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Olivier Guersent
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European Commission
Rue de Spa 2
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Belgium

9 February 2018

Subject: EBA Opinion and Report on matters relating to the regulatory perimeter under the CRDIV/CRR

Dear Mr Guersent,

Thank you for your letter of 22 January 2018 regarding the EBA's Opinion and Report on other financial intermediaries and regulatory perimeter issues.¹

We set out below some further reflections in relation to the amendments of Article 2(5) CRDIV (entities excluded from the application of the CRDIV) and Article 9(2) (the capacity for Member States to exclude entities from the prohibition on taking deposits and other repayable funds from the public without a banking licence) presented in the Commission's legislative proposal dated 23 November 2016.²

Article 2(5) CRDIV

Article 2(5) CRDIV excludes from the scope of that Directive entities pursuing public policy objectives, such as central banks and post office giro institutions, and other entities where, due to the nature of their activities, it is not considered necessary to subject them to EU legislation intended to promote the level playing field for the provision of banking services (e.g. friendly societies and cooperative undertakings).

¹ <https://www.eba.europa.eu/-/eba-publishes-an-opinion-and-report-on-regulatory-perimeter-issues-relating-to-the-crdiv-crr>.

² COM/2016/0854 final - 2016/0364 (COD): <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:854:FIN>.

The EBA welcomes the Commission's proposals to amend points (16) and (24) of Article 2(5) CRDIV and notes the need for a number of additional amendments as identified in Figure 1 of the Report.

Regarding the proposals for new paragraphs (5a) and (5b), which would confer on the Commission powers to make delegated acts for the purposes of removing specific institutions or categories of institution from the scope of the Directive, the EBA refrained from commenting on these provisions in the Opinion and Report as the choice of whether to use delegated acts for this purpose is a political matter.

However, the EBA included some observations about the use of Article 9(2) CRDIV and the interaction with Article 2(5) which are relevant to the Commission's proposals and are summarised below.

In short, the EBA fully supports the Commission's objective of ensuring the consistent and effective application of EU banking law. However, in our view, the Commission's proposals are not sufficient to address the issues, which the EBA has identified in previous work, relating to the scope of the CRDIV and stemming primarily from the differences in the approaches of the Member States to the definition of the terms 'deposit', 'other repayable funds' and 'public'.³

Article 9(2) CRDIV

Article 9(2) CRDIV enables Member States to exclude from the prohibition in Article 9(1) certain entities, including those *'expressly covered by national law... provided that [the] activities are subject to regulations and controls intended to protect depositors and investors'*.

As set out in the Opinion and Report, it appears that some Member States are relying on Article 9(2) CRDIV to exclude various types of entities (see in particular footnotes 22 to 24 of the Report). Indeed, the EBA's work illustrates that Article 9(2) CRDIV covers a range of situations, including cases where no express reliance was reported to the EBA.⁴

The variations observed arise in part from the absence of a common definition of the terms 'deposit', 'other repayable funds' and 'public' used in the prohibition specified in Article 9(1) CRDIV and the definition of 'credit institution' set out in point (1) of Article 4(1) CRR.

Absent common definitions, differences arise in the way the prohibition in Article 9(1) CRDIV is applied to different forms of business activity.

³ See the EBA's 2014 Opinion and Report on the perimeter of credit institutions for further detail in this regard: <https://www.eba.europa.eu/-/eba-publishes-an-opinion-on-the-perimeter-of-credit-institutions>.

⁴ See further pages 15 to 17 of the Report.

For example, in a Member State, the issuance of corporate bonds by group companies to raise funds to finance the activities of other group companies may not be regarded as involving the receipt of ‘other repayable funds’ and, as such, the prohibition in Article 9(1) CRDIV is legally irrelevant (and therefore the Member State need not consider whether to rely on paragraph (2)). In another Member State the same activity may be regarded as involving the receipt of ‘other repayable funds’ and therefore a banking licence would be required to carry out the activity unless it is excluded from the prohibition in Article 9(1) CRDIV by exercise of the power conferred by Article 9(2).

This illustrates that variations as to interpretation in overall scope of the CRDIV need to be addressed in conjunction with any changes to the capacity for entities to be excluded from the scope of the Directive so as to ensure that entities are not inadvertently brought within the scope of the CRDIV/CRR (as would be the case in the second example above in the event the Member State no longer had power under national law to exclude such activity from the scope of the prohibition in Article 9(1) CRDIV).

Interaction between Article 2(5) and 9(2) CRDIV

Reflecting further on the Opinion and Report, which we regard as entirely consistent on the interaction between Articles 2(5) and 9(2) CRDIV, we observe that, save perhaps in one limited case,⁵ Article 9(2) CRDIV appears to be applied to exclude entities that do not share the characteristics of those covered by Article 2(5).

Article 9(2) CRDIV is in particular relied upon for entities such as, structured finance vehicles, financial intermediaries issuing corporate bonds or hire purchase providers or crowdfunding platforms,⁶ which, contrary to entities listed in Article 2(5), do not appear to be set up to pursue public policy objectives and, hence, belong to a different species.

Accordingly, Articles 2(5) and 9(2) CRDIV can be regarded as complementary in providing mechanisms to frame the application of the Directive.

However, the Commission’s proposed powers to make delegated acts under new Article 2(5a) and 2(5b) (in place of the discretion for Member States under Article 9(2) CRDIV), which seem to be drawn by reference to the characteristics of entities within the scope of Article 2(5), would not be sufficient to take account of entities for which reliance is currently placed under Article 9(2).

⁵ Savings companies as referred to in footnote 21 of the Report, which are similar to entities covered by Article 2(5) CRDIV.

⁶ See footnotes 22 to 24 of the Report.

The Commission's legislative proposals and possible ways forward

In view of the issues identified above, the EBA recommended in the Opinion and the Report that, before making changes to the scope of Article 9(2) CRDIV, a prior thorough impact assessment is carried out to examine the full implications of any changes particularly in the absence of a common definition of 'deposit', 'other repayable funds' and 'public'.

In terms of possible ways forward, a range of options could be considered addressing Article 2 and/or Article 9 CRDIV to help achieve the objective, which the EBA shares, of ensuring the consistent and effective application of EU banking law.

Regarding Article 9(2) CRDIV, instead of deleting the national discretion at this stage, as a possible compromise, one could propose a new provision in the Level 1 text requiring the EBA to monitor national practices in the application of the Directive.

In particular, we see merits in the inclusion in the Level 1 text of a specific monitoring role for the EBA taking account of approaches to the definition of the terms 'deposit', 'other repayable funds' and 'public', and in imposing an obligation for Member States to report to the EBA where the discretion conferred by Article 9(2) CRDIV has been relied upon to exclude entities from the scope of the Directive.

We also see benefits in including an obligation for the EBA to report to the Commission the results of such monitoring after sufficient information has been gathered and to prepare, as appropriate, such guidance as may be required regarding the application of the scope of the Directive, and/or such recommendations as are considered appropriate regarding legislative changes, for instance, with regard to the definition of 'deposit' and 'other repayable funds'.

Next steps

The EBA stands ready to provide such further technical support as may be considered helpful on all matters referred to in the letter, including taking account of FinTech developments and Brexit.

Yours sincerely,

A handwritten signature in black ink, which appears to read 'Andrea Enria', is positioned below the closing text.

Andrea Enria

CC: Martin Merlin, DG FISMA, Director, Directorate D
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