulations in force in some Member States also provide that the requirement that deposits or other repayable funds are taken from the public is not met where such deposits or other repayable funds are exclusively received from professional market participants or, as regards repayable funds, where the issuance is exclusively addressed to qualified investors. As a result, there are divergent practices regarding whether or not an authorisation as a credit institution is required where the entity's business model is exclusively focused on professional market participants. In the light of the divergent laws and practices in force across the EU, a clarification at the EU level would be beneficial to set out a comprehensive level playing field.

4. Conclusion

16. As illustrated in this Opinion, divergences remain in the interpretation of elements of the notion of 'credit institution', despite its definition being embodied in the CRR, an EU Regulation directly applicable in national law. Such divergences adversely impact the significant progress made with the Single Rulebook in levelling the playing field and deepening EU market integration in the banking and financial sector. The EBA Opinion is that the key terms 'business of which', 'deposits', 'other repayable funds' and 'public' that compose the notion of 'credit institution' should be clarified to establish a true level playing field across the EU to enhance the effectiveness of the Single Rulebook. The EBA therefore invites the Commission to consider providing clarifications of such key terms with a view to effectively and substantively harmonising the notion of 'credit institution' set out in EU law.

⁹ Court of Justice, 12 February 1999, C-199/97, *Romanelli*.

¹⁰ See 2014 EBA Report on regulatory perimeter, p. 11.

17. The EBA also acknowledges that clarifications to the regulatory perimeter should be carefully assessed to ensure that prudential requirements are imposed appropriately in relation to entities presenting similar risks to customers and financial stability, while also having regard to the impact that such clarifications may have on other financial intermediaries covered by national law, including those under Article 9(2) of the CRD. The EBA is therefore of the view that any amendment should be accompanied by an impact assessment. The EBA stands ready to provide the Commission with any assistance it may need.

This opinion will be published on the EBA's website.

Done at Paris, DD Month YYYY

[signed]

[José Manuel Campa]

Chairperson
For the Board of Supervisors