

EBA/Op/2022/12

27 October 2022

Opinion of the European Banking Authority on the set-up and operationalisation of Intermediate EU Parent Undertaking(s) under Article 21b CRD

1. Introduction and legal basis

1. With a view to strengthening the supervision of third-country groups (TCGs) with significant activities in the EU, Article 21b CRD requires that two or more institutions (i.e. credit institutions and investment firms¹) in the Union belonging to the same TCG have one single intermediate EU parent undertaking (IPU) where the total value of assets of that TCG in the Union is equal to or greater than EUR 40 bn. In specific circumstances, the competent authority (CA) may approve the establishment of two IPUs (Article 21b(2) CRD). The IPU can be a credit institution, a financial holding company or a mixed financial holding company that has received approval under Article 21a CRD, or an investment firm authorised in accordance with Article 5(1) of Directive 2014/65/EU that is subject to Directive 2014/59/EU (Article 21b(3), second sub-paragraph CRD).
2. Considering the cross-border footprint of the TCG's entities presence in the EU, a uniform approach is key to the consistent implementation of the IPU requirement and to ensuring that the TCG is subject to the same treatment across the EU.
3. For these reasons, the EBA developed Guidelines on the monitoring of the threshold and other procedural aspects on the establishment of intermediate EU parent undertakings² (EBA IPU Guidelines). The EBA subsequently developed and published the templates for the submission of data and information by competent authorities to the EBA, in accordance with Article 21b(6) and Article 47(2) CRD and as specified in the referred EBA IPU Guidelines³. The templates aim at

¹ As specified in Article 21(b), paragraph (5) CRD.

² EBA/GL/2021/08 of 28 July 2021, available at <https://www.eba.europa.eu/eba-publishes-its-final-guidelines-monitoring-threshold-establishing-intermediate-eu-parent>

³ The Decision, the templates and the related instructions, adopted on 13 May 2022, are available at the following link: [EBA adopts decision on supervisory reporting for intermediate EU parent undertaking threshold monitoring | European Banking Authority \(europa.eu\)](https://www.eba.europa.eu/eba-publishes-its-final-guidelines-monitoring-threshold-establishing-intermediate-eu-parent)

harmonising and facilitating the cross-border computation of the relevant data to monitor the meeting of the EUR 40 bn threshold.

4. In accordance with the grandfathering regime envisaged by Article 21b(8) CRD, TCGs with two or more institutions in the Union meeting the EUR 40 bn threshold as at 27 June 2019⁴ shall have an IPU (or two, where applicable) by 30 December 2023⁵.
5. Based on data as at 31 December 2021 reported by CAs to the EBA, 417 TCGs operate in the EU⁶. 15 TCGs hold total value of assets of no less than Euro 40 bn in the Union. Out of these, 1 TCG is already compliant with the IPU requirement.
6. The CRD provides little guidance besides the indications recalled above, the EBA has therefore deemed it opportune to provide further clarifications via the adoption of this Opinion on the applicable regulatory framework with a view to ensuring harmonised and effective application of the new regime throughout the Union. Significantly, the set-up of IPU(s) may give rise to operational issues and it is important that CAs are able to address them in a uniform way.
7. Furthermore, and in line with stances already expressed by the EBA in the past⁷, it is crucial that competent authorities ensure that the EU framework is effectively applied to the EU institutions belonging to TCGs and that the organisational arrangements taken do not lead to 'shell banks' which are inconsistent with Union law.
8. The issues laid down in this Opinion have also been brought to the attention of and discussed with the Banking Stakeholders Group.
9. The EBA competence to deliver an opinion is based on Article 29(1)(a) of Regulation (EU) No 1093/2010⁸, as part of the EBA's task to foster convergence and consistency of supervisory practices.

⁴ Or 30 June 2019 where data as at 27 June 2019 is not available, see EBA IPU Guidelines, para.13.

⁵ As clarified in paragraph 13 of the EBA IPU Guidelines, where the transitional period envisaged in Article 21b(8) CRD applies, the EUR 40 bn threshold should be deemed as reached and the obligation to have one (or two IPUs) in place applies where the quantitative threshold is met both as at 29 June 2019, and on 30 December 2023 based the average of the total value of assets in the Union of the group over the previous four quarters.

⁶ The list of third country groups with IPU (where applicable, branches of credit institutions with head-office in third country countries is available at: <https://www.eba.europa.eu/eba-publishes-list-third-country-groups-and-third-country-branches-credit-institutions-operating>

⁷ [EBA Opinion on issues related to the departure of the United Kingdom from the European Union, EBA/Op/2017/12 of 12 October 2017](#)

⁸ 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).

10. In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors⁹, the Board of Supervisors has adopted this Opinion which is addressed to competent authorities under Article 4(2)(i), (v) and (viii)¹⁰ of the EBA Regulation.

2. General comments

11. Compliance with the IPU requirement upon reaching the IPU threshold is a legal obligation.

12. The EBA IPU Guidelines clarify how the total value of assets should be determined and indicates that it is the sum of the assets of the EU parent institution of that TCG at the highest level of consolidation in the Union, the individual assets of stand-alone institutions and the assets of the direct EU branches of institutions headquartered in a third country (third country branches or 'TCBs') belonging to the same TCG. Considering the on-going monitoring objective and the need of ensuring timely compliance with the requirement, the EBA IPU Guidelines complement the backward-looking with a forward-looking approach, whereby institutions are requested to assess, at least annually, whether the threshold is expected to be reached within a three-year time horizon, based on the strategic planning of the TCG and the forecast of assets¹¹.

13. From the supervisory perspective, the EBA IPU Guidelines indicate on the one hand that EU parent institutions and stand-alone institutions of a TCG should coordinate to alert the consolidating supervisor or the group supervisor¹², and that the latter should liaise with the institution(s) that has reported the data of the total value of assets of the TCG in the Union, and with other relevant authorities, at least to determine, without delay:

- a. whether the derogations allowing to set-up two IPU instead of a single IPU (Article 21b(2) CRD) or allowing an IPU to be an investment firm (Article 21b(3) CRD) should apply to this particular TCG;

⁹ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

¹⁰ 'Competent authorities' means: "(i) competent authorities as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013, including the European Central Bank with regard to matters relating to the tasks conferred on it by Regulation (EU) No 1024/2013; [...] (v) with regard to Directive 2014/59/EU of the European Parliament and of the Council (1) and to Regulation (EU) No 806/2014 of the European Parliament and of the Council (2), the resolution authorities designated in accordance with Article 3 of Directive 2014/59/EU, the Single Resolution Board established by Regulation (EU) No 806/2014, and the Council and the Commission when taking actions under Article 18 of Regulation (EU) No 806/2014, except where they exercise discretionary powers or make policy choices; [...] (viii) with regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council (7) and Directive (EU) 2019/2034 of the European Parliament and of the Council (8), competent authorities as defined in point (5) of Article 3(1) of that Directive".

¹¹ The EBA IPU Guidelines also cater for the possibility, in special cases, that the reach of the threshold could not be foreseeable. In such circumstances, it is up to the CAs to set an appropriate timeline within which the TCG's EU institutions have to comply with the IPU requirement, specifying that such timeline "should be as short as possible and should not exceed one year or, in exceptional justified cases, two years from the date the threshold was reached" (EBA IPU Guidelines, paragraph 27).

¹² Article 46 of Directive 2019/2034/EU (IFD). The coordination between the parent undertaking and the standalone institutions to alert the consolidating supervisor or the group supervisor is laid down in paragraph 18 of the EBA IPU Guidelines.

- b. the timeline for the establishment of the IPU(s), taking into account that - save for the case where the threshold has been met unexpectedly - the IPU(s) will have to be in operation when the threshold will have been met¹³.

14. The EBA IPU Guidelines therefore provide initial guidance on the steps to be followed by the CAs and the institutions immediately after the threshold has been met or when the forward-looking approach indicates that it will be met within the next three years. However, there is a need for additional specifications to make such guidance operational.

15. Significantly, the EBA IPU Guidelines do not deal with the assessment criteria for the approval of the second IPU and, more generally, with the approach that should support the assessment of such exceptional situation. Similarly, the cooperation between the CAs and the other authorities involved in the process, such as the third country home authority and the resolution authority (RA) is not covered by the EBA IPU Guidelines.

3. Specific comments

3.2 Application for two IPUs

16. In terms of process, preliminary to any further potential action is whether the TCG will have one or two IPU(s).

17. Considering that it hampers the prudential consolidation of the EU activities of the TCG under the supervision of one single consolidating supervisor, the set-up of two IPUs is framed as an exception to the single IPU requirement by Article 21b(2) CRD. In particular, the exceptional possibility to allow two IPUs is envisaged by Article 21b(2) CRD where the single IPU would:

- a. “be incompatible with a mandatory requirement for separation of activities imposed by the rules or supervisory authorities of the third country where the ultimate parent undertaking of the third-country group has its head office; or
- b. render resolvability less efficient than in the case of two intermediate EU parent undertakings according to an assessment carried out by the competent resolution authority of the intermediate EU parent undertaking”.

18. As such, it is of paramount importance that the CAs follow the level 1 text and limit the approval to the cases where the relevant conditions are actually and satisfactorily met, based on the assessment of the CA and the RA in accordance with their respective competences.

19. From a process perspective, in order to ensure that the approval of two IPUs is subject to an appropriate assessment, it should be subject to an ad hoc application to be jointly submitted by all credit institutions and investment firms in the Union belonging to the TCG (the ‘Applicants’) with the support of the parent undertaking in the third country. The application should be

¹³ EBA IPU Guidelines, paragraphs 25-27.

addressed to the consolidating supervisor. The consolidating supervisor will inform the CA of each Applicant of the application received.

20. Absent a consolidating supervisor for all the credit institutions and investment firms in the Union, the CA entitled to receive such application should be identified in line with the criterion laid down in the EBA IPU Guidelines relating to the obligation of the EU parent institutions and standalone institutions to alert the consolidating supervisor that the Euro 40 bn threshold has been met or will be met based on the forward-looking approach¹⁴. Such criterion indicates to apply Article 111, paragraphs (3) or (5) CRD by analogy, assuming that all institutions authorised in the Union were part of a group having the same parent EU financial holding company or mixed financial holding company¹⁵ that have been granted approval in accordance with Article 21a CRD, and were subject to consolidated supervision pursuant to that Article (“consolidating supervisor”)¹⁶.

21. In the application, the Applicants should explain and demonstrate that the conditions of letter a) or b) of Article 21b(2) CRD are met in the specific case. The consolidating supervisor (identified in accordance with the paragraph above) will review and assess the application for purposes of letter a), whereas the review and assessment of the condition in letter b) will be under the exclusive remit of the resolution authority (RA).

22. Such RA will be the group level resolution authority as defined in point (44) of Article 2(1) BRRD¹⁷. Where standalone institutions are present in the Union, the coordination among the RAs competent for each credit institution and investment firms subject to resolution requirements will have as a natural forum the European resolution college established under Article 89 BRRD, where applicable.

a) Application under letter a) of Article 21b(2) CRD: content and assessment methodology

23. Where the application is based on the mandatory requirement of separation of activities which the TCG is subject to in the third country (Article 21b(2), letter a) CRD), the application should provide a detailed description of the applicable third country regime, the operational structure and the envisaged allocation of the activities to each IPU in line with the third country regime.

24. Relevant information and documents supporting the application include the following:

¹⁴ EBA IPU Guidelines, paragraph 18.

¹⁵ Considering the application by analogy of this provision, the case of EU parent credit institution should also be considered to be covered.

¹⁶ Where all institutions in the Union belonging to the same TCG are within the same consolidation perimeter, the application should be submitted to the current consolidating supervisor

¹⁷ “(44) ‘group-level resolution authority’ means the resolution authority in the Member State in which the consolidating supervisor is situated”.

- i. reliable evidence of the application to the TCG of the third country mandatory regime on segregation of activities to the TCG (eg. decision of the third country home authority; public disclosure by the third country parent undertaking);
- ii. the current structure of the respective group in the light of the mandatory separation requirement applied in the third country, including a description of the activities that are carried out in the separate group chains and interlinkages between the two separate arms of the group;
- iii. the application for any waiver to the mandatory separation requirement filed by the TCG with the third country home authority and the detailed explanation as to any exception that has been granted by such third country home authority;
- iv. the location and types of undertakings envisaged as IPUs;
- v. a business plan of the two IPUs with a least a three-year time horizon, laying down the description of the foreseen EU TCG structure under the two IPUs, the types and volumes of activities that each group intends to perform and the extent of its alignment with the overall TCG structure;
- vi. description of the interlinkages between structurally separated entities, including at the level of the management bodies of the two institutions, decision-making processes relating to strategic decisions;
- vii. confirmation, ideally from the third country home authority, that the two-IPU structure as envisaged - including the described interlinkages - would be compliant with the third country applicable framework;
- viii. the timeline with indication of clear milestones of how the group can ensure that the IPUs will be operational when the IPU threshold is reached.

25. The consolidated supervisor identified in accordance with the application by analogy of Article 111, paragraphs (3) or (5) CRD (see paragraph 20) should review and assess the application in coordination with the CAs supervising any of the Applicants.

26. The assessment should check whether the Applicants have provided sufficient evidence that one single IPU would be incompatible with third country laws, regulation and supervisory practices and whether the proposed two-IPU structure reflects – and is justified by – the needs of the third country regime. In particular, the Applicants should clarify whether the specific regulated financial activities carried out by TCGs institutions in the EU are captured by the third country mandatory separation requirement which provides the basis for requesting two IPUs. Future regulated financial activities intended to be performed by the TCG in the EU could only be considered by the consolidated supervisor to which the application has been submitted, if they are included and illustrated with credible supporting information and projections in the submitted business plan.

27. The consolidated supervisor will not be expected to directly assess the correct application of third country law, but should take the third country law and any relevant supervisory decision into account, as background information, when assessing the proposed two IPU structure submitted by the Applicants to meet the condition under letter a) of Article 21b(2) CRD. Whilst it is expected that the consolidated supervisor will have a general understanding of the third country law, it will also be supported by the confirmation of the compliance with the third country applicable framework submitted with the application (point vii of paragraph 24).

28. The consolidated supervisor's assessment of whether the proposed two IPU structure is justified under letter a) of Article 21b(2) should focus, among others, on the:

- a. potential misuse of the two IPU structure for arbitrage opportunities. Attention should be paid, for instance, to avoid an 'artificial' duplication of structures in presence of circumstances that would question the actual mandatory separation and the incompatibility with one single IPU, e.g. the presence of significant interlinkages between the two IPUs, or the provision of the same activities by both IPUs.
- b. unnecessary complexity of the overall structure;
- c. adverse impact on the compliance with EU and national laws, on the sound and prudent management of EU activities and on the viability and sustainability of the business model, having regard to funding and support from the parent in the light of the allocation of each IPU to a different corporate chain of the TCG;
- d. material impact on resolvability based on the RA's assessment of the two IPU structure (see section c) below).

29. Where the approval of two IPUs is granted, arrangements should be put in place to ensure intense supervisory cooperation between the respective consolidated supervisors of the two IPUs (where different). Considering that having two IPUs prevents the establishment of a single supervisory consolidation in the EU, the two consolidating supervisors responsible for each IPU – where different – should ensure the utmost coordination, cooperation and exchange of information with a view to reaching a level of supervisory transparency comparable to that that would be achieved where only one single IPU were in place. The EBA is committed to promoting and facilitating such enhanced level of coordination and cooperation in the context of the supervisory colleges, where applicable.

b) Cooperation between the competent and the resolution authorities in the assessment of the application for two IPUs

30. The two grounds that may justify granting approval to have two IPUs - a) the mandatory segregation of activities under the law of the third country; or b) the less efficient resolvability of the one single IPU structure - are separately laid down by Article 21b(2) CRD and are subject to distinct assessments by the CA and the RA respectively. However, they should not be understood as mutually exclusive or alternative but can also be cumulative.

31. The application will have to be filed with the consolidated supervisor in all cases. The RA will be competent for the assessment of the ground under letter b) of Article 21b(2) CRD which will feed into the decision of the CA.

32. Where the application is exclusively filed under letter a) of Article 21b(2) CRD, the CA may proactively exchange information with the RA in particular where potential material impact on resolvability is identified.

33. Where the RA's input is requested, it is of essence that it is involved at an early stage in the review and assessment of the application for two IPU submitted by the Applicants.

c) Assessment methodology of applications submitted under letter b) of Article 21b(2) CRD

34. The application based on letter b), solely or jointly with letter a), will have to provide a detailed explanation of the reasons why having two IPU will facilitate the resolvability of the TCG's operations.

35. The concept of 'efficient resolvability' is not defined under EU law, and leaves margin of appreciation to the RA. Its interpretation should be based on Article 15 BRRD relating to resolvability, which is based on the feasibility and credibility for the RA of either the liquidation under normal insolvency proceeding, or the resolution. From a resolution planning and crisis management perspective, efficiency should predominantly be linked to the objective of limiting the risks to the successful execution and implementation of a resolution strategy.

36. The RA's assessment of the application filed under letter b) of Article 21b(2) CRD will therefore be based on the potential application of the resolution tools and powers at the EU entity level. It will focus on the achievement of the resolution objectives, paying specific attention to elements of the two IPU structure that might potentially facilitate or hinder the efficient execution of the resolution strategy such as the allocation of activities between the two IPU, and the respective relevance of the two IPU in the light of financial stability considerations.

37. Without being exhaustive, the case-by-case assessment of the application by the RA should cover at least the following specific aspects of the two IPU compared to the one IPU structure:

- whether the second IPU performs critical functions;
- whether the failure of the second IPU creates any significant adverse effects on the financial system, including in circumstances of broader instability and system-wide events;
- whether the failure of the second IPU creates contagion effects for the first IPU;
- whether resolvability of the first IPU is achieved with less or equal execution risks than the resolvability of the single consolidated IPU structure.

38. In principle, the set-up of a second IPU may be justified under letter b) of Article 21b(2) CRD where the RA considers, having regard to the assessment of the two-IPU application on the basis on the assumption of the implementation of the resolution tools and powers at EU entity level, that the second IPU would support the achievement of the resolution objectives, including the avoidance of significant adverse effects on the financial system.
39. The consolidated supervisor should take the RA assessment into account when adopting the decision on the application for two IPUs.

3.3 Identification of required licensing and regulatory approvals to comply with the IPU requirement

40. In terms of sequencing, where an application for two IPUs is filed with the CA, the TCG should submit any further applications for licensing or regulatory approvals, as needed, only after the decision on the two IPUs has been taken. Notwithstanding the sequencing of the decisions, TCG institutions should start to enquire about the requirements for the relevant procedures and start the related preparations at an early stage.
41. Depending on the TCG's current presence in the EU, its structural organisation could already be compliant with the IPU requirement, i.e. have one EU parent institution in the form of credit institution, financial holding company and mixed financial holding company that have been granted approval in accordance with Article 21a CRD, in accordance with Article 3(3)(a) of the same Directive, or investment firm (in the specific case under Article 21b(3), second sub-paragraph CRD) capturing all the institutions in the Union within its prudential consolidation perimeter.
42. In other cases, the current TCG's presence in the EU may need to undergo restructuring operations. These may involve the set-up of a new EU parent undertaking or be limited to a restructuring of the TCG's control chain to ensure that the consolidation perimeter of the IPU captures all institutions in the Union belonging to the TCG¹⁸. The process and timeline for the set-up of the EU parent undertaking will depend on its legal form and the required restructuring: granting of authorisation as credit institution under Articles 8 or 8a CRD; granting actual approval under Article 21a CRD in the case of a financial holding company and a mixed financial holding company; granting approval as investment firm in the case under Article 21b(3) CRD, second sub-paragraph and supervisory clearance in accordance with the notification and assessment of the direct or indirect acquisition or increase of qualifying holdings.
43. Where the TCG's presence in the EU is deemed to be already compliant with the IPU requirement from a corporate structure and prudential perspective, , the EU institution subject to the direct supervision of the consolidating supervisor will explain the assessment performed

¹⁸ For the sake of completeness, it is worth reminding that the direct branches of institutions established in third countries, i.e. third country branches or TCBS, whilst counting towards the determination of the IPU threshold, fall outside the consolidation perimeter and will not be captured by the IPU. Additionally, upon the establishment of the IPU, the consolidation perimeter will follow the normal rules on prudential consolidation (Article 18 CRR) and would include also other financial institutions that are subsidiaries of the EU entities of the TCG.

on such compliance and inform the consolidating supervisor without delay, of its intention to not undertake any corporate restructuring.

44. Conversely, where action needs to be taken, the EU institutions belonging to the TCG should contact the consolidating supervisor (as identified in paragraph 20) and inform them about their plans to comply with the IPU requirement. Thereafter they should file the necessary applications sufficiently in advance to make sure that they will be able to comply with the IPU requirement upon reaching the IPU threshold.
45. The application for authorisation as credit institution has to be in compliance with the RTS on information to be submitted with the application for authorisation¹⁹, or as the case may be, with the RTS on information for re-authorisation of investment firms as credit institutions²⁰, and the application should be assessed in accordance with the EBA Guidelines on a common assessment methodology for granting authorisation as credit institution²¹. In respect of the acquisition or increase in qualifying holdings, CAs will apply Article 22 and 23 CRD and the ESAs Joint Guidelines on the prudential assessment of the acquisition or increase of qualifying holdings²².

3.4 Supervisory assessment: effectiveness and adequacy of internal governance arrangements, liquidity and funding management arrangements, and risk management function

a. Internal governance and outsourcing agreements

46. The set-up of one or two IPUs aims to ensure that the EU credit institutions and investment firms of a TCG fall within the scope of the EU framework of consolidated supervision and that these undertakings are effectively supervised. In this respect, when it comes to relationships of the EU TCG with entities established in a third country, the EU part of the TCG has to have sound and effective internal governance and outsourcing arrangements in place, with a view to ensuring that sufficient control and oversight are duly applied by the IPUs and the other EU institutions. This is consistent with stances that the EBA expressed in the Opinion on the departure of the United Kingdom from the EU²³, addressing the inconsistency of ‘shell banks’ with the EU prudential framework and the requirements for authorisation.
47. The IPU should also ensure that internal governance arrangements, processes and mechanisms of the financial institutions are effectively implemented and consistent, well integrated and adequate within the EU group. This may mean that several aspects could and should be

¹⁹ Endorsed by the European Commission on 17 June 2022 C(2022) 3949 final.

²⁰ https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/RTS%20on%20threshold%20methodology%20and%20monitoring/1025589/Final%20Report%20on%20the%20RTS%20on%20threshold%20monitoring.pdf

²¹ <https://www.eba.europa.eu/regulation-and-policy/other-topics/guidelines-authorisation-credit-institutions>

²² <https://www.eba.europa.eu/regulation-and-policy/other-topics/joint-guidelines-for-the-prudential-assessment-of-acquisitions-of-qualifying-holdings>

²³ EBA Opinion on issues related to the departure of the United Kingdom from the European Union, EBA/Op/2017/12 of 12 October 2017, available at <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1756362/81e612c6-dcab-4c4b-87e9-32784cb44de1/EBA%20Opinion%20on%20Brexit%20Issues%20%28EBA-Op-2017-12%29.pdf?retry=1>

scrutinised by the CA, including the suitability of the members of the management body and key function holders with regard to the new group structure, the scope of the internal control framework including effective processes to identify, manage, monitor and report the risks they are or might be exposed to, the consistency and coherence of systems within the group, and a clear organisational structure with well defined, transparent and consistent lines of responsibility on an EU consolidated basis.

48. Where the set-up of the IPU entails group restructuring operations, with a view, for instance, to establishing the appropriate control chain to define the consolidation perimeter, supervisory scrutiny of internal governance arrangements may be warranted. For instance, in case of material changes, the individual and collective suitability of the members of the management body and of the key function holders of the IPU may need to be reassessed²⁴.

49. The consolidating supervisor²⁵ (as identified in paragraph 20) should ensure that the new structure promotes the effective, sound and prudent management of the IPU at individual, sub-consolidated and consolidated levels across the EU. The management body should ensure that the internal control functions cover all activities, processes and systems and that they are independent of the business lines they control, with adequate segregation of duties and appropriate financial and human resources as well as powers to effectively perform their role. The reporting lines and the allocation of responsibilities, in particular among key function holders, should be clear, well-defined, coherent, enforceable and duly documented. The documentation should be updated as appropriate. If institutions plan on giving more than one role to staff on a temporary or permanent basis, i.e. with staff working for several group entities – in third countries and in the EU or in case of a two-IPU structure - (“dual hatting”), the organisational structures should ensure that clear reporting lines and responsibilities are not undermined within the supervised entity, or lead to potential or actual conflicts of interest. In this regard, additional supervisory scrutiny should be performed when the dual hatting practice would cover key functions in the institution. Institutions should also maintain or establish locally independent functions and controls which report to the local management body and are able to maintain the supervisory dialogue needed by the CA, for example in the areas of risk control, compliance and internal audit.

50. In respect of outsourcing arrangements, the current EU framework should be applied as to ensure that outsourcing of functions to service providers located in third countries (e.g. intragroup outsourcing) should be performed in an orderly manner and to an extent that would not undermine the institutions’ capabilities to meet the conditions for authorisation. In this respect, attention should be directed at ensuring that the responsibilities entrusted on the management bodies by Article 88 CRD remain with the management bodies of the EU institutions. In line with the requirements for banking groups in the EU, all outsourcing

²⁴ See joint EBA-ESMA guidelines on the suitability assessment of the members of the management body and key function holders

²⁵ Before the set-up of the IPU, the consolidating supervisor will be identified by application by analogy of Article 111 paragraphs (3) or (5)

arrangements should be duly documented and filed with a register to be established²⁶ within the IPU covering all institutions within the consolidating perimeter of the IPU.

b. Effectiveness of liquidity and funding management arrangements

51. For IPU, the correct application of Commission Delegated Regulation (EU) 2015/61 on liquidity coverage requirements is a key point of attention. It is worth reminding that that Delegated Regulation requires that the responsibility to comply with the prudential requirements, namely the control of the use of the buffer or of the access to funding have to be maintained within the management function of the credit institutions in the EU. Outsourcing arrangements²⁷ within or outside the group should be limited only to those liquidity and funding management services which exclusively relate to specific tasks (execution of transactions), and provided that these arrangements do not impinge on the EU credit institutions' responsibility to independently comply with the framework. Additionally, such outsourcing arrangements should be without prejudice to the possibility to establish liquidity sub-groups in accordance with Article 8 CRR. It is also necessary to closely monitor any potential funding currencies mismatches arising in this context and subsequent arrangements for the implementation of the liquidity coverage ratio and the net stable funding ratio by significant currency.

c. Effectiveness of risk management and booking arrangements

52. With a view to ensuring safety and soundness of the EU operations of TCGs and of the EU financial market, it is important that risks associated with the activities conducted in the EU are appropriately identified and that management measures, including mitigation measures, are implemented. Local governance and risk management arrangements need to be commensurate with the risks originated by the entities.

53. Recent experience²⁸ shows that, while some progress has been made, EU subsidiaries of third country undertakings maintain practices that may hamper their capacity to effectively manage locally material risks they may bear.

54. In particular, it appears that several entities keep relying to a large extent on back-to-back booking arrangements. While there are circumstances where the use of back-to-back transactions is justified, it is expected that, at a minimum, transactions with an EU nexus are neither systematically nor substantially back-to-backed, and risk-managed from the EU. Accordingly, the associated business is expected to be run in the EU.

55. EU credit institutions of third country groups should be able to actively manage the risks linked to back-to-back booking arrangements and remote booking arrangements, e.g. counterparty credit risk, CVA risk, settlement risk. Furthermore, institutions should have the capacity to risk-manage locally the market risk linked to one of two sides of a back-to-back transaction (i.e. as if

²⁶ See Section 11 of the [EBA Guidelines on outsourcing arrangements \(EBA/GL/2019/02\)](#)

²⁷ [EBA Guidelines on outsourcing arrangements \(EBA/GL/2019/02\)](#)

²⁸ A. Enria, The desks mapping review – integrating Brexit banks into European banking supervision, blogpost, 19 May 2022

the transaction was not back-to-backed) - without such capacity, the EU institution would not be able to risk manage its positions in case the third-country entity that is the end-counterparty of the back-to-back transaction is subject to recovery or resolution.

56. Finally, it appears that the regulatory treatment as regards CVA is not applied correctly by all institutions and that intragroup transactions with the third country entities are not capitalised how they should be. In this regard, the EBA has recently published Q&A n. 2022_6495²⁹ and it calls on credit institutions and competent authorities to restore compliance immediately.

4. Conclusions

57. This Opinion aims to clarify aspects of the EU regulatory framework relating to the IPU(s) as laid down in Article 21b(2) CRD, with a view to ensuring uniform application of the relevant regime by the CAs and RAs throughout the EU.

58. To this end, the Opinion draws the attention on the process and correct sequencing of actions for achieving the timely set-up of the IPU and sheds light on the two IPU structure, underscoring that it is an exception to the single IPU and its approval is subject to restrictive interpretation. It provides clarifications on the application process, including the identification of the Applicants, the CA entitled to receive the application, the information requirements and the content of the application. With regard to the assessment criteria, firstly it underscores that whilst the CA is not entitled nor supposed to apply third country law regulating the mandatory separation of activities, the latter should be taken into account by the CA in its review and decision and that the assessment should also focus on avoiding arbitrage opportunities, on ensuring the sound and prudent management of the two IPUs and reflect resolvability concerns that may be expressed by the RA.

59. With regard to the resolution aspects of the two IPU structure, the Opinion underscores the RA's competence to conduct the relevant assessment under letter b) of Article 21b(2) and the importance of the early involvement of the RA by the CA. It also identifies the main specific assessment criteria for the review of the application for two IPUs from a resolution perspective.

60. In respect of the operationalisation of the IPU, the Opinion reminds that shell banks are inconsistent with the EU framework, so that functions can only be outsourced to an extent that would not lead to depriving the institution of the capabilities to meet the conditions for authorisation. It further underscores on the importance of the IPU within the consolidated group, in ensuring clear, coherent and effective internal governance arrangements throughout the EU part of the TCG. Along these lines, with specific regard to dual hatting positions, it reminds the importance of clear reporting lines and that such arrangement do not lead to conflict of interests.

²⁹ [2022_6495 Exclusion of intragroup transactions with entities in third country from the CVA risk charge | European Banking Authority \(europa.eu\)](https://www.eba.europa.eu/en/press-communications/2022/0006495)

61. As regards the risk management function and booking arrangements, the Opinion stresses the importance of adequate local risk management capabilities. It reminds that institutions should not systematically nor substantially back-to-back transactions with an EU nexus, and recalls the importance of identifying and managing risks stemming from back-to-back transactions. Finally, the opinion recalls how the CVA risk associated to intragroup transactions should be capitalised.

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

