

26 October 2021

Re.: EBA consultation paper on draft RTS on criteria for the identification of shadow banking entities

Dear Madam or Sir,

The EUF is the industry body and voice for the European factoring and commercial finance industry. The EUF's members consist of 15 national factoring and commercial finance associations, representing 13 EU-member states (namely [in alphabetic order] Austria, Belgium, Croatia, the Czech Republic, Denmark, France, Germany, Greece, Italy, the Netherlands, Poland, Portugal and Spain) and the international factor chain FCI.

Commercial finance is a generic term for a range of asset based finance services which inter alia include factoring, invoice discounting, international factoring, supplier finance or reverse factoring. Hereinafter, we will generically use the term factoring for ease of reference.

Due to differences between national laws, especially in civil or contract law, but also between the historically evolved economic structures and prudential supervisory regimes of European countries, there are many variations on each of these product sets and the precise nomenclature varies from market to market, but all exist to provide working capital funding and financing solutions to businesses, particularly SMEs. The nature of the services provided by the factoring company will vary according to the clients' particular requirements but all of these solutions have in common the idea that funding may be offered based upon the debt invoicing created by the client company. If credit protection is part of the factoring agreement, it is referred to as non-recourse factoring, while a factoring agreement where the credit risk on the debtor remains with the seller is called (with) recourse factoring. The factoring company will often also undertake all credit management and collections work. Factoring is therefore simply a unique blend of credit and services designed to ease the traditional problems of selling on open account terms, mainly aimed towards SMEs.

A very large part of the factored volume conducted within the EU is generated by factoring companies that are banks or part of consolidated banking groups¹, but there is also a significant number of independent factoring companies, some of which are specialised in providing factoring services to certain sectors (e.g. the medical or construction sector).

Based on the national supervisory requirements, the (credit) risk management of factoring companies depends upon the kind of factoring solution in each case. In general, factoring is a short term, self-liquidating funding activity, with no retail deposits (unless the factor is a bank and therefore also offers "traditional" banking services).

It is against this background that the EUF wishes to comment on the draft EBA RTS on criteria for the identification of shadow banking entities (hereafter: draft RTS) and provide answers to questions 1-3, 11, 13 and 14 of the consultation document.

Considering that the range of "*banking services and activities*" under Articles 1 and 2 of the draft RTS encompasses factoring both by referring to the services and activities listed in inter alia point 2 of Annex I of Directive (EU) No 2013/36/EU (CRD) and by including any service or activity involving a credit risk transfer, **factoring companies** (whether they are authorised and supervised institutions or not) **fall under the scope of these draft RTS** according to Article 1 paragraph 1.

¹ In countries such as Austria, Croatia, Germany, Italy, France, Poland, Spain, and the Netherlands, the factored volume conducted by banks or companies which are part of banking groups lies between approx. 75% to 100%.

According to article 1, paragraph 2 of the draft RTS, explained further by recitals 1 and 2, the factoring companies subject to solvency and liquidity requirements equivalent or similar to those imposed by Regulation (EU) No 575/2013 (CRR) and Directive 2013/36/EU (CRD) will not be considered as shadow banking entities.

In a similar manner, entities referred to in art 1 paragraph 3 are not to be considered as shadow banking entities: “Any entity that is exempted or optionally excluded from Regulation (EU) No 575/2013, Directive 2013/36 EU (...)”.

Concerning the latter, this raises the question whether the exemption or exclusion has to be set:


- exclusively at European level and specifically provided by the texts mentioned (for example Kreditanstalt für Wiederaufbau in Germany or Caisse des Dépôts et Consignations in France, specifically exempted by article 2(5) of CRD),
- or may also be set at national level, which would leave full capacity to national legislators and supervisors to determine the scope of non-shadow banking entities.

As a general premise, we wish to point out that the terminology used in the draft RTS is unfortunately not always entirely concise, considering that e.g. the CRR covers not only credit institutions (i.e. banks), but also investment firms, and the finance sector as a whole covers a vast array of services which are only inadequately described by the term “*banking services and activities*” as used in the draft RTS. Also, international standard-setting bodies like the FSB no longer refer to “*shadow banking (entities)*” but rather use terms such as “*non-bank financial intermediation (NBF)*”. There is a perception that the terminology used to describe the part of the financing sector which is outside of any authorisation, supervision and clear exemptions should not only be more neutral in connotation, but also reflect more the diversity of financial solutions outside of traditional banking services and products.

With a view to questions 1-3 and in part also questions 13 and 14 of the consultation document, the EUF generally agrees with the chosen approach to identify shadow banking entities by defining them as outside of the range of entities which are authorised and supervised in accordance with certain legal acts or exempted/excluded from these legal acts (cf. Article 1 paragraphs 1-3 of the draft RTS). However, as mentioned above, we wish to point out that in order to avoid misunderstandings and misconceptions, it should be clarified in the RTS **how EBA considers the identification of “shadow banking” entities by national legislation and supervisory authorities. This is relevant where national legislators or supervisory authorities within their competency have deliberated and decided to explicitly exempt certain (otherwise authorised and supervised) entities from e.g. the CRR (in part or in whole).**

Also, with a view to question 11 and Article 3 paragraph 1, the suggested solution of letting the institution which has to comply with Article 394 CRR verify that entities from the financial sector in non-EU/third countries are authorised and “*supervised by a third-country supervisory authority that applies banking regulation and supervision based on at least the Basel core principles for effective banking supervision*” is certainly more open to interpretation and less clear cut than explicit exemptions from e.g. the CRR (be they national or on EU-level). **This raises the question of putting non-EU entities at an unfair advantage.**

Please do not hesitate to contact us should you have any queries regarding the aforementioned viewpoints or require more information on the factoring industry in Europe.



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