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BSG 2021 042

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BANKING STAKEHOLDER GROUP

EBA Consultation Paper: draft Guidelines on common assessment methodology for granting authorization as credit institution under Article 8(5) of Directive 2013/36/EU

The BSG welcomes the opportunity to comment on the draft guidelines given the importance of ensuring an effective, proportionate and consistent gateway for the provision of financial services in the EU. In this response we have primarily focused on the areas where we consider changes should be made to the proposed approach.

Q1. Are the subject matter, scope of application and definitions appropriate and sufficiently clear?

Credit institutions are defined under the Capital Requirements Regulation, as amended by the Investment Firms Regulation in relation to their deposit taking activities or their dealing on own account or underwriting or offering of financial instruments on a firm commitment basis.

However, once authorised as a credit institution, a firm may be able to carry out a range of financial activities which are subject to specific requirements under other EU legislation. Examples include providing investment services regulated by the Markets in Financial Instruments Regulation and Directive (including portfolio management which is specifically listed in CRD as a passported activity), providing consumer credit in accordance with the Consumer Credit Directive, mortgages to which the requirements of the Mortgage Credit Directive apply or payment services to which the Payment Services Directive applies.

Supervisors, credit institutions and consumers need to have clarity on the extent to which authorisation as a credit institution takes account of the applicant's intention carry out those other activities and the status of their authorisation or registration to do so. This is particularly important in cases where supervisors would be likely to need additional assurance where applicants are proposing to carry out certain activities that would not be needed for credit institutions not proposing to carry

out such activities (for example, in relation to surveillance for market abuse on a credit institution operating an MTF or OTF).

It would therefore be helpful if the guidelines could clarify the interaction between these requirements in the section on subject matter and scope and, where necessary, ensure that these elements are incorporated in the final RTS and ITS on information needed by competent authorities to assess applications for authorization.

A related point is that some activities are regulated for reasons which are not primarily or only prudential, such as market integrity or consumer protection. Examples would include the provision of portfolio management to clients, the operation of an MTF or OTF, the provision of mortgage or other credit to consumers or the provision of payment services to consumers. Where institutions plan to undertake these activities, competent authorities need to be able to consider the related risks before making decisions on authorisations. In some cases, the risk may not be material and, where they are, it may be possible to address them through limitations at the point of authorisation and subsequent ongoing supervision. However, competent authorities also need to be able to refuse authorisation in those cases where such an approach is insufficient to address the risks. In several places, the drafting of the guidelines appears to be too narrow to allow this to happen. Paragraph 16 is key: we make proposals to broaden paragraph 16 in response to Q3 below, and also paragraph 76 in response to question 6.

In relation to the perimeter guidance in paragraphs 45-56 we would suggest that if it has not already done so EBA checks whether the guidance is compatible with Islamic finance business models.

Referring to the ECB`s Guide on Authorisation, the BSG suggests adding that the authorisation process, starting from the national competent authorities' acknowledgement of receipt of the application should not exceed 12 months, including any suspension periods. Otherwise, yes the subject matter, scope and definitions are appropriate and sufficiently clear.

Q2. The GL clarify that competent authorities should co-operate with AML supervisors when granting the authorization. They also expressly specify that ML/TF risk is part of the risks to be assessed by the competent authorities, and expressly refer to ML/TF throughout the text. Are these references sufficiently clear?

The explicit inclusion of AML/TF risks is welcome in providing certainty for all parties about their relevance to the authorization process. We support the references included in the draft. We propose the following additional points to ensure the necessary clarity is provided:

Paragraph 18: as this paragraph is setting out factors which inform the proportionality of the assessment we suggest that it would be beneficial to also add a new point referring to "the AML/TF risks inherent in the business activities the specific credit institution plans to carry out and the AML/TF risk profile of the jurisdictions in which it intends to offer services"

Paragraph 68: we would suggest that it is useful to make an explicit connection between the extent of the inherent risk in the credit institution's planned activities, and the assessment of whether controls are sufficient and appropriate to manage the level of risk: "The level of inherent risk in the activities the specific applicant plans to undertake should inform competent authorities' judgement on the

proportionality of assessment of related controls and the adequacy of such controls in accordance with paragraphs 175-177."

There are also AML/TF dimensions to some of our other comments which are included in answers to the other consultation questions.

Q3. Are the requirements and limits to impose conditions precedents, obligations subsequent and restrictions sufficiently clear?

Paragraph 16 is extremely restrictive as it limits the scope for refusing authorization to prudential concerns while licensing as a credit institution may enable the firm to carry out activities subject to regulation primarily for market integrity or investor/consumer protection reasons. We understand and agree that the reasons for refusal should not be arbitrary or protectionist and that consistency is important. However, paragraph 16 risks leaving competent authorities open to challenge for refusing to authorize a credit institution which, for example, appears to have a business model which depends on highly irresponsible consumer lending practices. Similarly, a credit institution may have a business model which significantly depends on activity which is high-risk from an AML perspective without demonstrating any convincing plans or resources for managing the risk. We consider that in both cases competent authorities should have scope to refuse the authorization. We would ask EBA to consider a formulation which takes account of the potential for refusal to be grounded in market integrity, consumer or investor protection concerns relevant to the proposed plan of operation of the applicant credit institution.

Paragraphs 17 and following refer to the principle of proportionality. The BSG asks the EBA to examine introducing a fast-track procedure for applicant credit institution belonging to a group which is subject to the consolidated supervision of a competent authority. The concept of a fast-track procedure was introduced in the EBA`s report on significant risk transfer in securitisation and can contribute to competitiveness of the European financial market whilst benefitting from the deep knowledge of the group by the consolidating supervisor.

Paragraphs 30-31: these paragraphs should state clearly that if an authority is not assessing the likelihood that the credit institution will be able to comply with the requirements in relation to activities which are substantively regulated under other legislation, notably MiFID II, the Consumer Credit Directive, Mortgage Credit Directive and Payment Services Directive, the credit institution's activities should be limited until such time as a further request is made and consideration given to it. (See also comments on paragraph 44)

Paragraph 32 suggest replacing "despite not being legally binding" with "even where not legally binding" because some of the matters signalled by competent authorities may relate to aspects of the firm's legal obligations which were not capable of being fully evidenced at authorization.

Q4. To ensure the sound and prudent management of the credit institution, all activities likely to impact on the prudential treatment of the applicant credit institution should be assessed by the competent authority. Is this concept sufficiently clear with regard to applicants carrying on activities in addition to banking and financial activities?

Paragraph 44 needs to be clearer about how those financial activities which are listed in Annex 1 CRD but substantively regulated by EU directives and regulations other than CRR/CRD will be reflected in the decision on whether to authorise the applicant (see also comments on paragraphs 30-31).

Q5: Is the approach towards the assessment of the application submitted by undertakings meeting one of the conditions in n. (i)-(iii) of letter 1(b) of Article 4(1) of the CRR appropriate and sufficiently clear?

Yes.

Q6: Are the main focus areas, the level of granularity and specific technical aspects of the business plan assessment appropriate and sufficiently clear?

We suggest that the scope of paragraph 67 is broadened to allow for other regulatory objectives to be considered, given that as discussed above depending on its intended programme of activities an authorised credit institution will need to be able to meet other regulatory requirements for market integrity and consumer protection purposes, as follows: "… and its capacity to comply with prudential requirements, and where relevant market integrity and consumer protection requirements, within the planning horizon."

See also comment on paragraph 68 in response to question 2.

The BSG acknowledges the importance of an initial business model assessment before an authorization is granted. However, this should first consider the – targeted - scope of Art. 10 CRD which only and specifically requires a submission of programme of operations setting out the types of business envisaged and structural organisation of the credit institution. Furthermore, it shall respect economic management decisions. As Art 11 CRD states: "Member States shall not require the application for authorization to be examined in terms of the economic needs of the market." The assessment of the viability of the business model is ultimately connected to the assessment of the market need for products and services. The BSG suggests reviewing Paras 72 or 88 in light of the above.

Q7: Are the elements for the determination of capital at authorization and the determination of the amount to be paid-up at the moment of the authorization sufficiently clear?

Yes, these elements are sufficiently clear.

Q8 The approach taken by these Guidelines as regards the CAM for the internal governance is to directly indicate the minimum main elements and aspects required for the assessment based on the requirements laid out in the relevant EU regulatory acts. This selective approach, however, is without prejudice to the application by the competent authorities of additional parts of the various EBA Guidelines which may be relevant for the assessment of the applicant's internal governance. Is this approach sufficiently clear?

No, we do not consider that this approach is sufficiently clear and that paragraph 128 could helpfully be further clarified. This relates in part to the fact that depending on the planned programme of activities, key aspects of the control and governance framework relate to matters regulated under legislation other than the CRD may be relevant. Consideration may need to be given, for example, to whether relevant parts of MiFID II and associated ESMA Guidelines need to be referenced.

We also propose that for the avoidance of doubt it should be made explicit that in certain circumstances (for example, where an application appears to be higher risk, or where key controls need to be tested) a competent authority may need to carry out on-site visits, ask for demonstrations or conduct interviews with key staff in addition to reviewing documents before deciding whether to authorize an applicant credit institution.

On paragraph 170-171: we propose that in addition where the credit institution proposes to offer investment services within the meaning of MiFID II Annex 1 to retail clients, the competent authority should also consider whether the remuneration policy in relation to those services is consistent with MiFID II Article 24 paragraph 10. If found not consistent, it shall impose a condition precedent, obligation or restriction regarding these services On paragraph 182: we propose that the paragraph should be amended to reflect the fact that in addition to reducing the risk of business disruption occurring and minimising losses where it does, the operational resilience policy and plan should also contain appropriate focus on recovery from business disruption events that arise.