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Final report

Draft Regulatory Technical Standards on criteria for the identification of shadow banking entities under Article 394(4) of Regulation (EU) No 575/2013

Contents

1. Executive Summary

Article 394(4) of Regulation (EU) No 575/2013 (CRR) requires the EBA to develop draft regulatory technical standards (RTS) to specify the criteria for the identification of shadow banking entities. In developing these draft RTS, the EBA is required to take into account international developments and internationally agreed standards on shadow banking and consider whether, (a) the relation with an individual entity or a group of entities may carry risks to the institution's solvency or liquidity position; (b) entities that are subject to solvency or liquidity requirements similar to those imposed by this Regulation and Directive 2013/36/EU should be entirely or partially excluded from the obligation to be reported on shadow banking entities.

Regulation (EU) No 2019/876 amending the CRR has modified slightly the reporting obligation of Article 394(2) of the CRR. Where it said before "*an institution shall report […] its 10 largest exposures on a consolidated basis to unregulated financial entities […]*", it now states "*an institution shall report […] its 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis […]*". This amended obligation became applicable on 28 June 2021.

The CRR requires the EBA to submit the draft RTS to the Commission by 28 June 2020. However, in November 2019, the EBA adopted roadmaps with a planned timetable to deliver regulatory deliverables resulting from Regulation (EU) No 2019/876 amending the CRR. Accordingly, the EBA should submit these draft RTS to the Commission by December 2021;[1] the deadline was extended until June 2022.

The main basis for the development of the draft RTS has been the guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of the CRR.[2] These guidelines were published in December 2015 to give effect to the mandate of Article 395(2) of the CRR.

The draft RTS are a rather short legal text with three main Articles addressing the following:

- criteria for identifying both shadow banking and non-shadow banking entities;
- definition of banking activities and services; and
- criteria for excluding entities established in third countries from being deemed as shadow banking entities.

In a nutshell, entities that carry out banking activities or services that have been authorised and are supervised in accordance with the regulatory framework consisting of any of the legal acts referred to in Annex I of these draft RTS (or are part of a group supervised on this basis) shall not be considered as shadow banking entities; the same treatment shall apply to the entities that are exempted or excluded from the application of some of those legal acts, notably the CRR, the CRD, EMIR and Solvency

[1] The EBA published on 21 November 2019 a roadmap on the Risk Reduction Measures (RRM) package with a planned timetable to deliver the regulatory deliverables according to the mandates given by CRR2 to the EBA. (https://eba.europa.eu/eba-publishes-its-roadmap-risk-reduction-measures-package).

[2] See here: https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1310259/f7e7ce6b-7075-44b5-9547-5534c8c39a37/EBA-GL-2015-20%20Final%20report%20on%20GL%20on%20Shadow%20Banking%20Entities.pdf

II. All other entities that provide banking activities and services shall be considered shadow banking entities. However, specific rules apply to certain collective investment undertakings.

In the case of entities established in a third country, the draft RTS differentiate between institutions and other entities: institutions would not be identified as shadow banking entities provided that they are authorised and supervised by a supervisory authority that applies banking regulation and supervision based on at least the Basel core principles for effective banking supervision; other entities would not be identified as shadow banking entities provided that they are subject to a regulatory regime recognised as equivalent to the one applied in the Union for such entities in accordance with the equivalence provisions of the relevant Union legal act.

Next steps

The draft regulatory technical standards will be submitted to the Commission for endorsement following which they will be subject to scrutiny by the European Parliament and the Council before being published in the Official Journal of the European Union.

2. Background and rationale

1. The large exposure (LE) framework is a tool for limiting the maximum possible loss that a credit institution could face in the event of the sudden failure of a client or a group of connected clients, if available. By requiring credit institutions to measure and limit the size of their LE in relation to their Tier 1 capital, the LE framework acts as a backstop that complements the regulatory capital framework. In this sense, the LE framework also contributes to the stability of the financial system by reducing the possibility of contagion risk between credit institutions.

2. The Basel Committee on Banking Supervision (BCBS) is of the view that the LE framework is a useful tool to mitigate the risk of contagion between global systemically important banks, thus supporting global financial stability. Furthermore, the LE framework is also seen as a useful tool to contribute to strengthening the oversight and regulation of the shadow banking system in relation to LE.[3] In particular, the rules for the treatment of exposures to funds, securitisation structures and collective investment undertakings (CIUs) and the requirement for institutions to apply a look-through approach (LTA) when appropriate, help in achieving this objective.

3. The LE framework applicable to institutions[4] in the European Union is laid down in Regulation (EU) No 575/2013 (the CRR).[5] Supplemented by technical standards and guidelines developed by the European Banking Authority (EBA), the Union's LE framework was the inspiration for the large exposures standard (LEX) of the BCBS introduced in 2019.

4. The LE rules in the CRR were amended following the adoption of Regulation (EU) No 2019/876 (CRR2) amending the CRR.[6] One of the consequences of these amendments has been a greater alignment of the Union's LE framework with the LEX standards, e.g. by taking Tier 1 as the reference instead of eligible capital. In addition to dedicated rules related to the treatment of exposures with underlying assets[7] (CIUs, securitisation structures) and the requirement for institutions to apply a look-through approach, the reporting obligations in relation to an

[3] LEX large exposures of the Basel Committee on Banking Supervision (BCBS), rationale and objectives of a large exposures framework, paragraph 10.3. https://www.bis.org/basel_framework/standard/LEX.htm?type=all

[4] According to point (3) of paragraph 1 of Article 4 of the CRR, an institution means a credit institution or an investment firm. Article 387 of the CRR states that "*institutions shall monitor and control their large exposures in accordance with this Part*."

[5] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0575-20200627

[6] Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1–225) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R0876

[7] Commission Delegated Regulation (EU) No 1187/2014 of 2 October 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council as regards regulatory technical standards for determining the overall exposure to a client or a group of connected clients in respect of transactions with underlying assets (OJ L 324, 7.11.2014, p. 1–5) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R0876

institution's 10 largest exposures to non-bank exposures[8] formerly named "unregulated financial entities" was clarified by using the term "shadow banking entities" already introduced to the CRR (see Article 395(2) of the CRR) and specified in the EBA guidelines on limits on exposures to shadow banking entities (EBA/GL/2015/20, hereinafter, the EBA guidelines).[9]

2.1 Legal mandate

5. Further to the amendments of Regulation (EU) No 2019/876, Article 394(2) of the CRR on *reporting requirements* states that

> *[…] institutions shall report the following information to their competent authorities in relation to their 10 largest exposures to institutions on a consolidated basis, as well as their 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis, including large exposures exempted from the application of Article 395(1) […].*

6. Moreover, the new paragraph 4 to Article 394 mandates the EBA to

> *develop draft regulatory technical standards to specify the criteria for the identification of shadow banking entities referred to in paragraph 2. In developing those draft regulatory technical standards, EBA shall take into account international developments and internationally agreed standards on shadow banking and shall consider whether:*
>
> *(a) the relation with an individual entity or a group of entities may carry risks to the institution's solvency or liquidity position;*
>
> *(b) entities that are subject to solvency or liquidity requirements similar to those imposed by this Regulation and Directive 2013/36/EU should be entirely or partially excluded from the obligation to be reported referred to in paragraph 2 on shadow banking entities.*
>
> *EBA shall submit those draft regulatory technical standards to the Commission by 28 June 2020.*

7. The reporting framework 3.0, applicable from 30 June 2021, reflects the changes introduced by CRR2, amongst other things to the LE regime. Annex IX concerns instructions for reporting LE and concentration risk. In order to report information on the 10 largest exposures to institutions, on a consolidated basis, as well as on the 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis, the parent institutions in a Member State shall use templates LE1, LE2 and LE3. The exposure value calculated

[8] Article 394(2) of the CRR.

[9] EBA/GL/2015/20 of 15 December 2015 Guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of Regulation (EU) No 575/2013. https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1310259/f7e7ce6b-7075-44b5-9547-5534c8c39a37/EBA-GL-2015-20%20Final%20report%20on%20GL%20on%20Shadow%20Banking%20Entities.pdf

in column 210 ("Total") of template LE2 is the amount that shall be used for determining these 20 largest exposures.[10]

8. In November 2019, the EBA adopted roadmaps with a planned timetable to deliver regulatory deliverables resulting from CRR2. Given the need to prioritise the high number of newly introduced mandates and the existence of the EBA guidelines and the definition included therein, it was decided to postpone the date of delivery by 1.5 years. Accordingly, the draft RTS under Article 394(4) of the CRR should be submitted to the Commission by December 2021.

9. Under the mandate of Article 395(2) of the CRR, the EBA guidelines were published in 2015. The EBA guidelines were published with the objective of setting specific LE limits to shadow banking entities under Pillar 2 in view of the risks that such entities pose to the financial system. On the contrary, the new mandate under Article 394(4) of the CRR requires the identification of shadow banking entities specifically for the purposes of reporting and, in any case, of only the 10 largest exposures rather than of all exposures to shadow banking entities.

10. The EBA guidelines define credit intermediation activities as well as shadow banking entities by exclusion. Given the continued relevance of these guidelines in the Union's LE framework, the fact that the mandate in Article 395(2) of the CRR remains unaltered, and having due regard to the ultimate prudential objective of ensuring consistency of the implementation of the single rulebook on LE to institutions in the Union, these draft RTS rely to a great extent on the work undertaken for the EBA guidelines.

2.2 The shadow banking system

2.2.1 Shadow banking entities identified in the EBA guidelines

11. In the EBA guidelines, the EBA assessed the shadow banking system, noting its role in complementing the traditional banking sector by expanding access to credit in support of economic activity or by supporting market liquidity, maturity transformation and risk sharing, thereby promoting growth in the real economy. It noted however that the financial crisis had revealed fault lines in the shadow banking system which put the stability of the financial system at risk, e.g. a heavy reliance on short-term wholesale funding and a general lack of transparency. In this respect, the EBA identified some concerns regarding shadow banking entities, namely a) run risk and/or liquidity problems; b) interconnectedness and spillovers; c) excessive leverage and procyclicality; and d) opaqueness and complexity.

12. The EBA guidelines developed a definition of the terms "shadow banking entities", "banking activities" and "regulated framework" given that the CRR does not define these terms. The definitions were in line with the previous EBA Opinion and Report on the perimeter of credit

[10] For information on the reporting framework 3.0, see the EBA website https://www.eba.europa.eu/risk-analysis-and-data/reporting-frameworks/reporting-framework-3.0

institutions and captured entities not subject to appropriate prudential regulation and supervision, therefore posing the greatest risks.[11]

13. The approach in the EBA guidelines to identify shadow banking entities carves out certain entities from the scope of the definition. Such excluded entities are those that are subject to an appropriate and sufficiently robust prudential framework. Under this approach, also credit institutions, investment firms, insurance corporations and such entities established in third countries which are subject to prudential requirements which are considered to be equivalent to those applied in the Union are taken out of the scope of the EBA guidelines. Furthermore, entities subject to consolidated prudential supervision (whether as a result of EU legislation, applicable national legislation or an equivalent third country's legal framework) are out of the scope of the guidelines. Thus, the EBA guidelines focus on institutions' exposures to entities that pose the greatest risks in terms of both the direct risk institutions face by being exposed to such entities and also the risk of credit intermediation being carried out outside the regulated framework.

14. The EBA guidelines were developed having in mind, amongst other things, the European Commission's assessment of the current scope of application of the EU banking prudential rules, as part of the Commission's broader workstream on shadow banking; the work by the BCBS on the scope of consolidation for prudential regulatory purposes to ensure all institutions' activities are appropriately captured in prudential regimes; and the peer review launched by the FSB in 2015 regarding its member jurisdictions' implementation of the FSB's policy framework for shadow banking entities, as well as the results of the FSB's 5th shadow banking monitoring exercise in late 2015.

2.2.2 Shadow banking risks identified by the ESRB and the FSB

15. Since 2015, the European Systemic Risk Board (ESRB) has annually been monitoring what it now calls *EU non-bank financial intermediation* (NBFI) risks (previously referred to as *shadow banking risk*). According to the ESRB, NBFI accounted for around 40% of the EU financial system in 2020, and grew faster than institutions over the past decade, including in 2019.[12] On the other side, the Financial Stability Board (FSB) asserts that the financial assets of the NBFI sector – comprising mainly pension funds, insurance corporations and other financial intermediaries (OFIs) – accounted for 49.5% of the global financial system in 2019, compared to 42% in 2008. *Non-bank financial entities play an increasing role in providing financing to the real economy, as well as in managing the savings of households and corporates. Moreover, the relative size of NBFI in emerging market economies (EMEs) has increased at a faster pace than in advanced economies*

[11] The Opinion and Report are available here: https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/a7bf5c46-2b80-4286-8771-d14a22c87354/EBA-Op-2014-12%20%28Opinion%20on%20perimeter%20of%20credit%20institution%29.pdf

[12] ESRB EU Non-bank Financial Intermediation Risk Monitor 2020 of 21 October 2020 https://www.esrb.europa.eu/news/pr/date/2020/html/esrb.pr201021~a3c1929670.en.html

(AEs). More specifically, loan provision by non-bank entities dependent on short-term funding has increased significantly faster in EMEs than in AEs.[13]

16. The ESRB identified structural risks and vulnerabilities as well as cyclical risks.[14] Among the structural risks, it highlighted the following ones:

- risk-taking, liquidity risk, pricing uncertainty and risks associated with leverage among some types of investment funds and other non-bank financial institutions;
- interconnectedness and the risk of contagion across sectors and within the non-bank financial sector, including domestic and cross-border linkages;
- activity-related risks – procyclicality, leverage, and liquidity risk – created through the use of derivatives and securities financing transactions (SFTs).

17. Among the cyclical risks the report includes:

- a global recession and sharp contraction of economic activity in the EU;
- rising indebtedness, increased credit risk and the risk of rating downgrades;
- high uncertainty and risks associated with a low-for-longer interest rate environment;
- low liquidity and high volatility in some markets.

2.2.3 The range of entities covered by the ESRB and FSB monitoring[15]

18. The ESRB conducts its monitoring of the NBFI part of the financial system by splitting it into two areas, namely entity-based and an activity-based monitoring. It provides a mapping of activities to entity types, under which the following entities are considered:

- investment funds, namely money market funds (MMFs), bond funds, mixed funds, equity funds, hedge funds, real estate funds, ETFs, private equity funds and private debt funds;
- other financial institutions (OFIs), namely financial vehicle corporations (FVCs), special purpose entities (SPEs), security and derivative dealers (SDDs) and financial corporations engaged in lending (FCL).

[13] Global Monitoring Report on Non-Bank Financial Intermediation of 16 December 2020 https://www.fsb.org/wp-content/uploads/P161220.pdf

[14] ESRB EU Non-bank Financial Intermediation Risk Monitor 2020 of 21 October 2020, pages 12 ff.

[15] The entities considered, both within the FSB's and the ESRB's scope of monitoring, are largely derived from the classification according to the National Systems of Accounts, i.e. for the EU the ESA 2010. This entity classification might not always be fully in line with (prudential) supervisory definitions (e.g. according to the CRR/CRD, UCITS, AIFMD).

19. This list gives a useful indication of the entities included in the mapping exercise that the ESRB considers in its NBFI universe. The ESRB EU NBFI Risk Monitor 2020 notes the following risks and interlinkages with the financial system for each of those entities:

- The investment fund sector has linkages to the financial system via wholesale funding of institutions provided through non-bank financial entities, funding by institutions to investment funds, or connections through the repo and securities lending markets; it also has linkages to the non-financial system, including the real economy, by channelling investors' funds to households and non-financial corporations. Contagion channels can also arise due to ownership linkages between asset managers and other financial firms.[16]

- Bond funds have strong interconnections with the banking sector given their exposures to firms across different sectors through holdings of debt securities. Bond funds engage in credit intermediation and can also perform maturity and liquidity transformation.[17]

- Money market funds (MMFs) have very strong interconnections with the banking sector as they provide short-term funding to financial institutions and corporates, and engage in some maturity and liquidity transformation since a large portion of MMFs' assets consists of bank debt securities and deposits. MMFs play an important role for the liquidity management of non-banks. Therefore, stress in the MMF sector could trigger severe liquidity issues for institutions and institutional investors.[18]

- Real estate is a highly illiquid asset class. Open-ended real estate funds may offer redemptions at higher frequencies which can expose them to liquidity transformation risks.[19]

- EU hedge funds are regulated entities, mostly subject to the Alternative Investment Fund Managers Directive (AIFMD) rules, which regulate Alternative Investment Funds' (AIFs') managers. They usually make greater use of leverage compared with other fund types and are typically restricted to professional investors.[20]

- Private equity funds are collective investment schemes that tend to invest in equity and debt issued by non-listed firms. They tend to incur little liquidity or maturity transformation risk as their redemption risk is limited by their long-term funding and closed-ended structures.[21]

[16] ESRB EU Non-bank Financial Intermediation Risk Monitor 2020 of 21 October 2020, page 25.

[17] Ibid, page 28.

[18] Ibid, page 30.

[19] Ibid, pages 33–34.

[20] Ibid, page 39.

[21] Ibid, page 41.

- Financial vehicle corporations (FVCs) are special purpose vehicles engaged in securitisation activity, through which they facilitate the transfer of credit risk from financial institutions that originate the credit to the buyers of the securities issued by the FVC. FVCs can also hold deposits and loan claims, debt securities and equity and investment fund shares.[22]

- Special purpose entities (SPEs) fulfil narrow, specific, and temporary objectives and are usually part of complex ownership networks within multinational groups. SPEs can issue debt securities and may engage in liquidity transformation.[23] SPEs have complex cross-border linkages which make them susceptible to vulnerabilities, and the lack of data at an EU level inhibits systemic risk monitoring of their activities and linkages.[24]

- Security and derivative dealers (SDDs) are investment firms specialising in securities trading, which are authorised to provide investment services to third parties. They may undertake liquidity and maturity transformation and are therefore an important part of the non-bank sector from a systemic risk perspective.[25]

- Financial corporations engaged in lending (FCL), which include financial leasing, factoring, mortgage lending and consumer lending companies, specialise in asset financing for households and non-financial corporations. They engage in credit intermediation outside the banking regulatory perimeter when carrying out lending activities. There are divergent prudential rules among countries to address the liquidity and leverage risk that FCLs pose. In some countries, the assets of FCLs are partly consolidated into banking groups, thus falling within the banking regulatory perimeter, whereas other countries do not impose any prudential requirements.[26]

20. The range of activities of those entities show some common patterns as all of them engage, to a lesser or greater extent, in maturity transformation, liquidity transformation, leverage or transfer of credit risk. These activities have been characterised as typical credit intermediation activities of a credit institution under a regulated framework.

21. However, while the range of entities considered by the ESRB in its NBFI monitoring remains large, some entities are excluded from its scope due to their low level of involvement in credit intermediation that could cause systemic risk. The NBFI universe includes a wide range of actors, including shadow banking entities, but not limited to them. The existence of sectorial regulations and their potential risk mitigating effect seems not to be considered in the ESRB approach to scope out entities.

[22] Ibid, pages 43–44.

[23] Ibid, page 45.

[24] Ibid, page 45.

[25] Ibid, page 46.

[26] Ibid, pages 47–48.

22. Furthermore, the ESRB terminology reflects its monitoring universe adequately and recognises the strengthened microprudential regulation of NBFI. Parts of this universe, such as equity funds or large parts of the OFI residual, do not engage in shadow banking activities. Moreover, regulatory requirements, data reporting and supervision at EU and global level have been strengthened in a number of non-bank areas, for example OTC derivatives (European Market Infrastructure Regulation (EMIR)), alternative funds (Alternative Investment Fund Managers Directive), securitisation (Credit Rating Agencies Regulation and "simple, transparent and standardised" (STS) securitisation requirements), money market funds (Money Market Funds Regulation) and securities financing transactions (Regulation on transparency of securities financing transactions), also with a view to reducing shadow banking risk.

23. The ESRB monitoring of entities is complemented by the monitoring of activities in order to have a wider overview of the NBFI sector. The activities considered are *risk transformation* (e.g. credit intermediation, maturity transformation, liquidity transformation and leverage) and *market activities* (notably SFTs, derivatives and reuse of collateral).

24. As for the FSB, it considers the NBFI sector as a *broad measure* of all non-bank financial entities, which comprises all financial institutions that are not central banks, institutions, or public financial institutions. This universe of entities differs from the group of entities under the ESRB activity-based monitoring as well as from the definition of shadow banking entities in the EBA guidelines. The FSB however includes in its monitoring a *narrow measure*[27] comprising a subset of entities of the NBFI sector that authorities have identified as being involved in credit intermediation activities that may pose bank-like financial stability risks (i.e. credit intermediation that involves maturity/liquidity transformation, leverage or imperfect credit risk transfer) and/or regulatory arbitrage.[28] This narrow measure comprises five economic functions or activities: collective investment vehicles with features that make them susceptible to runs; lending dependent on short-term funding; market intermediation dependent on short-term funding; facilitation of credit intermediation; and securitisation-based credit intermediation.[29]

25. In general, the FSB uses a conservative approach, i.e. the inclusion of non-bank financial entities or activities in the narrow measure is based on a conservative (inclusive) assessment of the risks such entities or activities may pose, especially during stressed events.[30] Existing policies or regulations that could mitigate shadow banking risks are not recognised. Classification is done on a pre-mitigant basis, i.e. classifying authorities are asked to assume a scenario in which policy measures have not been adopted and/or risk management tools have not been exercised.[31]

[27] NBFI entities that are prudentially consolidated into banking groups are excluded from the narrow measures.

[28] Global Monitoring Report on Non-Bank Financial Intermediation of 16 December 2020, page 3.

[29] Global Monitoring Report on Non-Bank Financial Intermediation of 19 January 2020, page 3.

[30] Ibid, page 6.

[31] Global Monitoring Report on Non-Bank Financial Intermediation of 19 January 2020, page 7.

26. The NBFI definition used in both FSB and ESRB[32] monitoring exercises has been adopted with a view to monitoring the size and interconnectedness of these entities from a macroprudential perspective. No limitations and/or constraints are directly imposed on these entities because of the monitoring exercise. The NBFI definition is designed to be as broad as possible to have a global overview of these different types of actors and their impact on the stability of the financial system.

27. However, the guidelines mandate to the CRR (as well as the new reporting mandate) is to be read in the context of microprudential supervision, i.e. with the objective of overseeing and limiting the possible distress of individual financial institutions. Under this microprudential perspective, a constraining risk management approach is followed with the EBA guidelines applying stricter exposure limits to entities defined as a shadow banking entities under Pillar 2.

28. As stated above, both the FSB and ESRB incorporate a broad range of entities in their monitoring exercises, but they do not consider existing policies that mitigate shadow banking risks. Article 394(4)(b) of the CRR notes however that, in defining the criteria for the identification of shadow banking entities, "*entities that are subject to solvency or liquidity requirements similar to those imposed by this Regulation and Directive 2013/36/EU should be entirely or partially excluded from the obligation to be reported referred to in paragraph 2 on shadow banking entities*". Consequently, even though the FSB and ESRB NBFI definitions have been taken into account in the development of these RTS, their approach is not fully compatible with the CRR's mandate, and sectorial regulations in the Union that address solvency and liquidity issues have thus been considered in order to identify shadow banking entities.

2.3 Identification of shadow banking entities for regulatory reporting

2.3.1 Approach followed

29. In developing this mandate, the EBA considered several aspects, in particular:

- Under the EBA guidelines, institutions are expected to specify their risk management approach, thereby setting specific individual and aggregate limits for shadow banking entities and thus limiting the risks that shadow banking entities pose to institutions when the latter enter into a relation with a shadow banking entity. Given the continued relevance of those guidelines in the Union's LE framework, the fact that the mandate in Article 395(2) of the CRR remains unaltered, and having due regard for the ultimate prudential objective of ensuring consistency in the implementation of the single rulebook on LE to institutions in the Union, these draft RTS rely to a great extent on the work undertaken for the EBA guidelines, also noting that institutions have already developed systems to meet the obligations under the current EBA guidelines.

[32] The ESRB's NBFI Monitor analyses the non-bank financial intermediation considering a range of systemic risks and vulnerabilities related to it. It is not focused on credit intermediation only, but takes into account also interconnectedness, liquidity and leverage (e.g. the Monitor includes ETFs or real estate funds which do not engage in credit intermediation).

- By its very nature, the LE regime acts as a backstop that, by limiting the amount of exposures that an institution can have towards a single client or a group of connected clients, addresses the possible damage that the failure of the client or a group of connected clients could cause to the institution's solvency position. Such risks are therefore considered in the LE framework itself by means of the limits of Article 395 of the CRR. Complementing this regime, the EBA guidelines require institutions to specify individual and aggregate limits to exposures to shadow banking entities under their individual risk management framework (Pillar 2). Hence the continued relevance of the EBA guidelines in developing these draft RTS.

- CRR2 does not substantially amend the reporting obligation under Article 394(2) of the CRR, but rather specifies it further by replacing the term "unregulated financial sector entities" with "shadow banking entities", a term used already in the EBA guidelines of 2015.

- In this regard, the EBA's intention has been to build as much as possible on the existing EBA guidelines. One remaining aspect considered was if there has been, after the publication of the EBA guidelines, changes in existing regulations (inter alia on investment firms, funds, etc.) that would make an update of the EBA guidelines necessary and would have an impact in the development of the RTS mandate.

30. The requirement to report the 10 largest exposures to shadow banking entities explicitly notes that these are entities that *carry out banking activities outside the regulated framework*. The shaping of these draft RTS does, therefore, rely to a great extent on both terms. The following two sections provide a rationale on how they were interpreted for the purpose of these draft RTS, thus setting out the criteria for the identification of shadow banking entities.

31. These draft RTS consider international developments and other work in the area of shadow banking. In particular, the work by the FSB and the ESRB, as set out in the section above, remains of utmost importance. In addition, these draft RTS consider regulatory developments in the EU. This was the case already at the time of publishing the EBA guidelines in 2015 and remains relevant for these draft RTS, too.

32. For the adoption of criteria to identify shadow banking entities, these draft RTS also look at other rules or regulatory frameworks that provide for solvency or liquidity requirements similar to those imposed by the CRR and the CRD (i.e. the term regulatory framework is used in a broad sense and not restricted to the CRR and CRD). Only those entities that carry out banking activities outside an adequate prudential framework should be treated as shadow banking entities. Thus, an institution should not have to consider exposures to counterparties that operate within the regulated framework for the respective reporting requirement under Article 394(2) of CRR2, since they are not considered as shadow banking entities.

2.3.2 What are "banking activities"?

33. While the CRR does not provide a definition of the term "banking activities", several publications do provide an approximation to it. The *Commission Communication on shadow banking* states that shadow banking is a system of credit intermediation that involves entities and activities outside the regular banking system.[33]

34. Although shadow banking entities are not EU-wide regulated like institutions, their operations encompass various forms of banking business, as they take in funds from the public, lend over long periods and take in deposits that are available immediately (i.e. maturity and/or liquidity transformation), take on the risk of the borrower not being able to repay, or use borrowed money, directly or indirectly, to buy other assets.

35. The definition of credit intermediation activities provided for in the EBA guidelines is deemed clear and still remains relevant so that it was also taken up in these draft RTS. Most importantly, the same understanding of what banking activities are will prevent diverging application across the LE framework that could undermine its consistent implementation in the Union. Therefore, banking activities are to be interpreted as any activity or service involving maturity transformation, liquidity transformation, leverage or credit risk transfer. In any case, the activities and services referred to in points 1 to 3, 6 to 8 and 10 of Annex I of the CRD are deemed as banking activities.

36. For the purposes of these draft RTS, entities that play a part in the financial system but do not perform banking services and activities as set out in these draft RTS shall not be considered as shadow banking entities. For example, Securitisation Special Purpose Vehicles, which may not be regarded as carrying out any of the activities listed under Annex I to the CRD,[34] shall not be identified as shadow banking entities.

2.3.3 The regulated framework

37. The CRR does not contain any reference to what the regulated framework comprises. As already stated, these draft RTS rely to a great extent on the EBA guidelines to ensure a consistent implementation, from a prudential point of view, of the LE framework in the Union. Therefore, the regulations that were considered at the time of developing the EBA guidelines in order to identify rules that provide for a robust set of prudential requirements or supervision in the Union and that decide whether an entity is an excluded undertaking or a shadow banking entity, are still relevant for the development of these draft RTS.

38. The following paragraphs consider the regulations that were assessed at the time of developing the EBA guidelines, and provide a rationale, from the point of view of the criteria in Article 394(4) of the CRR, while considering whether any important developments have occurred since.

[33] Communication from the Commission to the Council and the European Parliament: Shadow Banking – Addressing New Sources of Risk in the Financial Sector. COM/2013/0614 final of 4 September 2013 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0614:FIN:EN:PDF

[34] Q&A 2014_1530.

39. Equally, the draft RTS consider the situation of entities established in third countries and differentiates between institutions and other entities. Since the application of the amendments to the CRR from 28 June 2021, Article 391 of the CRR has required a Commission decision determining the equivalence of the prudential supervisory and regulatory requirements so that a third-country institution can be treated as an institution for the purposes of calculating the value of exposures in accordance with Part Four of the CRR. In the absence of any equivalence decision, an institution situated in a given third country would, as a result, be identified as a shadow banking entity.

40. Noting that this might result in an uneven treatment of institutions subject to prudential regulatory and supervisory requirements, the draft RTS provide for a formula under which such institutions that are authorised and supervised by a supervisory authority in a third country that applies banking regulation and supervision which is at least based on the Basel core principles for effective banking supervision should not be identified as shadow banking entities. Consequently, an institution in the Union that has exposures to a third-country institution needs to check whether this client meets those criteria (i.e. whether it is authorised and supervised by an authority that applies at least the Basel core principles) to decide whether its exposures need to be also reported separately as exposures to a shadow banking entity (if it is one of the 10 largest exposures of this kind) or only under the general requirement of paragraph 1 of Article 394 of the CRR (if the exposure is equal to or exceeds 10% of Tier 1 capital).

41. The application of the Basel core principles for effective banking supervision has been deemed a sufficiently prudential standard to support the identification of institutions in third countries as they represent a sound foundation for the regulation, supervision, governance and risk management of a country's banking sector. Furthermore, it is also recognised that the application of such principles by a supervisory authority appears adequately proportional for LE purposes. In general, the Basel core principles provide in this regard a sufficient basis for effective supervision, capturing effective risk-based supervision, and the need for early intervention and timely supervisory actions, as well as supervisory expectations of institutions, emphasising the importance of good corporate governance and risk management, and compliance with supervisory standards.

42. Notwithstanding the treatment of third-country institutions, in the case of other third-country entities the draft RTS fully rely on the requirements in the different legal acts listed in Annex I even if such entities are subject to some form of international standards. Exposures to entities in third countries subject to regulatory regimes which have been deemed equivalent in accordance with the equivalence provisions of the Union legal act that would apply to those entities, would not be treated as exposures to shadow banking entities, and should therefore be reported under the general requirement of paragraph 1 of Article 394 of the CRR. Conversely, the absence of an equivalence decision in accordance with the equivalence provisions of the Union legal act would result in those exposures being reported as exposures to shadow banking entities.

(i) The CRR and the CRD

43. Both the CRR and the CRD are the core legal instruments for credit institutions in the Union. As stated in the CRR, "*together, this Regulation and Directive 2013/36/EU should form the legal framework governing the access to the activity, the supervisory framework and the prudential rules for credit institutions. This Regulation should therefore be read together with that Directive*."[35] While the CRR contains the prudential requirements for institutions that relate to the functioning of banking and financial services markets, the CRD contains provisions on, inter alia, the access to the activity of institutions, governance and the supervisory framework. The CRR and CRD are indeed the legal framework for institutions[36] in the Union and thus the core of "the regulated framework".

44. Entities in a consolidated situation as defined in point (47) of Article 4(1) of the CRR should be interpreted as falling within the CRR, thus part of the regulated framework. It must be noted that Article 21a of the CRD governs the authorisation of (mixed) financial holding companies.[37] Such financial institutions also form part of the group of institutions that is supervised on a consolidated basis and thus are outside the shadow banking perimeter. The same holds true for other financial institutions and ancillary services undertakings included in consolidation.

45. Article 2(5) of the CRD excludes from its scope entities such as central banks and post office giro institutions and, in 20 Member States, various types of specified entities (see points (4) to (23) of Article 2(5)) which, due to the nature of their activities (e.g. national savings banks), were not subjected to EU legislation intended to promote a level playing field for the provision of banking services. Since such entities are explicitly exempted or optionally excluded from the application of an act of the regulated framework, it should be interpreted that they are not shadow banking entities. In a similar way, entities referred to in Article 9(2) of Directive 2013/36/EU are excluded entities and therefore not treated as shadow banking entities.

46. Article 119(5) of the CRR states that "*exposures to financial institutions authorised and supervised by the competent authorities and subject to prudential requirements comparable to those applied to institutions in terms of robustness shall be treated as exposures to institutions.*" The CRR defines a "financial institution" as an "*undertaking other than an institution and other than a pure industrial holding company, the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU, including a financial holding company, a mixed financial holding company, a payment institution as defined in point (4) of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council, and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined, respectively, in points (f) and (g) of Article*

[35] Recital 5 of the CRR.

[36] From 28 June 2021, "institution" means a credit institution authorised under Article 8 of Directive 2013/36/EU or an undertaking as referred to in Article 8a(3) thereof (see Article 62(3)(c) of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014. OJ L 314, 5.12.2019, p. 1–63).

[37] See also the ECB note "The ECB's role in approving (mixed) financial holding companies" (https://www.bankingsupervision.europa.eu/ecb/pub/pdf/The_ECBs_role_in_approving_mixed_financial_holding_companies.pdf)

212(1) of Directive 2009/138/EC"[38]*.* Exposures to financial institutions should not be treated as exposures to shadow banking entities as long as such financial institutions, pursuant to Article 119(5) of the CRR, are supervised and authorised and subject to comparable requirements of those applicable to institutions.

(ii) The regulation of investment firms

47. The European legislator has adopted specific prudential rules for investment firms, namely Regulation (EU) 2019/2033 on the prudential requirements of investment firms (IFR)[39] and Directive (EU) 2019/2034 on the prudential requirements and prudential supervision of investment firms (IFD)[40]. The relevant investment firms are authorised under, and subject to the requirements of, Directive 2014/65/EU (MiFID)[41] and Regulation (EU) No 600/2014 (MiFIR)[42].

48. This new prudential regime addresses investment firms which are not systemic by virtue of their size and interconnectedness with other financial and economic actors; whereas systemic investment firms remain subject to the prudential framework of the CRR and CRD and are required to apply for an authorisation as credit institutions. Furthermore, investment firms which carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of MiFID shall apply, or can be allowed to apply by a decision of a competent authority and if they meet the conditions of Article 5 of the IFD, the requirements of the CRR and CRD in order to avoid disrupting certain group organisational structures which are currently covered under the CRR/CRD prudential rules.

49. The IFR lays down rules on own funds whose definition and composition is aligned with the CRR while being specific to investment firms. All investment firms should, at all times, hold own funds to cover either the permanent minimum capital requirement, which equals the initial capital set in accordance with the IFD required for obtaining a MiFID authorisation, or the fixed overheads requirements, which equals a quarter of the past year's fixed costs. Furthermore, investment firms which are not small and non-interconnected have to meet the capital requirement based on the activities they perform or the services they provide (the so called K-factor requirements[43]).

50. All investment firms are under the obligation to monitor and control their concentration risk, including in respect of their clients. Furthermore, they must have in place internal procedures to monitor and manage their liquidity requirements such that they can function in an orderly manner

[38] Article 4(26) of Regulation (EU) No 575/2013.

[39] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1–63) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2033

[40] Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ L 314, 5.12.2019, p. 64–114) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L2034

[41] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).

[42] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84–148).

[43] K-factors are a series of risk parameters/indicators representing the specific risks investment firms face and the risks they pose to customers/markets.

over time. To that end, investment firms should hold a minimum of one third of their fixed overheads requirement in high-quality and liquid assets listed in the Commission Delegated Regulation (EU) 2015/61. However, the IFR allows for investment firms which are small and non-interconnected, or which do not perform MiFID activities (3) and (6), to consider receivables from trade debtors as well as fees or commissions receivable within 30 days as liquid assets. Furthermore, competent authorities may exempt small and non-interconnected investment firms from liquidity requirements.

51. In view of the prudential treatment of investment firms in the Union, some even subject to the CRR, others subject to a specific prudential framework with dedicated capital and liquidity rules, it is prudent to consider the rules applicable to investment firms as defined in Article 4(1) of Directive 2014/65/EU[44] as part of the regulated framework. Thus, investment firms established in the Union shall not be identified as shadow banking entities. Those established in third countries shall not be identified as shadow banking entities when that third country's regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to the one applied in the Union.[45]

(iii) Payment institutions and electronic money institutions

52. Point (4) of Article 4 of Directive (EU) 2015/2366 defines "payment institution" as a legal person that has been granted authorisation in accordance with Article 11 to provide and execute payment services throughout the Union.[46] Directive (EU) 2015/2366 governs the conditions for the authorisation of payment institutions in the Union. Amongst other things, payment institutions are required to maintain a level of initial capital as referred to in Article 7 of Directive (EU) 2015/2366, which refers to Article 26(1)(a) to (e) of the CRR, and as referred to in Article 8 of Directive (EU) 2015/2366 a level of own funds that should not be lower than their initial capital or a level of own funds as calculated according to the rules of Article 9 of the Directive. Member States or their respective competent authorities may decide, if the conditions laid down in Article 7 of Regulation (EU) No 575/2013 are fulfilled, not to apply the rules of Article 9 of Directive (EU) 2015/2366 where the payment institution is included in consolidated supervisions of the parent credit institution.

53. Payment institutions are subject to several controls and to robust supervision by competent authorities, as detailed in Directive (EU) 2015/2366, which imposes stringent requirements for their authorisation. For these reasons and because Directive (EU) 2015/2366 concerns different

[44] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065

[45] Recognised third-country investment firms are subject to an equivalence decision on prudential rules considered by the competent authorities to be at least as stringent as those laid down in these draft RTS or in Regulation (EU) 2019/2033 or in Directive (EU) 2019/2034, and shall not be reported as exposures to shadow banking entities provided that the entity meets the legal provisions set out in Article 4(1)(25) of Regulation (EU) No 575/2013.

[46] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35–127) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2366

categories of payment service providers (e.g. also credit institutions under the CRR) it appears prudent to consider this framework as part of the regulated framework.

54. The same rationale applies to electronic money institutions. Point (1) of Article 2 of Directive 2009/110/EC states that an electronic money institution is a legal person that has been granted authorisation under Title II to issue electronic money.[47] Title II governs the requirements for the taking up, pursuit and prudential supervision of the business of electronic money institutions. Like payment institutions, electronic money institutions are subject to both initial capital and own funds requirements. Electronic money institutions can also be included in the consolidated supervision of the parent credit institution. Thus, those entities established in the Union shall not be identified as shadow banking entities.

(iv) Insurance and reinsurance undertakings

55. Equally, these draft RTS consider the rules applicable in the Union to insurance undertakings as defined in point (5) of Article 4(1) of the CRR and to reinsurance undertakings as defined in point (6) of Article 4(1) of the CRR[48], and to institutions for occupational retirement provision (IORPs) as defined in point (1) of Article 6 of Directive (EU) 2016/2341 to be part of the regulated framework.[49]

56. Directive 2009/138/EC (also known as "Solvency II") governs the taking up and pursuit of the business of insurance and reinsurance. It provides for a robust and stringent system of supervision of undertakings providing insurance and reinsurance services in the EU. Among the conditions for their authorisation, set out in Article 18 of that Directive, insurance and reinsurance undertakings are required to hold eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement provided for in Article 129(1)(d) of that Directive, to show evidence that they will be in a position to hold eligible own funds to cover the Solvency Capital Requirement, as provided for in Article 100 of that Directive, going forward, and to show evidence that they will be in a position to hold eligible basic own funds to cover the Minimum Capital Requirement, as provided for in Article 128 of that Directive, going forward.

57. Solvency II establishes a whole system of robust and detailed solvency requirements (valuation of assets and liabilities, technical provisions, own funds, Solvency Capital Requirement, Minimum Capital Requirement and investment rules) supplemented by Commission delegated acts and other technical standards developed by the European Supervisory Authority (EIOPA). It must be highlighted that there are entities which are exempted from the application of the Directive due

[47] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7–17) https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0110

[48] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1–155) https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0138

[49] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37–85) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L2341

to their size and provided that they meet all the conditions of Article 4 of that Directive. Notwithstanding that, those undertakings are not prevented from applying for authorisation or continuing to be authorised under the Directive.

58. Moreover, Solvency II provides that insurance and reinsurance undertakings which are part of a group, the head of which is outside the Union, should be subject to equivalent and appropriate group supervisory arrangements. The Commission should adopt in this case a binding decision regarding the equivalence of third-country solvency regimes. In the case of third countries for which no decision has been made by the Commission, the assessment of equivalence should be made by the group supervisor after consulting the other relevant supervisory authorities.

59. Article 4 of Solvency II excludes from its scope of application insurance undertakings on the basis of their size. In that case, said undertakings should not be considered as shadow banking entities. Equally, insurance undertakings to which Solvency II ceases to apply pursuant to Article 4 of Solvency II should not be considered as shadow banking entities.

60. Furthermore, Directive (EU) 2016/2341 governs the activities and supervision of IORPs. Among many requirements, the Directive requires Member States to require of every IORP referred to in Article 15(1) which is registered or authorised in their territories an adequate available solvency margin in respect of its entire business at all times which is at least equal to the requirements in this Directive in order to ensure long-term sustainability of occupational retirement provision. It also provides for Member States to require those IORPs to invest in accordance with the "prudent person" rule[50].

61. IORPs are required to adopt strategies, processes and reporting procedures to identify, measure, monitor, manage and report to their administrative, management or supervisory body regularly the risks, at an individual and at an aggregated level, to which the IORPs and the pension schemes operated by them are or could be exposed, and their interdependencies.

62. In view of the prudential treatment, insurance undertakings in the Union are subject to a specific prudential framework. Thus, insurance undertakings established in the Union shall not be identified as shadow banking entities. Those established in third countries shall not be identified as shadow banking entities when that third country's regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to the one applied in the Union.

(v) Central counterparties

63. Central counterparties (CCPs) play a fundamental role in the clearing of over-the-counter (OTC) derivatives. To ensure their adequate capitalisation to deal with possible credit, counterparty, market, operational, legal and business risks and to facilitate their orderly winding up or

[50] The "prudent person" rule is a legal principle that is used to restrict the choices of the financial manager of an account to the types of investments that a person seeking reasonable income and preservation of capital might buy for his or her own portfolio.

restructuring of their operations if necessary, Regulation (EU) No 648/2012 (EMIR) requires the authorisation and supervision of CCPs in accordance with the requirements laid down therein.[51] Such authorisation is conditional on a minimum amount of initial capital as well as other requirements (organisational, business conduct and prudential requirements) which apply to the clearing of all financial instruments in which the CCPs deal.

64. CCPs are required to have a risk management framework to manage credit risks, liquidity risks, operational and other risks, e.g. the risks that they pose to other entities as a result of interdependencies. A CCP should have adequate procedures and mechanisms in place to deal with the default of a clearing member. To minimise the contagion risk of such a default, the CCP should have in place stringent participation requirements, collect appropriate initial margins and maintain a default fund and other financial resources to cover potential losses. To ensure that it benefits from sufficient resources on an ongoing basis, the CCP should establish a minimum amount below which the size of the default fund should in general not fall.[52]

65. In view of the stringent requirements applicable to CCPs in the Union, which aim to limit the risks to other entities in case of their failure, the EU framework that governs CCPs should be considered as part of the regulated framework.

66. Article 1, paragraph 4 of EMIR states that the Regulation will not apply to a number of entities, namely (a) the members of the ESCB and other Member States' bodies performing similar functions and other Union public bodies charged with or intervening in the management of the public debt and the BIS. Furthermore, paragraph 5 notes that, with the exception of the reporting obligation under Article 9, EMIR shall not apply to (a) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC; (b) public sector entities within the meaning of point (18) of Article 4 of Directive 2006/48/EC where they are owned by central governments and have explicit guarantee arrangements provided by central governments; and (c) the European Financial Stability Facility and the European Stability Mechanism.

67. In view of the nature of those entities and the limited scope for risks that they could transmit to institutions, those entities should not be regarded as shadow banking entities. When established in a third country and performing banking services and/or activities, CCPs however should be identified as shadow banking entities unless they only perform clearing activities or the third country's regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to the one applied in the Union.

(vi) The rules for the resolution of institutions in the Union

[51] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1–59) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0648

[52] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012), recital 65.

68. Directive 2014/59/EU of 15 May 2014 (the Bank Recovery and Resolution Directive, BRRD) lays down rules and procedures relating to the recovery and resolution of institutions established in the Union, financial institutions established in the Union, financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the Union, parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies and branches of institutions that are established outside the Union in accordance with the specific conditions laid down in this Directive. [53]

69. The regime established in the BRRD provides authorities with a set of tools to intervene early and quickly in an unsound or failing institution so as to ensure the continuity of its critical financial and economic functions, while minimising the impact of its failure on the economy and the financial system. Authorities should be able, amongst other things, to maintain uninterrupted access to deposits and payment transactions, sell viable portions of the institution where appropriate, and apportion losses in a manner that is fair and predictable. These are objectives of a public interest nature that should help avoid destabilising financial markets while minimising the costs for taxpayers.

70. The BRRD includes a set of resolution tools available to resolution authorities to resolve a bank. Those tools are a) the sale of the business or shares of the institution under resolution, b) the setting up of a bridge institution, c) the separation of the performing assets from the impaired or under-performing assets of the failing institution, and d) the bail-in of the shareholders and creditors of the failing institution.[54] The relevant entities for carrying out such resolution tools are resolution authorities, bridge institutions and asset management vehicles.

71. A bridge institution is a legal person wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority. A bridge institution must be created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to maintaining access to critical functions and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1).[55] Normally, a bridge institution will operate under a new banking licence.

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[53] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190–348) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059

[54] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014), Article 37.

[55] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and

72. An asset management vehicle is defined in the BRRD as a legal person that is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority, and that is created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or from a bridge institution.[56] Asset management vehicles manage the assets transferred to them with a view to maximising their value through eventual sale or orderly wind-down.[57] An asset management vehicle is not established to carry out business, but to support the resolution of an institution and remain under public control, e.g. resolution authorities define their risk profile and investment strategy.

73. In view of all the above, and considering that such entities are established for the purposes of the resolution of institutions pursuant to the BRRD, i.e. with the objective of public policy relating to financial stability, it appears necessary to consider the rules that define and govern the setting up and business of entities that pursue objectives linked to the resolution of institutions pursuant to Directive 2014/59/EU as falling under the regulated framework for the purposes of these RTS.

74. Equally, the rules that govern the setting up and business of entities that pursue the same objectives of and carry out functions similar to those of asset management vehicles under Directive 2014/59/EU that were established prior to 1 January 2016 should also be regarded as being comprised under the regulated framework.

(vii) The regulation of funds in the Union

75. The ESRB NBFI Monitor has identified various linkages of the fund investment sector to the financial system through different routes.[58] There are some prudential frameworks in the EU similar to that of credit institutions and investment firms that apply to some types of funds. Two main sets of regulation for funds co-exist in the EU: the Undertakings for Collective Investments in

Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014), Article 40(2).

[56] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014), Article 42(2).

[57] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014), Article 42(3).

[58] See paragraph 15 of this background section.

Transferable Securities (UCITS) Directive [59] and the Alternative Investment Fund Managers Directive (AIFMD)[60].

76. The UCITS Directive prescribes rules under which UCITS and their managers operate. These include requirements on the asset manager (initial capital, own funds and internal control requirements) and the managed funds (e.g. limits to leverage and concentration). Therefore, such funds do not pose the same level of risk to institutions in terms of credit and step-in/bail-out risk (e.g. due to reputational, franchise and other risks) as unregulated funds and thus should not be regarded as shadow banking entities. Equally, entities established in non-EU countries and authorised under laws and regulations that subject them to supervision considered to be equivalent to that of the UCITS Directive should be subject to the same treatment.

77. AIFs are regulated via the requirements imposed on their asset managers under the AIFMD, e.g. initial capital, own funds and internal control requirements. However, some risks arising directly from the funds themselves are not mitigated satisfactorily from a prudential point of view. Leverage limitation like that applicable to UCITS does not apply to AIFs, although they shall put in place risk management policies and are subject to stress testing and reporting obligations. Given this, only AIFs with limited leverage should not be identified as shadow banking entities. Article 111(1) of Delegated Regulation 231/2013[61] considers leverage to be employed on a substantial basis when the AIF exposure exceeds 300% of its net asset value.

78. Some AIFs are entitled to grant loans, thus carrying out a core banking activity outside the regulated banking system, i.e. the CRR/CRD or comparable prudential regulation. These funds act as substitutes for bank lending and could generate credit intermediation risks, i.e. runs and/or liquidity risk, without having a banking (or comparable) authorisation, and are not subject to harmonised rules on concentration risks, credit assessment, provisioning, etc. Given this, only AIFs which are not entitled to grant loans or purchase third parties' lending exposures onto their balance sheet should not be identified as shadow banking entities.

79. As a consequence, only exposures to AIFs that do not employ leverage on a substantial basis according to Article 111(1) of Delegated Regulation 231/2013 and that do not grant loans or purchase third parties' lending exposures onto their balance sheet should be excluded from being identified as shadow banking entities.

[59] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32–96) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0065

[60] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061&qid=1615386509767

[61] Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision: Text with EEA relevance (OJ L 83, 22.3.2013, p. 1–95) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0231&from=EN

80. However, there are special rules in the Union for some types of AIFs, namely European long-term investment funds (ELTIFs),[62] qualifying social entrepreneurship funds[63] and qualifying venture capital funds.[64]

81. ELTIFs are AIFs or compartments of EU AIFs marketed in the EU as ELTIFs whose objective is to facilitate the raising and channelling of capital towards European long-term investments in the real economy, in line with the Union objective of smart, sustainable and inclusive growth.

82. Qualifying social entrepreneurship funds (EuSEF) are a type of AIF that provide funding to social undertakings that act as drivers of social change by offering innovative solutions to social problems, for example by helping to tackle the social consequences of the financial crisis, and by making a valuable contribution to meeting the objectives of the Europe 2020 Strategy.[65]

83. Qualifying venture capital funds (EuVECA) are a type of AIF with very specific objectives, e.g. to finance undertakings that are generally very small, that are in the initial stages of their corporate existence and that display a strong potential for growth and expansion. They also provide them with valuable expertise and knowledge, business contacts, brand equity and strategic advice, thus stimulating economic growth, contributing to the creation of jobs and capital mobilisation, fostering the establishment and expansion of innovative undertakings, increasing their investment in research and development and fostering entrepreneurship, innovation and competitiveness in line with the objectives of the Europe 2020 Strategy.[66]

84. In view of the objectives and the requirements applicable to these funds as well as to the managers of EuSEFs and EuVECAs, and in derogation of the treatment of some AIFs as shadow banking entities, ELTIFs, EuSEFs as defined under point (b) of Article 3(1) of Regulation (EU) No 346/2013, and EuVECAs as defined under point (b) of Article 3 of Regulation (EU) No 345/2013, should not be identified as shadow banking entities.

85. In the case of money market funds (MMFs), the EU legislator adopted in 2017 the Money Market Funds Regulation (MMFR).[67] It applies to MMFs that are required to be authorised as UCITS under the UCITS Directive or as AIFs under the AIFMD.[68] Accordingly, MMFs under the MMFR are, in

[62] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98–121) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0760

[63] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18–38) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32013R0346

[64] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1–17) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0345

[65] Recital 1 of Regulation (EU) No 346/2013.

[66] Recital 1 of Regulation (EU) No 345/2013.

[67] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8–45).

[68] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061&qid=1615386509767

principle, either UCITS or AIFs, and are subject, in addition to the MMFR, to the relevant rules under the UCITS Directive and the AIFMD. However, the MMFR requirements could override the obligations laid down in the UCITS Directive. It is the case for Article 8(2) of the MMFR, where MMFs authorised as UCITS shall not be subject to the obligations concerning investment policies of the UCITS Directive, unless explicitly specified otherwise in the MMFR.

86. The scope of the MMFR is CIUs authorised as UCITS or AIFs, which invest in short-term assets and have distinct or cumulative objectives offering returns in line with money market rates or preserving the value of the investment.[69] Under the MMFR, MMFs are subject to specific authorisation procedures by competent authorities, and can invest only in certain activities (money market instruments, bank deposits, eligible securitisations and ABCPs, as well as (reverse) repurchase agreements, derivatives and units or shares of other MMFs under specific conditions) aimed at ensuring the low riskiness and high liquidity of such assets. The MMFR lays down specific regulatory requirements for MMFs, including in terms of liquidity, concentration and diversification, as well as risk management requirements, and introduces a set of rules of maximum harmonisation that, in certain cases, are more stringent than those applied to UCITS or AIFs.

87. These requirements make the framework under which MMFs operate more robust and safer. However, on 26 March 2021 the European Securities and Markets Authority, ESMA, published a consultation document[70] in response to the mandate of Article 46 of the MMFR which requires that "*by 21 July 2022, the Commission shall review the adequacy of this Regulation from a prudential and economic point of view, following consultations with ESMA"*.

88. The consultation document notes that "*the COVID-19 crisis has been challenging for MMFs. A number of EU MMFs faced significant liquidity issues during the period of acute stress in March 2020 with large redemptions from investors on the liability side, and a severe deterioration of liquidity of money market instruments on the asset side.*[71]"

89. At international and EU level, various workstreams have started to assess the situation faced by MMFs during the March 2020 crisis, and which policy options should be considered in order to address the issues which have been identified. This is the case in particular at FSB and IOSCO level. The objectives of that work include in particular: i) to enhance MMF resilience and ensure that, regardless of the market conditions, they can operate without impacting financial stability; and ii) to avoid interventions of central banks.

90. The changes that the consultation document proposes are threefold: a) reforms targeting the liability side of MMFs (e.g. related to swing pricing, redemptions in kind, holdbacks, minimum

[69] The main objectives of the MMFR are to harmonise the rules applicable to MMFs established, managed or marketed in the EU, to enhance the protection of investors, and to improve the resilience of MMFs in situations where redemption requests reach such a level that they threaten both the ability of MMFs to honour them and the supply of cash on the money market.

[70] Consultation Report, EU Money Market Fund Regulation – legislative review, 26 March 2021 | ESMA34-49-309 https://www.esma.europa.eu/sites/default/files/library/esma34-49-309_cp_mmf_reform.pdf

[71] ESMA, Consultation Report, p. 4.

balance at risk or removal of stable net asset value); b) reforms targeting the asset side of MMFs (e.g. related to restrictions on asset holdings, increasing liquidity buffers and/or making them usable/countercyclical, decoupling regulatory thresholds from suspensions/gates); and c) reforms that are external to MMFs themselves (e.g. related to sponsor support, enhancing liquidity of underlying instruments in which MMFs invest, a liquidity exchange bank and enhanced MMF reporting to and stress testing by authorities).

91. ESMA notes that "*the main objective of the review of the MMFR should be to make MMFs more resilient to stressed market conditions without the need of (implicit) central bank support and to reduce their contribution to the building up of risk in the financial system. This objective is not conflicting with the preservation of the key intermediation role that MMFs perform in the short-term segment of money markets. On the contrary, tackling the vulnerabilities emerged in the Covid-19 turmoil would make more clear and transparent to investors and issuers of the financial instruments purchased by the MMFs the allocation of costs and risks that is implied by the intermediation function offered by MMFs. In addition, this will allow to preserve the current economic functions played by MMFs, in particular cash management, and short-term funding to issuers.*[72]"

92. In view of the ongoing review of the MMFR to tackle the vulnerabilities identified with MMFs, it is considered appropriate to follow the EBA guidelines and consider MMFs as shadow banking entities until such reforms are in place before reassessing the current policy stance.

Additional aspects

93. In order to facilitate the reading of the provisions of these RTS, a decision tree explaining the different cases and options is provided in the accompanying documents section, Annex I. Within the same Annex, a decision tree explaining the different cases for institutions, insurance firms, investment firms, CCPs, MMFs, AIFs and public entities is also provided.

94. The EBA will reflect further on an update of the existing EBA guidelines (EBA/GL/2015/20) to ensure consistency with the final RTS once adopted and where needed.

[72] ESMA, Consultation Report, p. 20.

3. Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

[…]

supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for specifying the criteria for the identification of shadow banking entities referred to in Article 394(2) of Regulation (EU) No 575/2013

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012[73], and in particular Article 394(4) thereof,

Whereas:

(1) According to Article 394(4) of Regulation (EU) No 575/2013, when specifying the criteria for the identification of shadow banking entities, undertakings that are subject to solvency or liquidity requirements similar to those imposed by that Regulation and Directive 2013/36/EU should be excluded from the obligation to be reported referred to in Article 394(2) of that Regulation. This Regulation determines that undertakings authorised and supervised in accordance with the Union legal acts of Annex I ("regulated framework") should not be identified as shadow banking entities. Against this background, financial institutions treated as institutions for the purposes of the calculation of risk-weighted assets under the standardised approach in accordance with Article 119(5) of Regulation (EU) No 575/2013 should not be considered to be shadow banking entities.

(2) There is a need to ensure that, in addition to the undertakings authorised and supervised in accordance with the regulated framework consisting of the Union legal acts referred to in this Regulation, undertakings explicitly exempted or excluded from the legal acts listed in points 1, 2, 7 and 10 of Annex I, central banks and post office giro institutions should not be identified as shadow banking entities for the provision of services or performance of activities, for which they have been exempted or optionally excluded. Entities that are part of a non-financial group, whose principal activity is to carry out credit intermediation activities for entities within the group, should also not be identified as shadow banking entities.

(3) When an undertaking offering banking services or performing banking activities is not authorised and supervised in accordance with the regulated framework, or it is not exempted or optionally excluded from the regulated framework, this undertaking

[73] OJ L 176 27.6.2013, p. 1

should be identified as a shadow banking entity. Undertakings that do not offer any banking services and do not perform any banking activities, such as Securitisation Special Purpose Entities (SSPEs), should not be considered to be shadow banking entities.

(4) According to Article 394(4) of Regulation (EU) No 575/2013, when specifying the criteria for the identification of shadow banking entities, international developments and internationally agreed standards on shadow banking should be taken into account. Against this background, it should be ensured that collective investment undertakings authorised in accordance with Directive 2011/61/EU (Alternative Investment Funds Directive) are regarded as shadow banking entities except where they do not employ substantial leverage or where they do not originate loans in the ordinary course of their business or where they do not purchase third-party lending exposures for their own account. Moreover, exposures to money market funds (MMFs) should be seen as exposures to shadow banking entities, considering that the risks associated with MMFs, particularly in stressed market conditions, have not been fully addressed by the existing prudential requirements in the Union. This has been observed during the COVID-19 crisis, where MMFs faced severe liquidity issues.

(5) There is a need to ensure that, in addition to the services and activities referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU, other services and activities, whether referred to in the regulated framework or not, should be regarded as banking services and activities to the extent they involve maturity transformation, liquidity transformation, leverage or credit risk transfer.

(6) Since the Basel Core Principles for effective banking supervision represent internationally agreed principles and a sound foundation for the regulation, supervision, governance and risk management of a country's banking sector, this Regulation recognises that the exposures to institutions in third countries should not be reported as exposures to shadow banking entities in those cases where no equivalence decision pursuant to Article 391 of Regulation (EU) No 575/2013 was taken provided that the institution verifies that the third-country institution is authorised and supervised by a supervisory authority that applies at least those core principles.

(7) Undertakings neither authorised nor supervised on an individual basis in accordance with the Union regulated framework, with the Basel Core Principles, should, nevertheless, not be considered as shadow banking entities, if these undertakings are subsidiaries of a parent undertaking authorised and supervised in accordance with the Union regulated framework or the Basel Core Principles, and provided that these subsidiaries are included in the prudential consolidation and supervision on a consolidated basis of that parent undertaking.

(8) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Supervisory Authority (European Banking Authority) (EBA).

(9) EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in

accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council.[74]

HAS ADOPTED THIS REGULATION:

Article 1

Criteria for identifying entities

1. Any undertaking that is authorised and supervised in accordance with any of the legal acts referred to in Annex I of this Regulation including as laid down in the national law of the Member States, including financial institution towards which exposures are treated in accordance with Article 119(5) of Regulation (EU) No 575/2013, shall not be identified as a shadow banking entity for the purposes of Article 394(2) of Regulation (EU) No 575/2013.

2. Any undertaking that is exempted or optionally excluded from any of Regulation (EU) No 575/2013, Directive 2013/36/EU[75], Regulation (EU) No 648/2012[76] or Directive 2009/138/EC[77], including as laid down in the national law of the Member States, or any undertakings that are part of a non-financial group whose principal activity is to carry out credit intermediation activities for its parent undertaking or its subsidiaries or other subsidiaries of its parent undertaking, shall not be identified as a shadow banking entity for the purposes of Article 394(2) of Regulation (EU) No 575/2013.

3. Any undertaking established in the Union or in a third country that offers banking services or performs banking activities as set out in Article 2 and that is not excluded according to paragraphs 1 or 2 of this Article or according to Article 3 shall be identified as a shadow banking entity for the purposes of Article 394(2) of Regulation (EU) No 575/2013.

4. As an exception to paragraph 3, an undertaking shall not be identified as a shadow banking entity where it is included in the supervision on a consolidated basis of an institution as defined in Article 3 (1), point 3 of Directive 2013/36/EU.

5. Undertakings for the Collective Investment in Transferable Securities as defined in Directive 2009/65/EC shall be regarded as shadow banking entities where they are money market funds falling under Regulation (EU) No 2017/1131.

[74] 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, 15.12.2020, p. 12).

[75] See Articles 2(5) and 9(2) of Directive 2013/36/EU.

[76] See Article 1(4) and 1(5) of Regulation (EU) No 648/2012.

[77] See Article 4 of Directive 2009/138/EC.

6. Alternative investment funds as defined in Directive 2011/61/EU shall be regarded as shadow banking entities, where any of the following applies:

   (a) the alternative investment fund is a money market fund falling under Regulation (EU) 2017/1131; or

   (b) the alternative investment fund employs leverage on a substantial basis as set out in Article 111(1) of Commission Delegated Regulation (EU) 231/2013; or

   (c) the alternative investment fund is not prohibited from originating loans in the ordinary course of its business or from purchasing third-party lending exposures for its own account on the basis of its rules or instruments of incorporation.

Article 2

Banking services and activities

1. For the purpose of this Regulation, the following shall be regarded as banking services and activities:

   (a) the services and activities referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU; and

   (b) any other service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer.

2. By way of derogation from paragraph 1, for the purpose of this Regulation, activities and services consisting of clearing as defined in Article 2 paragraph 3 of Regulation (EU) No 648/2012 shall not be regarded as banking services and activities.

Article 3

Criteria for excluding entities that offer banking services or perform banking activities established in third countries from being deemed as shadow banking entities

1. A third-country institution shall not be identified as a shadow banking entity where the institution has verified that that third-country institution has been authorised and is being 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.

2. Other undertakings established in a third country shall not be identified as shadow banking entities where the third-country's regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent

to the one applied in the Union for such undertakings in accordance with the equivalence provisions of the relevant Union legal act referred to in Annex I.

3. Any undertaking established in a third country shall not be identified as shadow banking entity where it is included in the supervision on a consolidated basis of an institution that has been authorised and is being 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.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President
[Position]

ANNEX I

List of Union Acts under the Regulated Framework

1. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. OJ L 176, 27.6.2013, p. 1
2. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. OJ L 176, 27.6.2013, p. 338–436
3. Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014. OJ L 314, 5.12.2019, p. 1–63
4. Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU. OJ L 314, 5.12.2019, p. 64–114
5. Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. OJ L 173, 12.6.2014, p. 84–148
6. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. OJ L 173, 12.6.2014, p. 349–496
7. Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. OJ L 201, 27.7.2012, p. 1–59
8. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. OJ L 337, 23.12.2015, p. 35–127
9. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC. OJ L 267, 10.10.2009, p. 7–17
10. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). OJ L 335, 17.12.2009, p. 1–155
11. Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs). OJ L 354, 23.12.2016, p. 37–85
12. Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and

investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. OJ L 173, 12.6.2014, p. 190–348

13. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). OJ L 302, 17.11.2009, p. 32–96
14. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. OJ L 174, 1.7.2011, p. 1–73
15. Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds. OJ L 123, 19.5.2015, p. 98–121
16. Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds. OJ L 115, 25.4.2013, p. 18–38
17. Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds. OJ L 115, 25.4.2013, p. 1–17

4. Accompanying documents

4.1 Draft cost-benefit analysis / impact assessment

1. Regulation (EU) 2019/876 amending Regulation (EU) No 575/2013 (the CRR) has added paragraph 4 to Article 394 mandating the EBA to develop draft regulatory technical standards (RTS) to specify the criteria for the identification of shadow banking entities.
2. The present analysis provides an overview of the findings as regards problem identification, possible options to remove problems and their potential impacts. Given the nature and the scope of the draft RTS, and pursuant to the principle of "proportionate analysis", this analysis is high-level and qualitative in nature. Only a quantitative analysis is presented with the aim of providing information about the materiality of the phenomena here discussed.
3. The quantitative analysis relies on information available through the Supervisory Reporting Templates (i.e. COREP) and, in particular, it leverages only on data provided in the EBA sample. This way, it is not necessary to collect information from National Competent Authorities (NCAs) or directly from the institutions[78].

A. Problem identification and baseline scenario

4. Notwithstanding its recognised complementary role, the shadow banking system is considered to be systematically affected by some risks like heavy reliance on short-term wholesale funding and lack of transparency. For this reason, an excessive level of exposures of the traditional institutions toward this sector could jeopardise the stability of the financial system.

5. The large exposure (LE) regime already set limits to the maximum possible loss that a credit institution could face in the event of the failure of a client or group of connected clients. However, it is required to pay additional attention to the shadow banking sector. Indeed, the CRR already subjected institutions to a specific reporting obligation in relation to their 10 largest exposures to unregulated financial entities and the EBA guidelines on limits on exposures to shadow banking entities under paragraph 2 of Article 395 of Regulation (EU) No 575/2013 require the setting of specific (i.e. at counterparty level) and aggregate limits to the exposures toward these entities.

6. With the adoption of the Regulation (EU) No 2019/876 the reporting requirement has been modified by referring to the 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis.

[78] Making ad hoc data collections is a costly and time-consuming process. For this reason it is preferable, whenever it is possible, to exploit data that are readily available from statistical agencies and databases.

7. The CRR does not provide a comprehensive definition of the shadow banking sector so that there is material risk that different interpretations could be adopted across institutions when reporting under the obligation of Article 394(2) of the CRR.

B. Policy objectives

8. Providing a common framework for the identification of shadow banking entities should bring a harmonised reporting under Article 394(2) of the CRR and in turn it would enable competent authorities to exploit these data for monitoring the shadow banking sector. Moreover, this should help supervisors and institutions alike to better limit and monitor exposure toward this sector.

Quantitative analysis

9. The following chart is based on COREP data. In particular, pursuant to Article 394(2) of the CRR, institutions are required to report their 10 largest exposures to unregulated financial entities. The sample analysed consists of about 130 institutions (excluding subsidiaries). The data are at the highest level of consolidation.

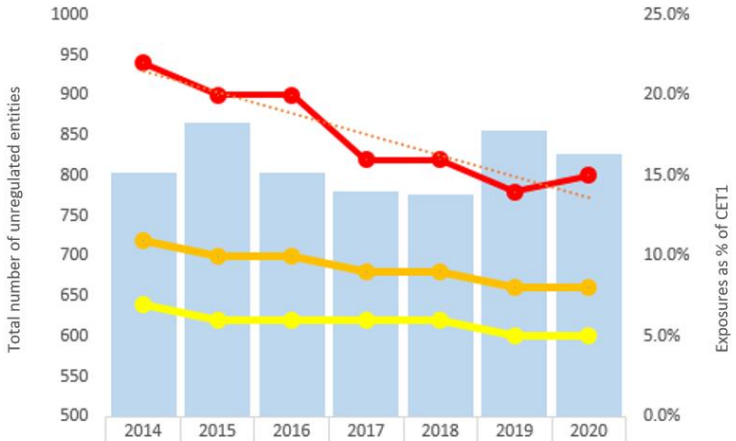
10. The chart shows the total number of counterparties reported (at the end of each year) as being among the 10 largest exposures to unregulated financial entities[79]. The number of reported entities has been quite stable over the observed period (816 on average) with relatively low variation in the different years.

11. The chart also shows some percentiles of the distribution of the ratio between the exposure value[80] of the reporting institution toward the reported entity and the CET1 capital of the reporting institutions. A decreasing trend can be observed: at the end of 2014, one over twenty (5%) of reported non-regulated financial entities had an exposure value higher than 11% of the CET1 capital of the reporting institution. At the end of 2020, the same quantile of the distribution of the ratio between the exposure and the CET1 capital was 8%. A similar trend can be observed also for the 90th and 99th percentiles suggesting a general shift of the distribution.

[79] Some counterparties may be reported multiple times.

[80] After the CRM substitution effect but before the application of the exemptions as per Articles 400 and 493 of the CRR.

Number of reported non-regulated financial entities and percentiles of the distribution of the ratio between exposure of the reported entity and CET1 capital of the reporting institution



	2014	2015	2016	2017	2018	2019	2020
No. of counterparties	803	866	803	780	777	857	827
99°pctle	22.0%	20.0%	20.0%	16.0%	16.0%	14.0%	15.0%
95°pctle	11.0%	10.0%	10.0%	9.0%	9.0%	8.0%	8.0%
90°pctle	7.0%	6.0%	6.0%	6.0%	6.0%	5.0%	5.0%

Source: COREP

C. Options considered, cost-benefit analysis and preferred options

Scope of the RTS

12. The common framework presented in these draft RTS largely relies on the EBA guidelines. Under the EBA guidelines, institutions are expected to set limits to the exposures toward shadow banking entities. This reduces the cost of compliance in as much as institutions have already developed systems to meet the obligations under the current EBA guidelines and it appears also coherent with the fact that Regulation (EU) No 2019/876 did not amend substantially the reporting obligation under Article 394(2) of the CRR.

13. However, the draft RTS provide a rationale for viewing entities subject to different regulatory frameworks (e.g. investment firms, payment institutions, funds, etc.) as being entitled to be considered to be regulated.

Scope of application

14. As regard the typical "zero" option, i.e. doing nothing, it should be taken in consideration whenever the costs of the proposed regulation are deemed higher than the benefit. In this specific case, the draft RTS do not entail additional costs in that they mainly confirm the existing EBA guidelines. However, the draft RTS provide a relevant clarification about the possibility to extend the classification of regulated entities outside the perimeter represented by the CRD/CRR.

15. The draft RTS browse through the regulatory frameworks that are relevant for different entities (namely investment firms, payment institutions and electronic money institutions, insurance and

reinsurance undertakings, central counterparties, resolution institutions) and provide a rationale for considering them to be similar to the rules in the CRR and CRD.

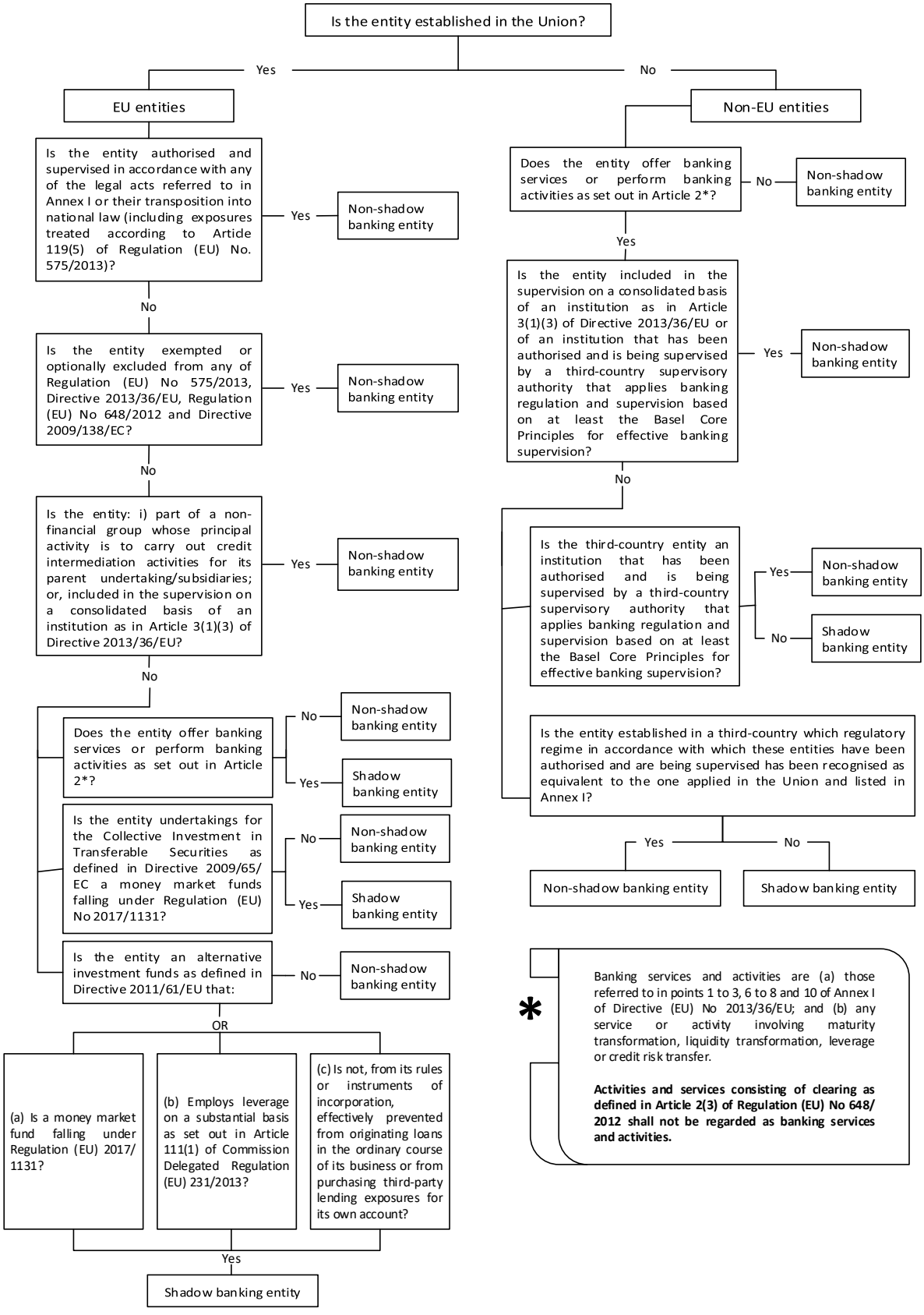
Preferred option

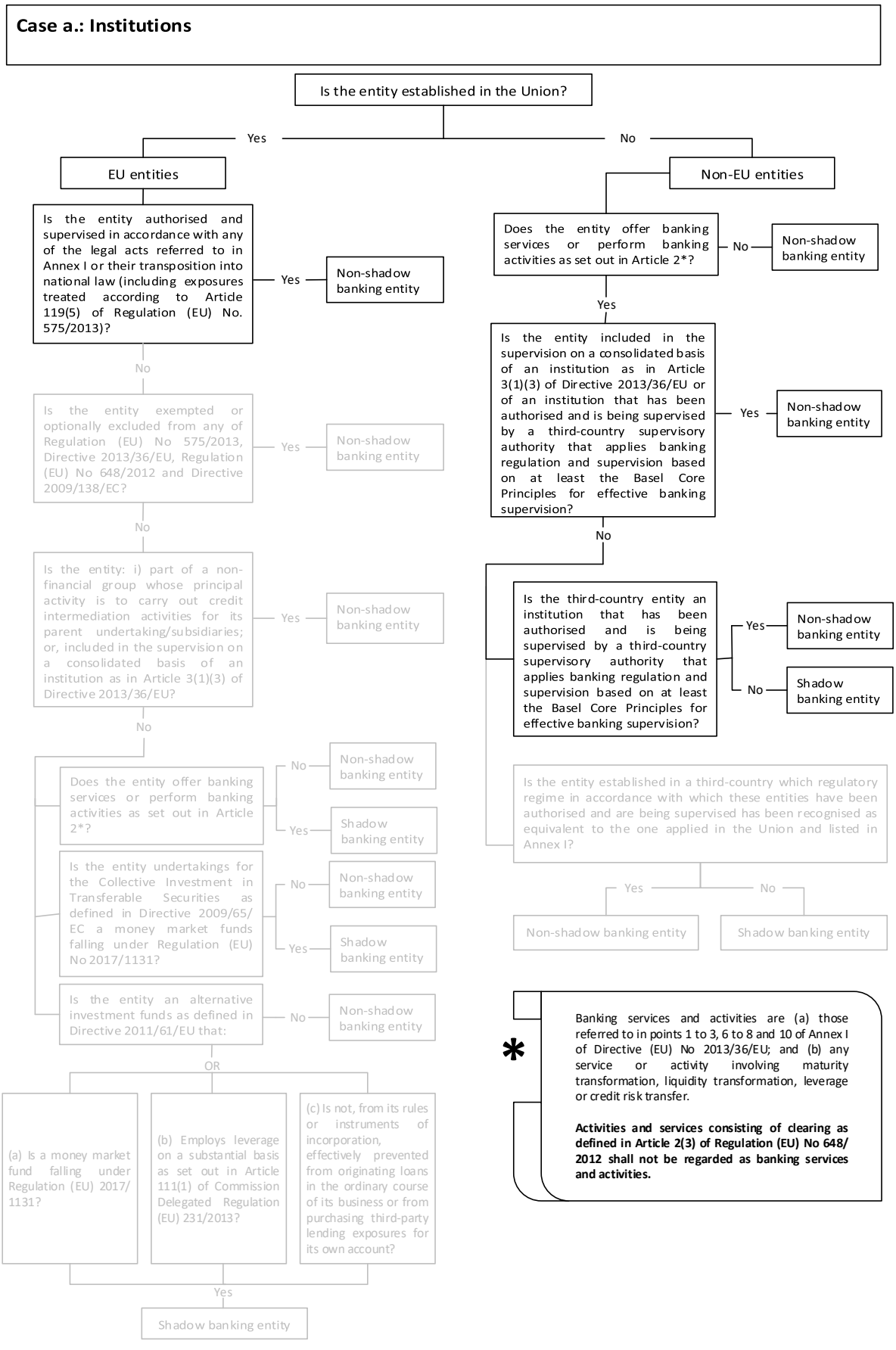
16. The draft RTS clarify that it is possible to avoid classifying as shadow banking entities counterparties different from credit institutions but carrying out banking activities (such maturity and liquidity transformation, credit risk transfer and similar activities) to the extent that they are subject to a framework considered similar to the CRD/CRR. The draft RTS specify which regulations can be so considered.

17. Considering the possible risks stemming from exposures toward the shadow banking sector, the importance for authorities to have information about that sector and the need to ensure a harmonised level of reporting across EU institutions, it is deemed that the benefits of the draft RTS compensate the costs.

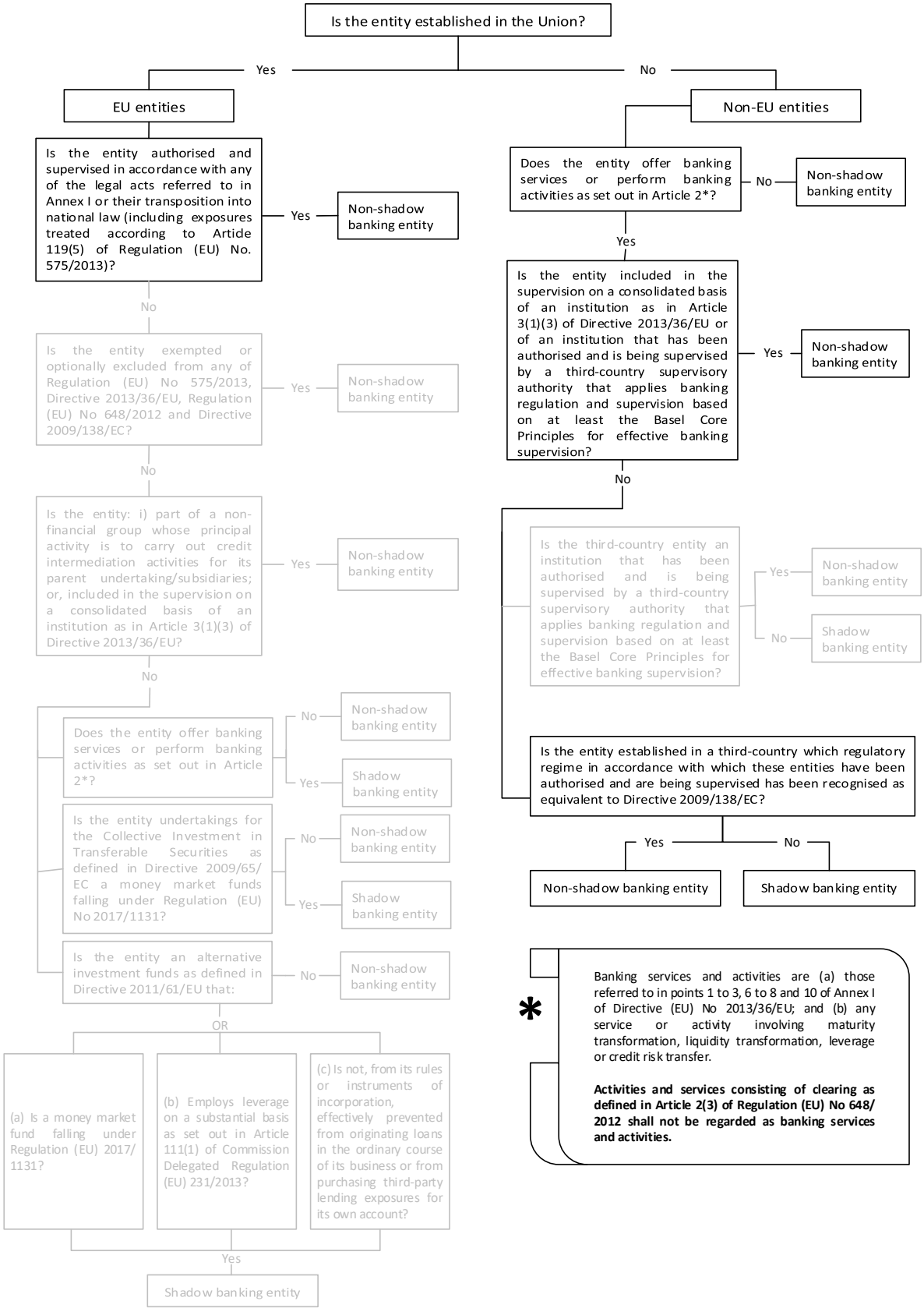
4.2 Annex I

IDENTIFICATION OF SHADOW BANKING ENTITIES TO BE REPORTED ACCORDING TO ARTICLE 394(2) OF REGULATION (EU) No. 575/2013

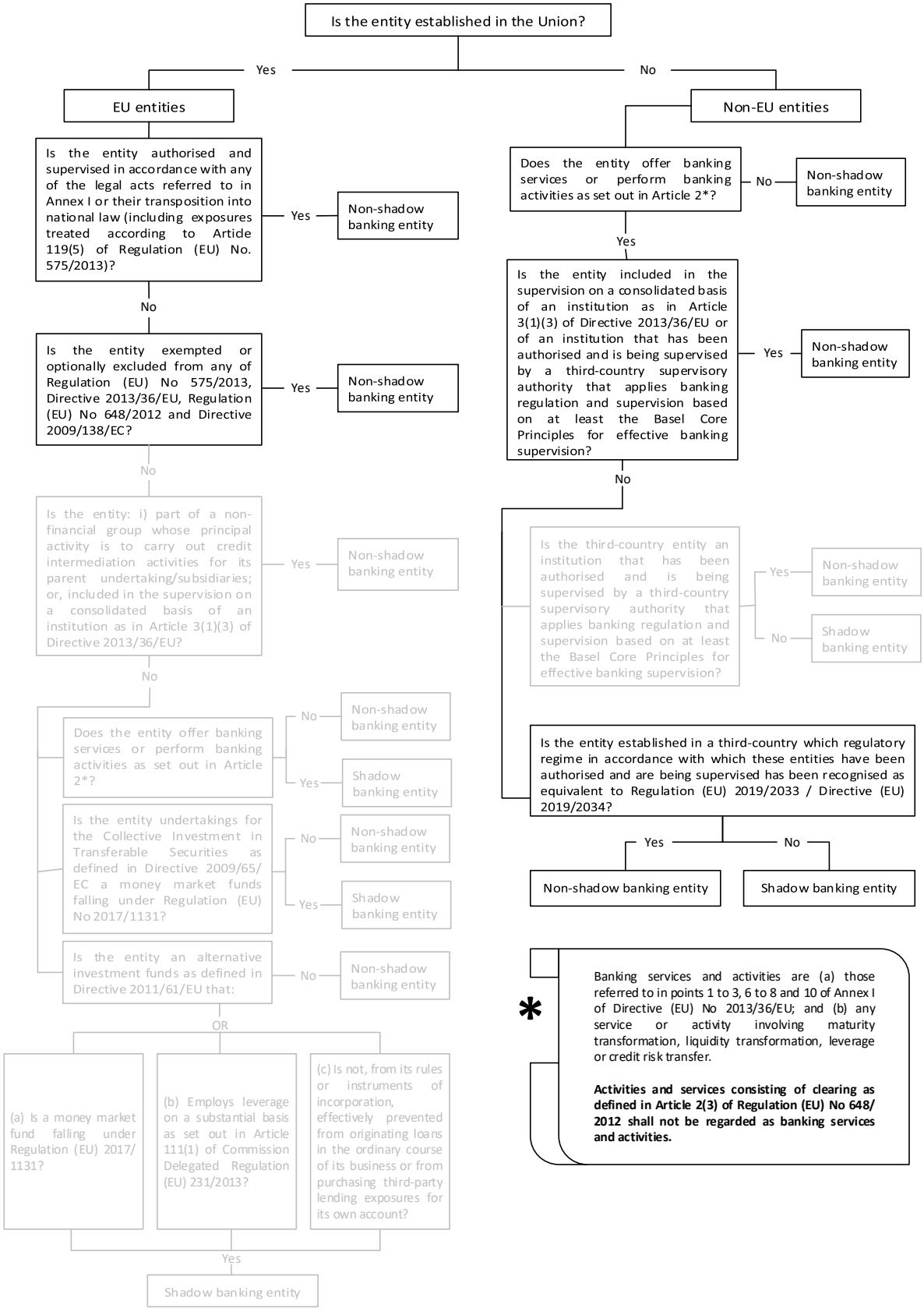



Case a.: Institutions
Is the entity established in the Union?
Yes
No
EU entities
Non-EU entities
Is the entity authorised and supervised in accordance with any of the legal acts referred to in Annex I or their transposition into national law (including exposures treated according to Article 119(5) of Regulation (EU) No. 575/2013)?
Yes
Non-shadow banking entity
No
Is the entity exempted or optionally excluded from any of Regulation (EU) No 575/2013, Directive 2013/36/EU, Regulation (EU) No 648/2012 and Directive 2009/138/EC?
Yes
Non-shadow banking entity
No
Is the entity: i) part of a non-financial group whose principal activity is to carry out credit intermediation activities for its parent undertaking/subsidiaries; or, included in the supervision on a consolidated basis of an institution as in Article 3(1)(3) of Directive 2013/36/EU?
Yes
Non-shadow banking entity
No
Does the entity offer banking services or perform banking activities as set out in Article 2*?
No
Non-shadow banking entity
Yes
Shadow banking entity
Is the entity undertakings for the Collective Investment in Transferable Securities as defined in Directive 2009/65/EC a money market funds falling under Regulation (EU) No 2017/1131?
No
Non-shadow banking entity
Yes
Shadow banking entity
Is the entity an alternative investment funds as defined in Directive 2011/61/EU that:
No
Non-shadow banking entity
OR
(a) Is a money market fund falling under Regulation (EU) 2017/1131?
(b) Employs leverage on a substantial basis as set out in Article 111(1) of Commission Delegated Regulation (EU) 231/2013?
(c) Is not, from its rules or instruments of incorporation, effectively prevented from originating loans in the ordinary course of its business or from purchasing third-party lending exposures for its own account?
Yes
Shadow banking entity
Does the entity offer banking services or perform banking activities as set out in Article 2*?
No
Non-shadow banking entity
Yes
Is the entity included in the supervision on a consolidated basis of an institution as in Article 3(1)(3) of Directive 2013/36/EU or of an institution that has been authorised and is being 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?
Yes
Non-shadow banking entity
No
Is the third-country entity an institution that has been authorised and is being 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?
Yes
Non-shadow banking entity
No
Shadow banking entity
Is the entity established in a third-country which regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to the one applied in the Union and listed in Annex I?
Yes
No
Non-shadow banking entity
Shadow banking entity
*
Banking services and activities are (a) those referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU; and (b) any service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer.
Activities and services consisting of clearing as defined in Article 2(3) of Regulation (EU) No 648/2012 shall not be regarded as banking services and activities.

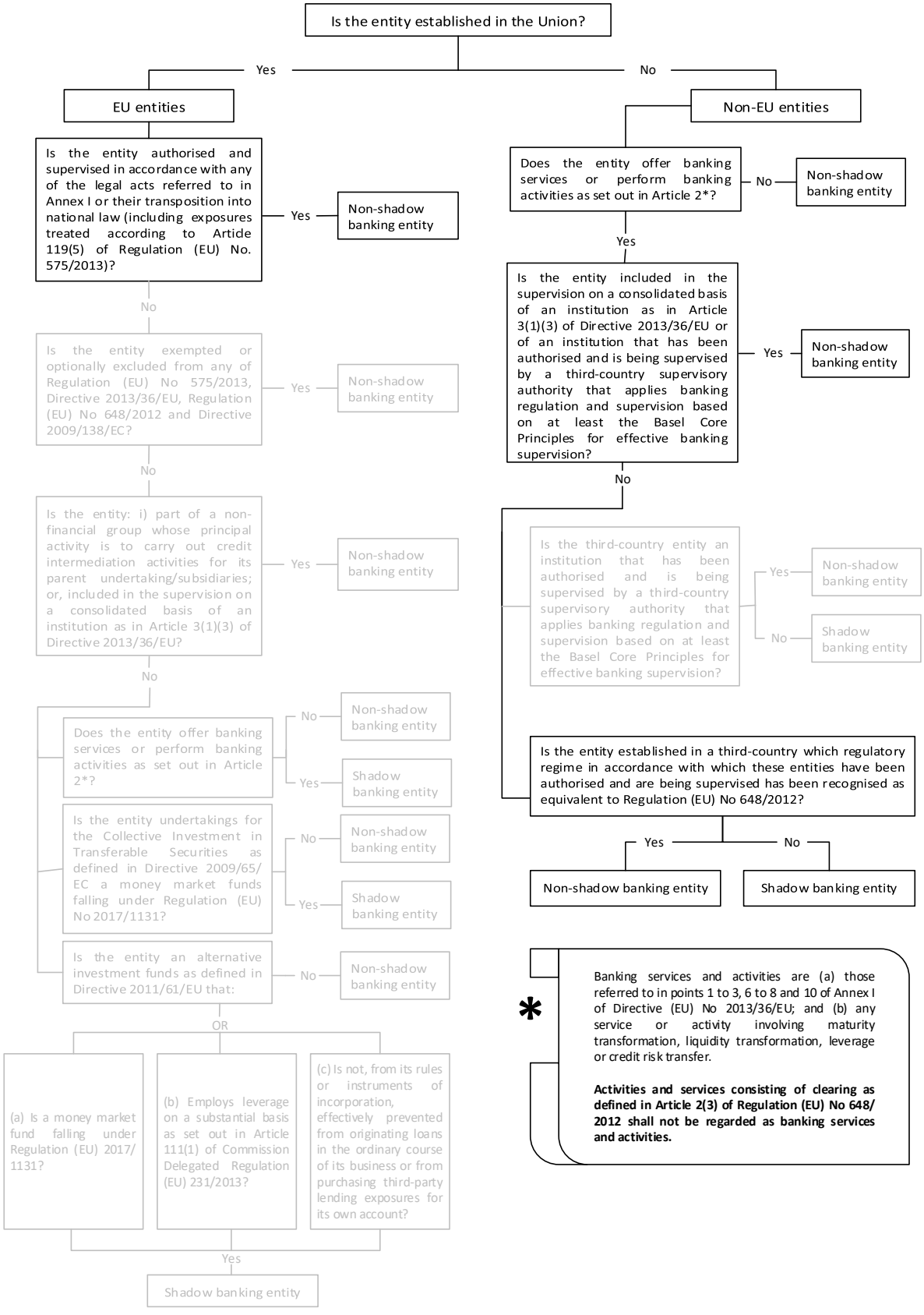
Case b.: Insurance undertakings



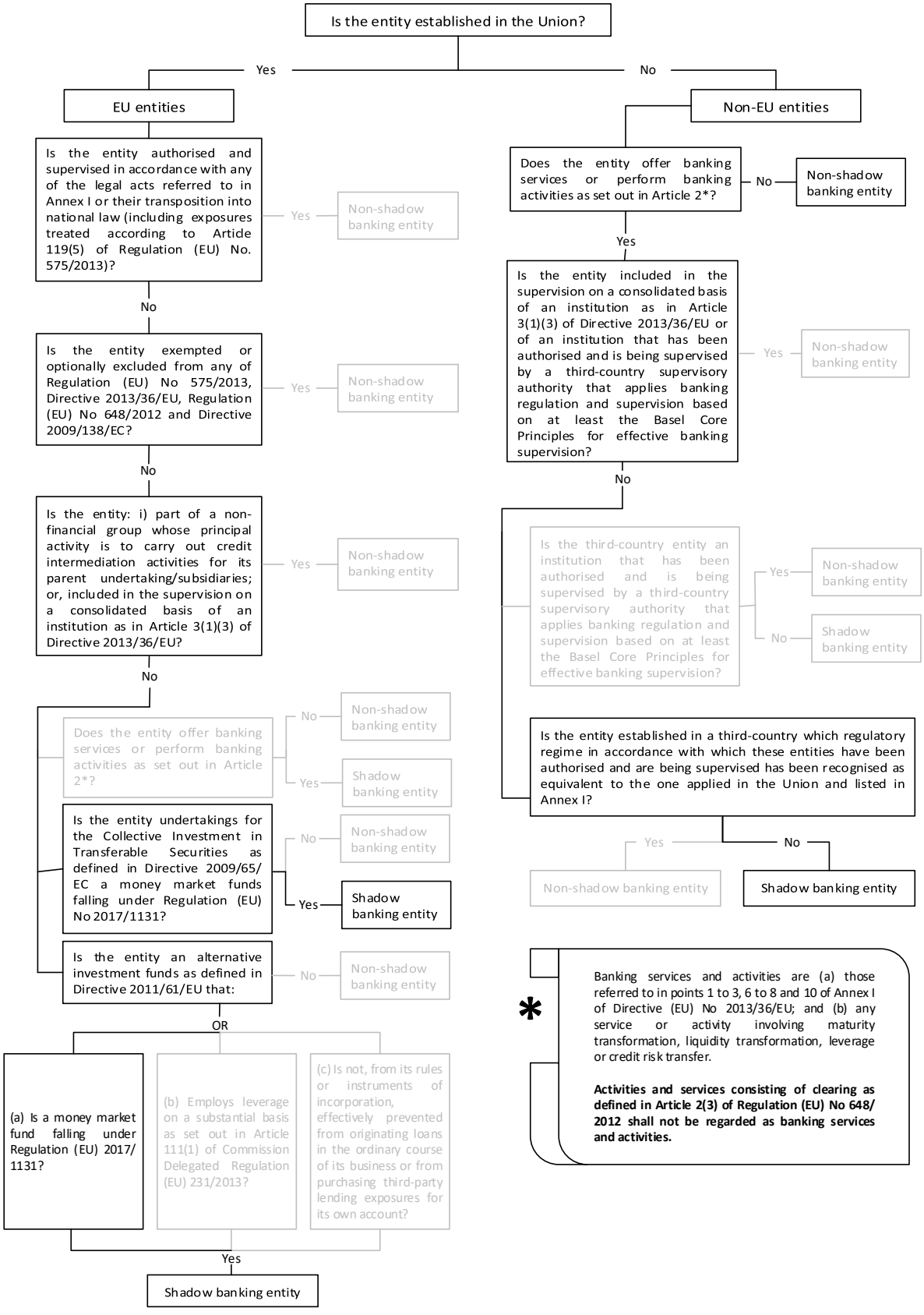
Case c.: Investment firms and recognized third country investment firms according to Article 4(1)(25) of Regulation (EU) No. 575/2013



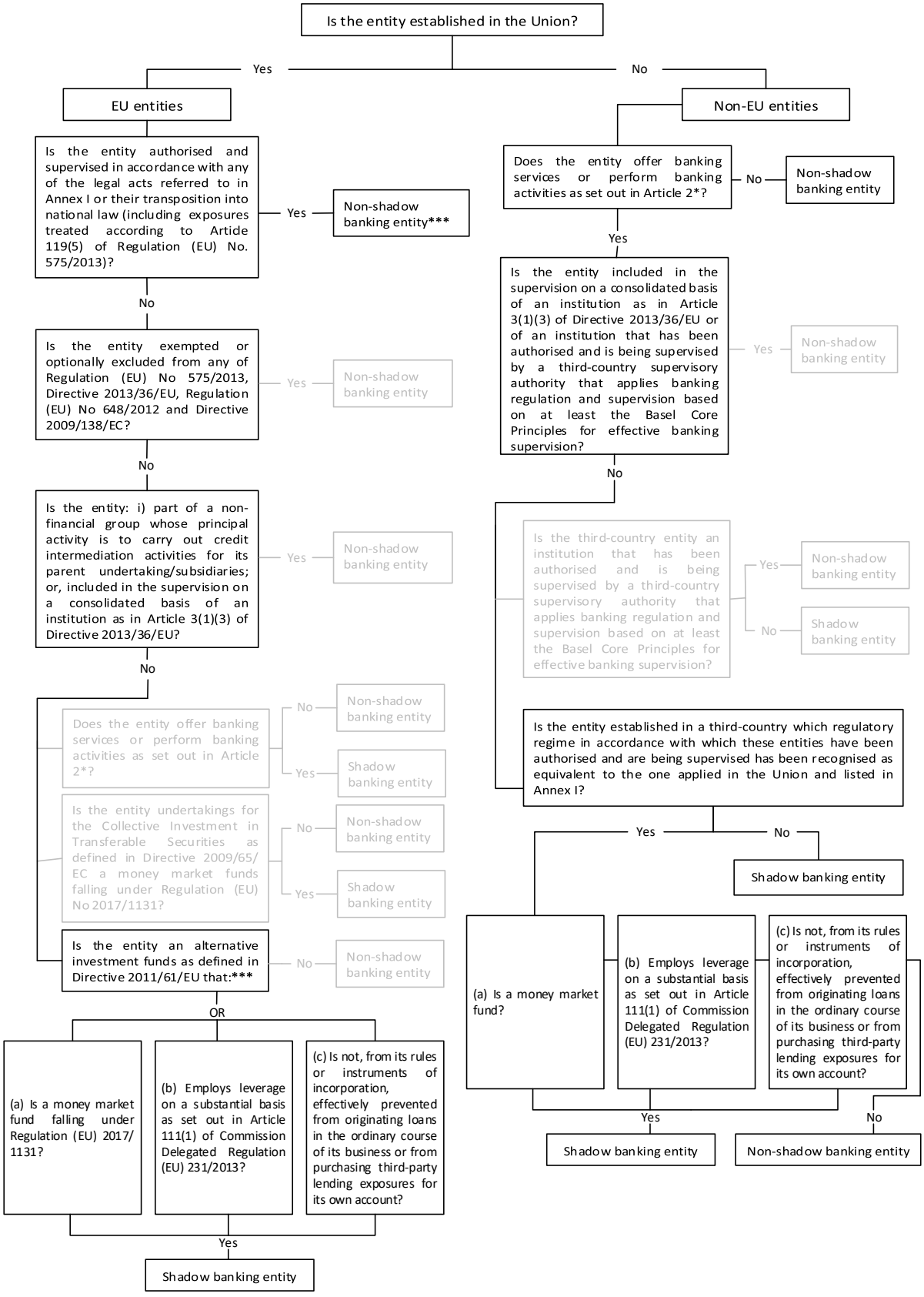
Case d. Central Counterparties Clearing (CCPs)

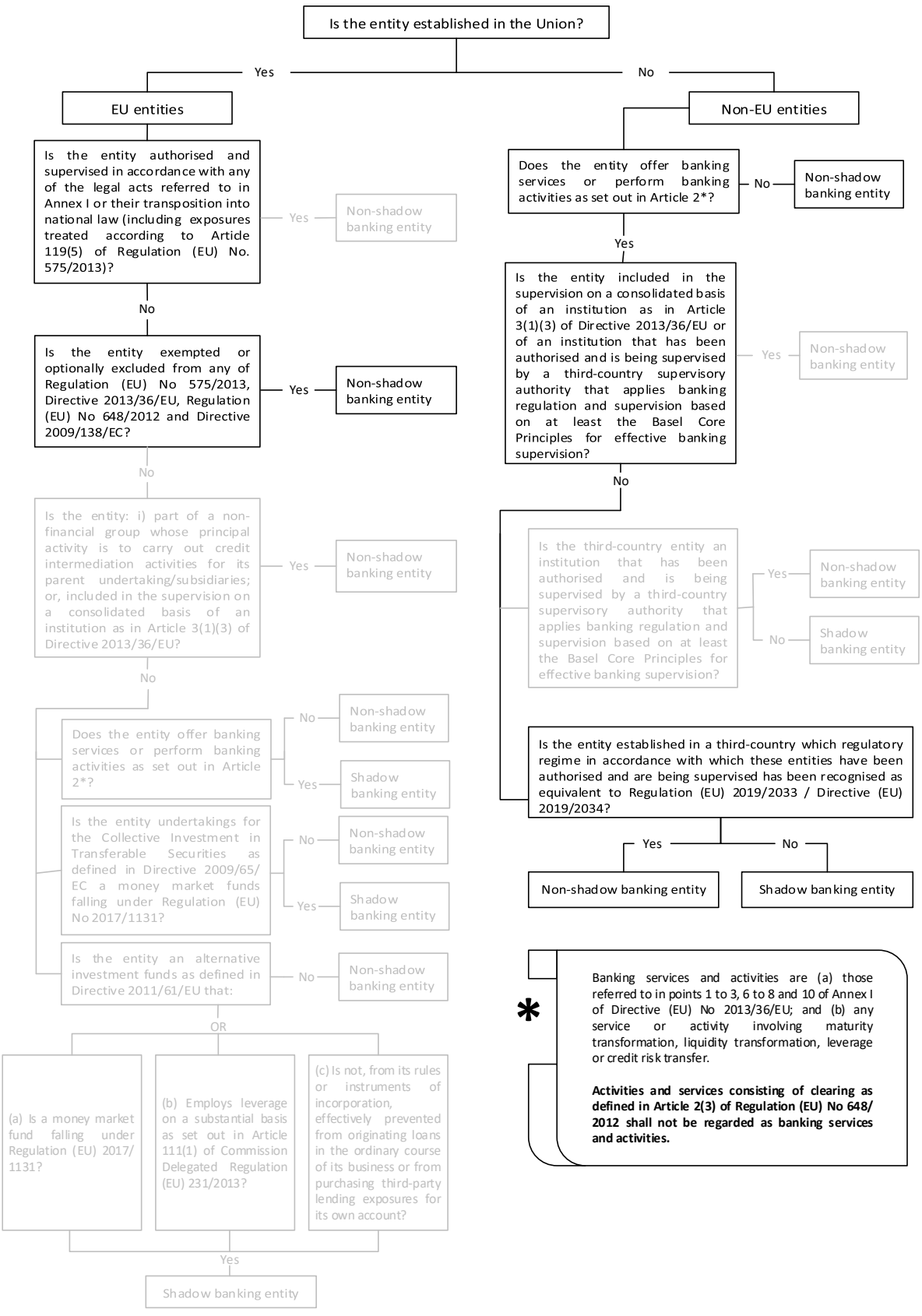


Case e.: Money Market Funds (MMFs)



Case f.: Alternative Investment Funds (AIFs)




Case g.: Central Governments, Central Banks, Public Sector Entities and Multilateral Development Banks
Is the entity established in the Union?
Yes
No
EU entities
Non-EU entities
Is the entity authorised and supervised in accordance with any of the legal acts referred to in Annex I or their transposition into national law (including exposures treated according to Article 119(5) of Regulation (EU) No. 575/2013)?
Yes
Non-shadow banking entity
No
Is the entity exempted or optionally excluded from any of Regulation (EU) No 575/2013, Directive 2013/36/EU, Regulation (EU) No 648/2012 and Directive 2009/138/EC?
Yes
Non-shadow banking entity
No
Is the entity: i) part of a non-financial group whose principal activity is to carry out credit intermediation activities for its parent undertaking/subsidiaries; or, included in the supervision on a consolidated basis of an institution as in Article 3(1)(3) of Directive 2013/36/EU?
Yes
Non-shadow banking entity
No
Does the entity offer banking services or perform banking activities as set out in Article 2*?
No
Non-shadow banking entity
Yes
Shadow banking entity
Is the entity undertakings for the Collective Investment in Transferable Securities as defined in Directive 2009/65/EC a money market funds falling under Regulation (EU) No 2017/1131?
No
Non-shadow banking entity
Yes
Shadow banking entity
Is the entity an alternative investment funds as defined in Directive 2011/61/EU that:
No
Non-shadow banking entity
OR
(a) Is a money market fund falling under Regulation (EU) 2017/1131?
(b) Employs leverage on a substantial basis as set out in Article 111(1) of Commission Delegated Regulation (EU) 231/2013?
(c) Is not, from its rules or instruments of incorporation, effectively prevented from originating loans in the ordinary course of its business or from purchasing third-party lending exposures for its own account?
Yes
Shadow banking entity
Does the entity offer banking services or perform banking activities as set out in Article 2*?
No
Non-shadow banking entity
Yes
Is the entity included in the supervision on a consolidated basis of an institution as in Article 3(1)(3) of Directive 2013/36/EU or of an institution that has been authorised and is being 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?
Yes
Non-shadow banking entity
No
Is the third-country entity an institution that has been authorised and is being 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?
Yes
Non-shadow banking entity
No
Shadow banking entity
Is the entity established in a third-country which regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to Regulation (EU) 2019/2033 / Directive (EU) 2019/2034?
Yes
No
Non-shadow banking entity
Shadow banking entity
*
Banking services and activities are (a) those referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU; and (b) any service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer.
Activities and services consisting of clearing as defined in Article 2(3) of Regulation (EU) No 648/2012 shall not be regarded as banking services and activities.

4.3 Feedback on the public consultation

The EBA publicly consulted on these draft technical standards.

The consultation period lasted for 3 months and ended on 26 October 2021. Twenty-one responses were received on a non-confidential basis, which were all published on the EBA website (here).

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments, or the same body repeated its comments in its response to different questions. In such cases, the comments and the EBA's analysis are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

Summary of key issues and the EBA's response

Overall, the respondents agreed in general with the principles underlying the draft RTS. In particular, the respondents supported the policy choices taken in the draft RTS, while suggesting minor amendments to align the content of these draft RTS with the current guidelines on limits on exposures to shadow banking entities, which are already implemented by institutions in their IT systems.

There was strong support by the respondents for the proposed approaches to identifying EU and non-EU entities as a shadow banking entity for the purposes of Article 394 paragraph 2 of Regulation (EU) No 575/2013.

Some respondents were opposed to the identification of MMFs as shadow banking entities. The EBA reiterates that the proposed approach within these draft RTS for MMFs is aligned to the assessment made by the ESRB, the FSB and the EBA guidelines already in place since 2015.

Furthermore, some technical issues were raised in response to the questions in the Consultation Paper.

EBA response

The EBA welcomes the support for these draft RTS and agrees that it is important to ensure consistency, where possible, between these draft RTS and international developments and internationally agreed standards on shadow banking. A clause to review these draft RTS is included with the introduction of the new MMFR. A clause to re-analyse the treatment of MMFs when the new MMFR will be in place has been added.

These draft RTS need to be submitted to the Commission for adoption. Following submission, the RTS will be subject to scrutiny by the European Parliament and the Council before being published in the Official Journal of the European Union and coming into force in the EU. The EBA believes this timeframe provides institutions with sufficient time to implement the draft RTS.

A more detailed presentation of the comments received and of the EBA response is included in the table set out below.

Summary of responses to the consultation and the EBA analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Uniform definition of shadow banking entities between GL and RTS	Three respondents pointed out that uniform definition of shadow banking entities and thus substantively consistent rules for identifying shadow banking entities for large exposure reporting under Article 394(2) of the CRR as well as for defining limits for risk exposures to shadow banking entities should be introduced. To ensure absolute consistency, the EBA guidelines (EBA/GL/2015/20) should be aligned with these RTS requirements.	The draft RTS need to be submitted to the Commission for adoption. Following submission, the RTS will be subject to scrutiny by the European Parliament and the Council before being published in the Official Journal of the European Union and coming into force in the EU. The EBA acknowledges the need for consistency between the RTS and the guidelines (EBA/GL/2015/20) and will assess the way forward for the guidelines after the final RTS is submitted to the Commission. The final RTS will define a "shadow banking entity", also for the purposes of the guidelines (EBA/GL/2015/20) even if these guidelines have not yet been aligned accordingly.	No amendments.
Clarification on Article 1 and 2 to be read as cumulative	One respondent requested a confirmation that the criteria of Article 1 and 2 are to be read on a cumulative basis.	Only the proposed approach in Article 1(1) of the draft RTS [Article 1(3) of the final draft RTS] needs to be read on a cumulative basis with Article 2. In particular, Article 1(1) of the RTS [Article 1(3) of the final draft RTS] identifies as shadow banking entities any entity established in the Union or in a third country that offers banking services or performs banking activities as set out in Article 2 and that is not excluded according to paragraphs 2 or 3 of Article 1 or Article 3 of the draft RTS [paragraphs 1 or 2 of Article 1 or Article 3 of the final draft RTS]. Paragraph 1 and 2 of Article 1 of the final draft RTS apply independently from the definition of banking	The order of the paragraphs in Article 1 has been changed (see also "Change of order in paragraphs under Article 1" below) and the reference to Article 3 has been added in Article 1(3) of the final draft RTS in order to clarify that entities established in third countries have to be identified as shadow banking entities when they are not excluded by

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		services and activities given in Article 2. This means that if the entity is excluded according to paragraph 1 or 2 of Article 1 of the final draft RTS, this entity shall not be considered to be a shadow banking entity even if this entity offers banking services or performs banking activities according to Article 2.	any of the paragraphs of Article 3.
Definition of a materiality threshold based on Tier 1 capital	Four respondents suggested that because banks have already designed their processes and IT systems in accordance with the EBA guidelines (EBA/GL/2015/20), a materiality threshold (i.e. <0.25% of Tier 1 capital) should be introduced in these RTS. In case a materiality threshold will be introduced, one respondent required a clarification in the draft RTS, and in the EBA guidelines (EBA/GL/2015/20), of the capital to be used in the calculation of the materiality threshold knowing that the CRR2 Large Exposures framework has changed from Eligible capital to Tier 1 capital.	The aim of these RTS is to define criteria for the identification of shadow banking entities in the context of reporting the 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework under Article 394(2) of the CRR. Even if an exposure to a shadow banking entity does not exceed the 0.25% of Tier 1 capital threshold coming from the EBA guidelines (EBA/GL/2015/20), it would still have to be reported if it is one of the 10 largest exposures. The threshold set out by the EBA guidelines (EBA/GL/2015/20) will continue to apply for the purpose of setting internal limits according to Article 395(2) of the CRR. As regards the proposal for the capital base to be used in the calculation of the materiality threshold, the EBA acknowledges that the EBA guidelines (EBA/GL/2015/20) should now refer to a threshold as % of Tier 1 capital instead of as % of eligible capital.	No amendments.
Change of order in paragraphs under Article 1	One respondent proposes to change the order of the first 3 paragraphs under Article 1, as follows: - paragraph 2;	The EBA has taken note of this suggestion. The proposed order for Article 1 now lists those entities that are not to be considered shadow banking entities	The order of paragraphs in Article 1 has been amended to list entities that would not be identified as shadow banking

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	- paragraph 3; - paragraph 1.	in the first 2 paragraphs and those that are identified as shadow banking entities from paragraph 3 to 6.	entities in paragraphs 1 and 2 and those that are shadow banking entities from paragraph 3 to 6 with the exemption of the newly inserted paragraph 4, which is a derogation from paragraph 3.
Amendment to recital 1	One respondent requires to remove *"to the extent that these entities provide services or perform activities included in their authorisation"* at the end of recital (1).	The wording in recital 1 is meant to reflect that those entities that are supervised and authorised according to any of the Union legal acts listed in Annex I should not be considered to be shadow banking entities.	Recital 1 has been amended accordingly.
Use "Non-bank Financial intermediation/institution" instead of "shadow banking entities"	Five respondents would like to point out that the term "Non-bank Financial Intermediation" is now used internationally. Thus, the draft RTS should use this term instead of "shadow banking entities".	As regards the proposal to replace the term "shadow banking entities", the EBA reiterates that this term comes from the mandate in Article 394(4) and is consistently used in other Articles of Regulation (EU) No 575/2013.	No amendments.
Amendment to EBA Q&A 2013_572	Two respondents suggest that the EBA Q&A 2013_572 should also be reconsidered. It states that the exposure amount for determining the 10 largest exposures to "unregulated financial sector entities" (now referred to as "shadow banking entities") that are part of a group of connected clients (GCC) is the aggregated, total amount of the exposures to all entities within the GCC, including exposures to entities within this group that are not "unregulated financial sector entities".	In the EBA's view, the answer provided in Q&A 2013_572 is to be deemed appropriate due to the fact that Article 394(2) of the CRR refers to the *"[…] 10 largest exposures to shadow banking entities […]"* and it is specified in point (a) of the same Article that exposures to be reported could have as counterparty *"[…] the client or the group of connected clients to which an institution has a large exposure"*. Hence, no amendments related to this issue are needed. As regards aligning the wording of Q&A 2013_572 (referencing the term "unregulated financial sector entities"), the EBA reiterates that the wording used in	No amendments.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	One of these respondents argues that, to preserve consistency with the EBA guidelines, clarification is needed that any membership of a shadow banking entity in a group of connected clients is irrelevant and that only a single borrower approach is relevant with regard to settling the question of whether there is an exposure to a shadow banking entity. This respondent refers to the EBA feedback on the EBA guidelines consultation, page 53: *"the EBA clarifies that these guidelines only apply to exposures to individual shadow banking entities, and do not require the creation of groups of connected clients."*	this Q&A is in line with the wording included in Regulation (EU) No 575/2013. As part of the Risk Reduction Measures package adopted by the European legislators in May 2019, the CRR was amended, thereby modifying the reporting obligation in Article 394(2) of the CRR. Where it said before "*An institution shall report […] its 10 largest exposures on a consolidated basis to unregulated financial entities […]",* it now states *"an institution shall report […] its 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis […]"*. That said, the term "unregulated financial sector entities" used in Q&A 2013_572 is meant as "shadow banking entities", which is the current wording introduced by Regulation (EU) 2019/876 of 20 May 2019 (CRR2), amending Regulation (EU) No 575/2013. Furthermore, the EBA notes that the mandate in Article 394(4) of the CRR refers to criteria for the identification of shadow banking entities. This implies that institutions are required to identify shadow banking entities towards which they have exposures independently of whether these entities are single clients or form a group of connected clients.	
Clarify interaction with look-through requirements	One respondent misses a clarification regarding the interaction of these RTS with Article 390(7) of the CRR in conjunction with Regulation (EU) No 1187/2014 (supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council as regards regulatory technical standards for determining the overall exposure to a client or a group of connected	These draft RTS and the large exposure regime in the CRR address a different set of concerns, as laid down also in the feedback table of the EBA guidelines on limits on exposures to shadow banking entities (EBA/GL/2015/20).	No amendments.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	clients in respect of transactions with underlying assets). According to the respondent's opinion, it should be made clear that the shadow banking entity test can only relate to the relevant look-through transaction itself and not to the underlying exposures.	Institutions have to identify shadow banking entities to set appropriate limits in accordance with the EBA guidelines (EBA/GL/2015/20) as well as for the reporting requirements of Article 394(2) of Regulation (EU) No 575/2013. These draft RTS specify the criteria for the identification of shadow banking entities. With regard to transactions with underlying assets, both the EBA guidelines and these draft RTS apply in parallel to the Commission Delegated Regulation (EU) No 1187/2014. When identifying shadow banking entities, any transaction itself which qualifies as a shadow banking entity is subject to the limits of the EBA guidelines as well as to the reporting requirements of these draft RTS. In addition, when institutions apply the look-through approach according to Commission Delegated Regulation (EU) No 1187/2014 for large exposure purposes to identify all underlying exposures of transactions in which they invest and which is expected of them, the criteria of these draft RTS have to be applied, too, to identify possible shadow banking entities with regard to the underlying assets. If needed, the EBA stands ready to provide further technical clarifications through the Q&A process.	
Responses to questions in Consultation Paper EBA/CP/2021/30			

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Question 1. Do you agree with the conditions of Article 1 paragraph 2 for identifying an entity as a non-shadow banking entity? Please provide reasons if you do not agree with any of the conditions or have comments with regard to any of them.	Seven respondents agree with the conditions of Article 1(2) for identifying an entity as a non-shadow banking entity. Of which: - Two respondents welcome that exposures to financial institutions should not be treated as exposures to shadow banks as long as these financial institutions are supervised and approved in accordance with Article 119(5) of the CRR and are subject to requirements comparable to those for institutions. - One of these respondents also states that the exception in Recital 2 referring to entities that are part of a non-financial group and whose principal activity is to carry out credit intermediation activities for entities within the group is not adequately covered by the wording of Article 1(2) or (3) of the draft RTS. - This respondent also suggests adding a clear specification within Article 1(2) to avoid misinterpretations of the RTS. With regard to the European directives also referred to in Annex 1, one of these respondents suggests that the words *"with any of the legal acts referred to in Annex I or their transposition into national law"* should therefore be added as a minimum. Four respondents disagree with the conditions of Article 1(2) for identifying an entity as a non-shadow	The EBA welcomes the comments acknowledging that the conditions of Article 1(2) of the draft RTS [Article 1(1) of the final draft RTS] for identifying an entity as a non-shadow banking entity are deemed appropriate. That said, the EBA notes that the approach in Article 1(1) of the draft RTS [Article 1(1) of the final draft RTS] should clearly recognise exposures to financial institutions to not be treated as exposures to shadow banking entities as long as those financial institutions are supervised and authorised and are subject to comparable requirements to institutions in accordance with Article 119(5) of the CRR. Thus, paragraph 2 of Article 1 of the draft RTS [Article 1(1) of the final draft RTS] has been changed accordingly. In particular, Article 1(2) of the draft RTS [Article 1(1) of the final draft RTS] states that *"Any undertaking that is authorised and supervised in accordance with any of the legal acts referred to in Annex I of this Regulation including as laid down in the national law of the Member States, including financial institutions towards which exposures are treated in accordance with Article 119(5) of Regulation (EU) No 575/2013, shall not be identified as a shadow banking entity for the purposes of Article 394(2) of Regulation (EU) No 575/2013."* As regards the proposal to specify that entities that are part of a non-financial group and whose principal activity is to carry out credit intermediation activities for entities within the group shall be identified as non-shadow banking entities, Article 1(3) of the draft RTS	Paragraph 1 of Article 1 of the final draft RTS has been amended in order to clarify that financial institutions treated according to Article 119(5) of the CRR shall not be identified as shadow banking entities. Moreover, in the same paragraph it has been specified that entities should be excluded from being identified as shadow banking entities if they are supervised and authorised according to the legal acts referred to in Annex I as laid down in the national law of the Member States. Paragraph 2 of Article 1 of the final draft RTS has been amended in order to clarify that entities whose principal activity is to carry out credit intermediation activities for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings shall be identified as non-shadow banking entities. Moreover, a

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	banking entity, proposing exempting funds (such as MMFs and AIFs).	[Article 1(2) of the final draft RTS] now covers this case. Moreover, a reference within this paragraph and a clarification in Recital 2 have been added. Furthermore, regarding a clear specification within Article 1(2) of the draft RTS [Article 1(1) of the final draft RTS] that entities would not be considered to be shadow banking entities when authorised and supervised in accordance with any of the legal acts referred to in Annex I, the EBA notes that the listing of various directives in Annex I should directly imply also their transposition into national law, since it is obligatory. That said, the EBA notes that a reference also to *"their transposition into national law"* would introduce major clarity to these draft RTS, specifying that if an entity that is authorised and supervised in accordance with the national transposition of any of the legal acts listed in Annex I of these draft RTS, that entity shall not be identified as a shadow banking entity. Consequently, Article 1(2) of the draft RTS [Article 1(1) of the final draft RTS] has been amended accordingly. As regards the treatment of MMFs and AIFs envisaged in Article 1(4) and 1(5) of the draft RTS [Article 1(5) and 1(6) of the final draft RTS], the EBA has taken note of the request from the industry proposing the exemption of funds (such as MMFs and AIFs) but does not share their concerns. In the EBA's view, the proposed approach for funds is consistent with the EBA guidelines (EBA/GL/2015/20). Major details are given under the EBA analysis of Question 5 to Question 9 of these draft RTS. Finally, the EBA	clarification to Recital 2 has been added.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		reiterates that, if needed, the treatment of MMFs will be re-analysed with the introduction of the new MMFR.	
Question 2. Have you got any comments regarding the list of entities that, being exempted or optionally excluded from those four legal acts in Annex I, should not be considered to be shadow banking entities?	Five respondents support the approach taken to align the RTS with the EBA guidelines (EBA/GL/2015/20), such that entities exempted or optionally excluded from the CRR, CRD and Solvency II are excluded from the shadow banking definition. Of which: - One respondent proposed the following amendment to Article 1(3), pointing that without the amendment the paragraph could be misinterpreted such that if an entity is listed as exempt in one of the legal acts but not the others it would still be treated as a shadow banking entity: *"Any entity that is exempted or optionally excluded from <u>any of</u> Regulation (EU) No 575/2013, Directive 2013/36/EU, Regulation (EU) No 648/2012 and Directive 2009/138/EC shall not be identified as a shadow banking entity for the purposes of Article 394 paragraph 2 of Regulation (EU) No 575/2013."*	The EBA welcomes the comments acknowledging that the approach that entities exempted or optionally excluded from the CRR, CRD and Solvency II are excluded from the shadow banking definition, which is in line with the EBA guidelines (EBA/GL/2015/20), is deemed appropriate. That said, the EBA has taken note of the request from the industry for an amendment of Article 1(3) of these draft RTS, in order to clarify that entities excluded from any of the following legal texts listed, i.e. Regulation (EU) No 575/2013, Directive 2013/36/EU, Regulation (EU) No 648/2012 or Directive 2009/138/EC, shall not be identified as a shadow banking entity. Thus, Article 1(3) of the draft RTS [Article 1(2) of the final draft RTS] has been amended accordingly.	The wording in Article 1(2) of these final draft RTS has been amended to specify that any entity that is exempted or optionally excluded from "*any of*" the following legal texts listed, i.e. Regulation (EU) No 575/2013, Directive 2013/36/EU, Regulation (EU) No 648/2012 or Directive 2009/138/EC; shall not be identified as a shadow banking entity for the purposes of Article 394(2) of the CRR.
Question 3. Conversely, what are your views concerning other entities exempted or optionally excluded from the other legal acts in Annex I and	Two respondents recognise that whilst it is clear that the intention is to exclude sovereigns, supranational and governmental agencies from the definition of shadow banking, the scope of the exclusion would benefit from additional clarity. In particular, this definition should be made clearer more broadly and	The EBA has taken note of the request from the industry that governmental agencies or associations in countries that apply the Basel Core Principles should be excluded from the definition of a shadow banking entity. Article 3(2) of these draft RTS exempts entities (including governmental agencies)	No amendments.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
that would be identified as shadow banking entities? Please provide reasons in case your view is that any of those entities should fall under the exemption in Article 1 paragraph 3 and therefore not be treated as shadow banking entities.	governmental agencies or associations in countries that apply the Basel Core Principles should be excluded from the definition of a shadow banking entity. These respondents remark also that a number of entities – e.g. public sector entities and multilateral development banks – are exempt from EMIR *"with the exception of the reporting obligation"* (EMIR Article 1 paragraph 5) and ask for a confirmation in the final RTS that these entities should not be treated as shadow banking entities. Moreover, a confirmation is requested that entities excluded or optionally excluded from the Large Exposures framework according to Article 400 of the CRR should not be considered to be shadow banking entities. Finally, one respondent asks that further direction is provided regarding the treatment of SPVs, which are designated as shadow banking entities. According this respondent SPVs should also be dependent on the activity and whether or not they are performing banking services and activities as included in Article 2 of the draft RTS. As such, it would be helpful to consider different forms of SPVs, for example those established for the purposes of asset ownership, Securitisation Special Purpose Entities (SSPEs) and specific structures like conduits that are funded by asset-backed commercial paper programmes.	established in a third country from being identified as shadow banking entities where the third country's regulatory regime under which these entities have been authorised and are being supervised has been recognised as equivalent to the one applied in the Union. That said, for the purposes of a consistent application of these draft RTS and consideration within Article 3(2), the EBA recognises that excluding these entities would contradict the treatment of other non-bank entities in third countries that perform banking activities as defined in Article 3(2) of the RTS. Thus, the proposed approach has not been amended. Furthermore, since Article 1(3) of the draft RTS [Article 1(2) of the final draft RTS] clearly states that any entity that is exempted or optionally excluded from Regulation (EU) No 648/2012 (EMIR) shall not be identified as a shadow banking entity for the purposes of Article 394(2) of the CRR, the EBA does not consider a clarification regarding the exemptions from EMIR necessary. Regarding exposures fully or partially exempted from the large exposures framework according to Article 400 of the CRR, the EBA believes that entities that are counterparties of such exposures cannot be excluded from the definition of shadow banking entities. In particular, pursuant to Article 400 of the CRR, exposures may be exempted from the large exposures limit as set out in Article 395(1) of the CRR; however, entities that are counterparties in such transactions still may be identified as shadow banking	

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	In addition, another respondent proposes an exemption for exposures from own securitisation transactions. This is relevant if the originator sells exposures to a SSPE for the purpose of securitisation and the originator subsequently acquires the asset-backed securities so as to pledge them afterwards to the central bank to participate in monetary policy operations. In this case, legal title to, but not beneficial ownership of, the exposures is transferred to the SSPE. The credit risk remains economically with the originating institution because of the amount of the retained tranche. These SSPEs are also normally consolidated in accordance with IFRS 10. These SSPEs are not shadow banking entities in connection with a proprietary securitisation transaction in an interpretation based on the purpose of the regulatory requirement. It would be helpful to clarify this to ensure consistent treatment in institutional practice.	entities for the purpose of Article 394(2) of the CRR. Thus, no amendment is needed. As regards the approach envisaged in these draft RTS for SPVs, the EBA welcomes the comments acknowledging that SPVs should be identified as shadow banking entities depending on the activity and whether or not they provide banking services and activities as defined in Article 2 of the draft RTS. In the EBA's view, the regulatory and supervisory framework envisaged in Regulation (EU) 2017/2402 (Securitisation Regulation) for SPVs cannot be fully compared to the requirements within the legal acts listed in Annex I of these draft RTS. For this reason, the EBA believes that the treatment of these draft RTS for SPVs should not be changed. Thus, according to the current Article 1(3) of the final draft RTS, those SPVs that perform banking services and activities as defined in the legal provisions set out in Article 2 of these RTS shall be identified as shadow banking entities. However, those SPVs that do not perform banking services and activities as set out in Article 2 of these RTS shall not be considered to be shadow banking entities. This is in particular the case of Securitisation Special Purpose Entities (SSPEs), which may not be regarded as carrying out any of the activities listed under Annex I to CRD4, as confirmed by Q&A 2014_1530, and as a result shall not be identified as shadow banking entities.	

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Question 4. Have you got any other comments with regard to the content of Article 1 of the draft RTS? In your view, is it clear and easy to implement for the purposes of the reporting obligation of Article 394(2) of Regulation (EU) No 575/2013?	Two respondents noted that the proportionality concern with regard to the proposed method should be considered, especially for smaller banks or firms that do not have dedicated resources to implement such controls/definitions in their IT systems. Thus, the EBA should be able to publish an accompanying document that lists the article number of relevant legal acts where exemptions are made. Three respondents noted that all subsidiaries included in a regulated consolidation were permitted to be excluded in the EBA guidelines (EBA/GL/2015/20), while this does not seem to be the case in these draft RTS. To be consistent, the EBA should add this provision in the RTS. One respondent suggested to review Article 1(5) by replacing the word "either" with "any" (or a word or phrase with similar effect). One respondent noted that the draft RTS do not provide information regarding the identification of shadow banking in the case of branches. In particular, a clarification about how reporting institutions should report exposures to such a branch if the branch would be identified as a shadow bank (but not the head office) or vice versa is required. Three respondents would appreciate some information regarding the determination of the 10 largest shadow banking entities, if these entities are part of a (mixed) group of connected clients. In particular, a clarification on whether reporting entities should only consider the total exposures to	In the EBA's view, the proposed approaches in these draft RTS were designed to be compatible also with smaller institutions, which do not have dedicated resources to implement such controls/definitions in their IT systems. Given that the reporting requirements set out in Article 394(2) of the CRR have a quarterly frequency, and considering that institutions should have already implemented the EBA guidelines (EBA/GL/2015/20), the EBA expects that institutions have already performed a comprehensive mapping of their counterparties. The EBA notes that to achieve a full alignment with the EBA guidelines (EBA/GL/2015/20) a clarification is required for entities subject to consolidated prudential supervision, which are out of the scope of the guidelines. Thus, new Article 1(4) and Article 3(3), and a new Recital 7, have been added to clarify that *"undertakings neither authorised nor supervised on an individual basis in accordance with the Union regulated framework or with the Basel Core Principles should, nevertheless, not be considered to be shadow banking entities, if these undertakings are subsidiaries of a parent undertaking authorised and supervised in accordance with the Union regulated framework or the Basel Core Principles, and provided that these subsidiaries are included in the prudential consolidation and supervision on a consolidated basis of that parent undertaking."* In line with the agreed spirit of the RTS, for the sake of clarity, it has to be noted that Article 1(4) and Article 3(3) must be read	New Article 1(4), Article 3(3) and Recital 7 have been added to provide a clarification that undertakings included in the consolidated supervision of an institution are out of the scope of these draft RTS. These draft RTS remains analysed as in line with the EBA guidelines on limits on exposures to shadow banking entities (EBA/GL/2015/20). Paragraph 6 of Article 1 (former paragraph 5 of Article 1 of the draft RTS) has been amended by replacing "either" with "any".

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	all individual shadow banks within the group in order to determine the *"10 largest exposures to shadow banking entities"* pursuant to Article 394(2) of the CRR is required.	without prejudice to Article 1(5) and Article 1(6), so the latter prevail over the former articles. As regards the request for an alternative wording in Article 1(5) of the draft RTS [Article 1(6) of the final draft RTS], the EBA notes that replacing "either" with "any" would allow greater clarification about those funds that are identified as shadow banking entities according to points (a) to (c). Thus, paragraph 5 (now paragraph 6) of Article 1 has been amended accordingly. As a branch is no separate legal entity (but rather "an extension" of the institution), branches would always be treated like the head office. Thus, if the head office would be identified as a shadow banking entity (or not), this would be also valid for the branch. Thus, no further clarification is required. The methodology to calculate and aggregate large exposures, with reporting requirements set out in Article 392(2) of the CRR, are not part of the EBA mandate in Article 394(4). With regard to mixed groups, Q&As 2013_572 and 2013_492 detail the treatment of such exposures. Moreover, the EBA stands ready to provide more details through the Q&A process.	
Question 5. In general, what are your views on the treatment of funds in these draft RTS? Do you agree with the approach adopted in these draft RTS,	Four respondents support the treatment for funds structured as UCITS, pointing that UCITS are treated as heavily regulated entities. These respondents provide full support to the EBA's decision, in Article 1 (5) (b) of the RTS, that only funds that are substantially leveraged should be considered as	The EBA welcomes the comments acknowledging the fact that the proposed treatment for funds structured as UCITS is deemed appropriate and sufficiently clear. Furthermore, the EBA welcomes the comments acknowledging the fact that the treatment for AIFs specified in Article 1 (5)(b) of the draft RTS [Article	As regards AIFs not identified as shadow banking entities, Recital 4 has been amended to further specify this aspect. Article 1(6)(c) [Article 1(5)(c) in the draft RTS] has been

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that follows the approach in the EBA guidelines on limits on exposures to shadow banking entities, or alternatively should it be extended to capture those funds as shadow banking entities?	shadow banking entities, underlying that the AIFMD cross-reference represents a substantial improvement compared to previous EBA guidelines (EBA/GL/2015/20). It is also supported that *"only exposures to AIFs that do not employ leverage on a basis according to Article 111(1) of Delegated Regulation 231/2013 and that do not grant loans or purchase third parties' lending exposures onto their balance sheet should be excluded from being identified as shadow banking entities"*. In particular, it is noted that RTS based on this statement would have ensured that only AIFs that generate their own exposures while being substantially leveraged would be deemed to be shadow banks. Five respondent pointed out that the same wording as used in the EBA guidelines (EBA/GL/2015/20) which refer to *"originate loans or purchase third party lending exposures"* should be used also in these RTS. Twelve respondents argue that due to the organic differences between banks and funds and between their respective regulations, investment funds should in general not be considered as comparable to banks and therefore not as shadow banking entities. Furthermore, since the MMFR, the UCITS and AIFM directives (as well as their implementing acts) and related ESMA guidelines have introduced a robust regulatory framework, ensuring prudential supervision in a manner adapted to the specificities of investment funds, the definition of shadow	1(6)(b) of the final draft RTS] is appropriate and, with the AIFMD cross-reference, represents a substantial improvement compared to the current EBA guidelines (EBA/GL/2015/20). As regards AIFs that would be excluded from the definition of shadow banking entities, the EBA notes that the approach proposed in Article 1(5) of these draft RTS is clear in setting criteria for the identification of those AIFs that are deemed to be shadow banking entities. There is no need to further specify this aspect by adding a paragraph in Article 1 of these RTS. However, the EBA recognises that a more detailed description of the implication of Article 1(5) for those AIFs that do not fulfil the definition of shadow banking entities in the recitals of these RTS could provide more clarity. Moreover, the EBA recognises that aligning the wording of these draft RTS with that used in the EBA guidelines (EBA/GL/2015/20) would allow clarification of those AIFs excluded from the definition of shadow banking entities. That said, Article 1(5)(c) of the draft RTS [Article 1(6)(c) of the final draft RTS] has been amended by replacing the wording *"originating exposures"* with *"originating loans" and "purchasing third-party exposures"* with *"purchasing third-party lending exposures"*. The EBA believes that the proposed approach for the identification of money market funds falling under Regulation (EU) No 2017/1131 and alternative investment funds as defined in Directive 2011/61/EU as shadow banking entities when fulfilling the legal	amended in order to clarify that AIFs which are prevented by applicable laws to invest in "lending exposure" are also excluded from the definition of shadow banking entities. Besides, with this change the wording of the RTS will comply with the respective wording in the EBA guidelines.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	banking entities should not include MMFs (both UCITS and AIFs) and certain AIFs carry out banking activities outside the regulated framework. Moreover, the same respondents oppose that MMFs, 3 times leveraged AIFs and AIFs that grant loans are considered under this shadow banking scope. In particular, the AIFMD provides for a strict leverage regime under which AIFs have to set leverage limits themselves and moreover NCAs or ESMA can further restrict the use of leverage. In addition, AIMFs are subject to solvency/capital requirements depending on AuM/exposure and AIFs are subject to liquidity requirements. Thus, they should not be considered as shadow banking entities.	provision in Article 1(4) and (5) of the draft RTS [Article 1(5) and 1 (6) of the final draft RTS] is deemed prudentially sound and appropriate. These Articles reflect the EBA guidelines (EBA/GL/2015/20), which have already been implemented by institutions. Moreover, the EBA has specified in paragraph 89 of the background that the treatment of MMFs will be reassessed when the ongoing reforms to tackle the vulnerabilities identified with MMFs will be in place.	
Question 6. What would be the advantages and disadvantages of taking a broader approach with respect to the scope of funds included as shadow banking entities?	Eight respondents outlined that the broad approach proposed by the EBA potentially gives the impression that the regulatory framework for funds is not appropriate. From an operational point of view, a broader approach could lead to higher administrative burdens in terms of reporting while the purpose for this reporting (e.g. monitoring of certain risks) may already be covered within the regulatory framework for funds. A broader classification of funds as shadow banking entities would lead to additional large exposure limits again at the level of the funds themselves and hence additional management and reporting of a risk that is already excluded.	In the EBA's view, the requirements proposed in these draft RTS reflect the ones enclosed in the EBA guidelines (EBA/GL/2015/20), which have been implemented in institutions' processes since 2015. The EBA also notes that the identification as shadow banking entities of funds that fulfil the requirements in Article 1(4) and (5) of the draft RTS [Article 1(5) and 1(6) of the final draft RTS] does not imply any additional large exposure limit as defined in Article 395(1) of the CRR.	No amendments.
Question 7. What are your views with regard to the consideration of	One respondent welcomed the fact that the EBA will reassess the treatment of MMFs when the ongoing reforms to tackle the vulnerabilities identified with	The EBA notes the proposed approach for MMFs is consistent with the EBA guidelines and welcomes the comments acknowledging the fact that Article 1(4) of	No amendments.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
money market funds as shadow banking entities?	MMFs will be in place – thus, expecting Article 1(4) of the RTS to be amended following these reforms. Eleven respondents would in general welcome a reassessment of the classification of MMFs as shadow banking entities. These respondents argue that MMFs should not fall under the definition of shadow banking entities. This is because the system-wide pressures brought about through COVID-19 and an overall flight to liquidity applied to many market participants, not only MMFs. MMFs do not conduct "banking activities" and fall within an existing highly regulated framework. In particular, the vast majority of MMFs are UCITS and, in addition, they are regulated through the MMFR. UCITS MMFs are considered to be low risk as indicated by their mandatory *"Synthetic Risk and Reward Indicator"* on their respective Key Investor Information Document. Sponsor support is expressly prohibited by the MMFR, minimising any potential contagion risk between sponsors and MMFs. Moreover, MMFs conduct limited maturity and liquidity transformation within their portfolios, which minimise any risk; and they do not use leverage or undertake "credit risk transfer". Even though ESMA and the FSB are currently undertaking a review of the framework for MMFs, it would be premature to include MMFs in the scope of shadow banking entities in the current context of the ongoing discussions on the MMFR. This position should be reassessed in light of the outcomes of	the draft RTS [Article 1(5) of the final draft RTS], if needed, will be reassessed once the ongoing reforms to tackle the vulnerabilities identified with MMFs will be in place. Furthermore, for sake of clarification, also following the monitoring of these entities performed by the ESRB and the FSB, and the arguments put in the background of these draft RTS, the EBA believes MMFs *"have very strong interconnections with the banking sector as they provide short-term funding to financial institutions and corporates, and engage in some maturity and liquidity transformation since a large portion of MMFs' assets consists of bank debt securities and deposits. MMFs play an important role for the liquidity management of non-banks. Therefore, stress in the MMF sector could trigger severe liquidity issues for banks and institutional investors."* Moreover, due to the fact that: i) MMFs perform banking services and activities; ii) the regulatory framework of these entities is currently under review; and iii) MMFs were already identified as shadow banking entities in the EBA guidelines (EBA/GL/2015/20), in the EBA's view the proposed approach in Articles 1(4) and 1(5)(a) of the draft RTS [Article 1(5) and 1(6)(a) of the final draft RTS] is prudentially sound and aligned to the assessment made by the ESRB, the FSB and the EBA guidelines already in place since 2015. Thus, in the EBA's view, in the absence of the review of the regulatory framework for MMFs, it is premature to exclude	

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	current reviews which aim at identifying whether additional reforms are necessary to be adopted.	these entities from the shadow banking entities' definition. That said, the EBA reiterates that the treatment of MMFs will be re-analysed with the introduction of the new MMFR.	
Question 8. Do you face any difficulties identifying whether an alternative investment fund (AIF) should be considered to be a shadow banking entity?	One respondent recognises that there are no difficulties identifying whether an AIF constitutes a shadow banking entity because the EBA guidelines (EBA/GL/2015/20) have already been implemented. The identification of the extent of the fund's lending activity and capturing the commitment leverage under the AIFMD as a reference point of "substantial leverage" have proven to be effective. Limiting the AIF commitment leverage to 300% of the NAV has become established practice among asset management companies. Thus, no change to these criteria for classifying AIFs as shadow banks is necessary or expedient and therefore the proposal to retain these criteria is welcomed. Four respondents would welcome a reassessment of AIFs, which are regulated by the AIFMD and ESMA's guidelines and bear in addition specific requirements, and are subject to specific reporting requirements. Any possible inclusion in the shadow banking scope of a fund on an individual fund basis with regard to the leverage criteria should consider in addition risk-based measures. The 3 times the commitment measure is not always meaningful from a risk perspective. It overstates the risk – e.g. for a non-risky AIF that just manages short-term futures. This is	The EBA welcomes the comments acknowledging that, following the proposed approach in Article 1(5) of the draft RTS [Article 1(6) of the final draft RTS], there are no difficulties identifying whether an AIF constitutes a shadow banking entity because the EBA guidelines (EBA/GL/2015/20) have already been implemented. The EBA notes that the AIFMD imposes requirements on AIFs' assets managers; however, some risks arising directly from the funds themselves are not mitigated satisfactorily from a prudential point of view. Leverage limitation like that applicable to UCITS does not apply to AIFs, and AIFs are entitled to grant loans, thus carrying out a core banking activity outside the regulated banking system, i.e. the CRR/CRD or comparable prudential regulation. That said, in the EBA's view the proposed approach for AIFs is prudentially sound and also in line with the EBA guidelines (EBA/GL/2015/20). As regards AIFs subject to a stringent national regulatory framework, the EBA reiterates that only in the case where these entities would be exempted by the transposition of the legal acts listed in Annex I of these draft RTS, as indicated in Article 1(2) of the draft RTS [Article 1(1) of the final draft RTS], they do not	No amendments.

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	why local regulators like Autorité des Marchés Financiers are using in addition the UCITS leverage measures (and limits) to capture global exposure more adequately for UCITS-like AIFs on an individual basis. Moreover, while AIFs that either grant loans or purchase third parties' lending exposures onto their balance sheet are not presently covered by a dedicated EU legal regime, they do benefit from more specific and stringent domestic regulations in the Member States where they are authorised and domiciled. Thus, it is proposed to narrow the scope of these AIFs to those that do not benefit from a stringent national regime. One respondent argues that following the statement in paragraph 75 that ELTIFs, EuSEFs and EuVECAs shall not be identified as shadow banking entities, a clear exemption in the RTS itself should be added. These funds are special types of AIF so there might be uncertainty whether they are within the scope of Article 1(5).	have to be identified as shadow banking entities. Hence, the treatment laid down in the draft RTS is deemed appropriate. Finally, the EBA notes that due to the legal provisions in Article 1(2) of these draft RTS and given that Regulation (EU) No 346/2013 and Regulation (EU) No 345/2013 are included in Annex I of these draft RTS, ELTIFs, EuSEFs as defined under point (b) of Article 3(1) of Regulation (EU) No 346/2013 and EuVECAs as defined under point (b) of Article 3 of Regulation (EU) No 345/2013 should not be identified as shadow banking entities. Thus, no amendments are needed.	
Question 9. Have you got any specific comments with regard to AIFs and, in particular, with points (b) and (c) of Article 1 paragraph 5?	Five respondents would like to underline that AIFs using leverage on a substantial basis as referred to in Article 1(5) (b) of the draft RTS are indeed generally considered to be riskier, but this assessment is rather made from the investors' perspective as the term leverage used under the AIFMD refers to an increase of exposure to the assets of the AIF. Moreover, there is generally no link between the amount of leverage employed by an AIF and its investment strategy.	As also explained in the EBA analysis under Question 8, the EBA reiterates that AIFMD imposes requirements on AIFs' assets managers; however, some risks arising directly from the funds themselves are not mitigated satisfactorily from a prudential point of view. Leverage limitation like that applicable to UCITS does not apply to AIFs, and AIFs are entitled to grant loans, thus carrying out a core banking activity outside the regulated banking system, i.e. the	Article 1(6)(c) of the final draft RTS has been amended in order to clarify that AIFs which are prevented by applicable laws from investing in "lending exposure" are also excluded from the definition of shadow banking entities. Besides, with this change the wording of the

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	Thus, the mere fact that an AIF is employing leverage on a substantial basis in accordance with the rules under the AIFMD does in no way justify the qualification as a shadow banking entity. In relation to loan origination or acquisition funds as referred to in Article 1(5) (c) of the draft RTS, the conclusion that these are counterparties subject to a specifically high risk of default seems inappropriate. These respondents argue that the insolvency risk of credit AIFs seems to be low. One respondent pointed out that because data on leverage (in relation to AIFs) are often only updated through annual reviews (and occasionally for certain ad hoc requests), it would be more practical to use a static criterion, such as in a declaration of an investment strategy that involves leverage instead of the exact level of leverage achieved. One respondent underlines that it may be advantageous for the fund to grant shareholder loans to a property company held by the fund (see Section 240 of the German Investment Code (KAGB)). It should be clarified that granting such shareholder loans is not covered by the requirement in point (c) of Article 1(5) of the draft RTS, which refers to originating exposures to third parties. Moreover, the term "leverage" should be clarified to be related to high levels of debt or high debt ratios of companies in the real economy.	CRR/CRD or comparable prudential regulation. This implies that AIFs may carry out banking activities and services without being subject to a comparable prudential regulation such as that imposed on institutions in the CRR and CRD. Moreover, the debt should be seen as the channel that interconnects these entities with institutions. This is independent from the low insolvency risk of credit AIFs. That said, in the EBA's view the proposed approach for AIFs is prudentially sound, is in line with the EBA guidelines (EBA/GL/2015/20) and provides an appropriate treatment for AIFs. As explained in Question 5, the EBA recognises that aligning the wording of these draft RTS with that used in the EBA guidelines (EBA/GL/2015/20) would allow better clarification that those AIFs which are prevented by applicable laws to invest in "lending exposure" are also excluded from the definition of shadow banking entities. Referring to: "originating exposures" could possibly lead to a disadvantage in the treatment of AIFs compared to the treatment of UCITS; thus, this point has been amended by replacing the wording "originating exposures" with "originating loans" and "purchasing third-party exposures" with "purchasing third-party lending exposures". This offers major clarity for the treatment of AIFs as shadow banking entities. Moreover, the EBA notes that the wording in Article 1(5)(c) of the draft RTS [Article 1(6)(c) of the final draft RTS] referring to an AIF that is effectively prevented *"by its rules or instruments of incorporation"* from	RTS will comply with the respective wording in the EBA guidelines.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		originating loans and/or purchasing third-party lending exposures shall not be identified as a shadow banking entity. This would be the case also for those AIFs that fall under the aforementioned restrictions by applicable law. Finally, the EBA reiterates that the rules for calculating the leverage and its definition for AIFs are already provided in Section 2 of Delegated Regulation 231/2013. Hence, no further specifications are needed.	
Question 10. Do you agree with the description of banking services and activities as included in Article 2 of the draft RTS? Have you got any specific comments regarding any of the points included?	Two respondents agree with the EBA that the services and activities referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU shall be regarded as banking activities. This list shall not be exhaustive. Thus, any service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer shall also be interpreted as banking services or activities. However, the EBA should further specify Article 2(b) of the Draft RTS as the missing definition of "maturity transformation", "liquidity transformation", "leverage" and "credit risk transfer" might create uncertainties leading to diverging interpretation and therefore also inconsistent implementation. In this context, EBA might want to consider limiting Article 2 (b) of the Draft RTS to considerable maturity or liquidity transformation and excessive leverage. In line with the proposal above, another respondent argues that point (b) of Article 2 of the RTS should be worded as follows: *"any service or activity involving*	The EBA welcomes the comments acknowledging that the proposed approach in Articles 2(a) and (b) of the draft RTS [Article 2(1) (a) and (b) of the final draft RTS] is appropriate, including references to services and activities referred to in points 1 to 3, 6 to 8 and 10 of Annex I of Directive (EU) No 2013/36/EU, but also a broader definition as in paragraph 2 of this Article. That said, as regards the proposal to limit banking services and activities only to those cases where those are "considerable", "excessive" or "material", the EBA notes that the degree to which an entity performs a certain activity should not be taken into account when including that activity in the "banking activities" category. As regards the request to align the wording of these draft RTS with the EBA guidelines (EBA/GL/2015/20), the EBA sees merit in this proposal. However, the reporting obligation in Article 394(2) of the CRR explicitly refers to shadow banking entities which carry out banking activities. Hence, no amendments	No amendments.

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	maturity transformation, liquidity transformation, leverage or credit risk transfer in the ordinary course of business." In this case, to be identified as a shadow banking entity, maturity transformation, liquidity transformation, leverage or credit risk transfer must be undertaken to an extent that is material and thus characterises the relevant business model of the entity. One respondent welcomes that the EBA's approach to describing banking services and activities is the same as that adopted in the EBA guidelines (EBA/GL/2015/20). In these guidelines, however, the EBA used the term "credit intermediation activities" to define bank-like activities. Thus, the same terminology and identification process should be used for these draft RTS.	are needed in these draft RTS. The EBA will consider this issue when amending the wording within the EBA guidelines (EBA/GL/2015/20).	
Question 11. Do you agree with the possibility granted under paragraph 1 of Article 3 to prevent the identification of a bank in a third country as a shadow banking entity in the absence of an equivalence decision under Article 391 of the CRR?	Three respondents point out that the industry supports the approach that ensures non-EU banks will not be considered to be shadow banking entities if the local regulator has implemented the Basel Core Principles for effective banking supervision. The respondents welcome the EBA's approach not to (exclusively) refer to the formal recognition of equivalence subject to Article 391 of the CRR but rather refer to regulation and supervision based on the Basel Core Principles for effective banking supervision. In this regard, the industry would benefit from the EBA publishing a list of countries to be considered compliant within Basel Core Principles on its website	The EBA welcomes the comments acknowledging that the approach proposed in Article 3(1) of these draft RTS ensures non-EU institutions are not identified as shadow banking entities if the local regulator has implemented the Basel Core Principles for effective banking supervision. The EBA also welcomes the comments acknowledging that the proposed approach does not (exclusively) refer to the formal recognition of equivalence subject to Article 391 of the CRR but rather refers to regulation and supervision based on the Basel Core Principles for effective banking supervision. In the EBA's view, the International Monetary Fund's (IMF) Financial Sector Assessment Program on the	No amendments.

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	or cross-referencing the relevant list (e.g. International Monetary Fund, World Bank and BCBS, in the context of the Finance Sector Assessment Program) that should be relied upon. For the purposes of Article 3(1) and (2) of the draft RTS, one respondent proposes generally treating all OECD countries as equivalent. This should apply both to institutions and to other financial institutions from OECD countries. Two respondents call for clarification for the treatment of UK banks. In the absence of an equivalence decision regarding the United Kingdom, the EBA should clarify whether the criteria for excluding entities under paragraph 1 of Article 3 would generally apply for supervised institutions in the United Kingdom. One respondent argues that the suggested solution is certainly more open to interpretation and less clear-cut than explicit exemptions. This raises the question of putting non-EU entities at an unfair advantage.	Basel Core Principles For Effective Banking Supervision can be used to assess countries that are considered compliant within Basel Core Principles. As regards UK institutions, the EBA believes that the proposed approach in Article 3(1) of these draft RTS allows exclusion of these entities from the definition of shadow banking entities. Finally, it is unclear how the proposed approach for identifying equivalence in third countries could put non-EU entities in an advantageous position. The Basel Core Principles represent agreed standards for sound regulation, supervision, governance and risk management of a country's banking sector. They aim to ensure effective risk-based supervision and set out supervisory expectations of institutions, emphasising the importance of good corporate governance and risk management, and compliance with supervisory standards. Hence, the treatment laid down in the draft RTS is deemed appropriate.	
Question 12. Have you got any comments regarding the approach set out in paragraph 2 of Article 3 for other entities established in third countries to prevent their identification as shadow banking entities?	Two respondents suggest that the approach used for non-EU banks can be applied to insurance firms as well. The current requirement for third countries to have equivalence under Solvency II should be replaced by an approach that ensures non-EU insurance firms will not be considered to be shadow banking entities if supervised in a country that follows the International Association of Insurance	The EBA welcomes the suggestion of ensuring that non-EU insurance firms are not considered to be shadow banking entities if supervised in a country that follows the IAIS's Insurance Core Principles (ICPs) for effective supervision. However, after consulting also with EIOPA, the EBA notes that the IAIS Insurance Core Principles constitute high-level standards applicable to all insurers. IAIS members are expected to implement the standards produced by the organisation, though this may not necessarily be the	A second subparagraph has been added in Article 2 to specify that third-country CCPs are excluded from being identified as shadow banking entities when performing only clearing as defined in Article 2(3) of Regulation (EU) No 648/2012.

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	Supervisors (IAIS) Insurance Core Principles for effective supervision. In addition, it should be clarified whether central clearing counterparties (CCPs) are intended to be captured within the scope of shadow banking entities. As such, it is proposed that any third-country CCP that ceases to be treated as a Qualified CCP as of 28 June 2022, in the absence of a formal ESMA decision rejecting the CCP's application, shall continue to be excluded from the definition of a shadow banking entity for a period of 2 years. Finally, more guidance is also requested for recognised third-country investment firms according to Article 4(25) of the CRR.	case. Moreover, the IAIS is currently working on a more comprehensive set of principles, namely the Common Framework (ComFrame) for the Supervision of Internationally Active Insurance Groups (IAIGs), which also includes a quantitative Insurance Capital Standard (ICS). This new framework is expected to be finalised by end-2024. As the aim is more explicitly to foster convergence in the supervision of IAIGs, ComFrame and the ICS are less general than the Insurance Core Principles. For these reasons, these principles are deemed to be not as prudentially sound as the Basel Core Principles, for the time being. That said, the proposed approach for insurances, if needed, will be reassessed when the ongoing international principles (ComFrame, ICS) will be finalised and in place. The EBA notes that Article 1(3) of the draft RTS [Article 1(2) of the final draft RTS] clearly specifies entities that are exempted or optionally excluded from Regulation (EU) No 648/2012 (EMIR) shall not be identified as a shadow banking entity for the purposes of Article 394(2), when established in the Union. That said, third-country CCPs recognised by ESMA under Article 25 of Regulation (EU) No 648/2012 shall not be identified as shadow banking entities when these CCPs are operating in third countries with prudential supervisory and regulatory requirements recognised as equivalent to Regulation (EU) No 648/2012 by an implementing act of the Commission	

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		in accordance with Article 25(2)(a) of Regulation (EU) No 648/2012. Furthermore, for what concerns third-country CCPs, a second subparagraph has been introduced in Article 2 to specify that these entities are excluded from being identified as shadow banking entities when performing only clearing as defined in Article 2(3) of Regulation (EU) No 648/2012. This type of activities is not deemed relevant for the definition of banking services and activities for the purpose of these RTS. It is noted that the Commission extended the equivalence for UK CCPs until 30 June 2025. Regarding investment firms located in third countries, they are included in the application of Article 3(2) of these draft RTS. They shall not be identified as shadow banking entities where the third country's regulatory regime in accordance with which these entities have been authorised and are being supervised has been recognised as equivalent to Directive (EU) 2019/2034 of the European Parliament and of the Council of November 2019 on the prudential supervision of investment firms (IFD). Finally, for recognised third-country investment firms, the EBA recognises that these entities subject to an equivalence decision on prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Regulation or in Directive 2013/36/EU shall not be reported as exposures to shadow banking entities provided that	

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		the entity meets the legal provisions set out in Article 4(25) of Regulation (EU) No 575/2013.	
Question 13. Do you agree with the list of legal acts included in Annex I?	Three respondents generally agree with the chosen approach to identifying 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. However, in order to avoid misunderstandings and misconceptions, it should be clarified in the RTS how the 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 (for example) the CRR. As a possible solution, it is proposed inserting an additional paragraph into Article 1 that gives the competent supervisory authorities the discretion to exempt other entities from the definition of shadow banking entities.	The EBA welcomes the comments acknowledging that the proposed approach to identifying 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 is appropriate. The EBA notes that unless a legal provision clearly allows competent authorities to exempt certain entities, it is not possible that national legislators or supervisors can exempt some entities from the CRR. Article 1(2) of these draft RTS clarifies that entities shall not be identified as shadow banking entities if authorised and supervised in accordance with any of the legal acts referred to in Annex I, which are transposed into national law. This gives national legislation and supervisory authorities the discretion to exempt other entities from the definition of shadow banking entities, when this is foreseen by their national law.	No amendments.
Question 14. Is there any other legal act that should be included in Annex I? If so, please mention the act and legal reference, and provide reasons to support it based on the criteria included	One respondent proposes to include Commission Implementing Decision (EU) No 2021/1753 on the equivalence of the supervisory and regulatory requirements of certain third countries and territories for the purposes of the treatment of exposures according to Regulation (EU) No 575 / 2013 of the European Parliament and of the Council.	In the EBA's view, also for the reasons specified in the EBA analysis in Question 11, the proposed approach of Article 3 of these RTS, which specifies the criteria to apply when excluding entities established in third countries from being deemed shadow banking entities, is deemed appropriate and should bring a	No amendments.

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in Article 394(4) of Regulation (EU) No 575/2013.	One respondent proposed to include Regulation (EU) No 909/2014 (CSDR) to avoid CSDs (particularly those being authorised in accordance with Article 54 of the CSDR to provide banking-type ancillary services) being identified as shadow banking entities.	harmonised reporting under Article 394(2) of the CRR. As regards the suggestion to include Regulation (EU) No 909/2014 (CSDR) to avoid CSDs being identified as shadow banking entities, the EBA notes that this would be in contradiction with the treatment envisaged for the same entities in the EBA guidelines (EBA/GL/2015/20). Thus, no amendments are deemed required.	