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# EBF Response to EBA consultation on RTS on criteria for a preferential treatment in cross-border intragroup financial support under LCR (EBA/CP/2015/22)

The overall objective of European banking legislation is to foster the harmonization of supervisory practices and the establishment of a level playing field within the SSM area, in order to preserve financial stability and integration of the banking system. The European Union is a single market, in which the financial sector now benefits from a common prudential regulatory framework, now also including the Bank Recovery and Resolution Directive (BRRD) which provides a single rulebook for the resolution of banks and large investment firms in all EU Member States.

Furthermore, within the European Union, the majority of European Union Member States (Euro Area and other Member States opting to participate) are part of the Banking Union which provides a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM). Residual National/local specificities are now identified and the ECB has a clear mandate (cf ECB National Options and Discretions Guide) to decide on whether and how to exercise these options. We therefore now expect a fully harmonised regulatory treatment within all EU SSM Member States.

Despite these significant advances of the single market and single rulebook in the European Union and Banking Union, banking groups with an EU parent institution still have to suffer an additional burden regarding their intragroup liquidity facilities compared to institutions operating only within a single national jurisdiction, i.e. purely national banking groups.

In fact, the LCR consideration of a liquidity facility between an EU parent institution and a local institution is not equivalent, depending of the countries where both institutions are established (Art. 425/4(d) CRR & Art 29 AD). Additional conditions have to be fulfilled if the EU parent institution is not from the same EU member: e.g. low liquidity profile, daily follow-up etc. This presents a distortion of the level playing-field in the single-market compared to institutions with EU parent institutions in the same Member State.

We would expect, to avoid any inequity at the very least within SSM EU groups, that this new RTS guarantees an equal treatment for institutions having their parent institution within the same Member State or within another SSM Member State.

**Question 1: Do respondents agree with the specifications of the criterion relating to the low liquidity risk profile? If not, what alternatives would you suggest to assess the liquidity risk profile of the liquidity receiver and provider?**

**Article 2 Low liquidity risk profile of the liquidity provider and receiver**

We would suggest that the EBA reconsiders the requirement for the liquidity receiver to have a low liquidity risk profile. For banks operating a centralised liquidity model in particular, liquidity receivers often need intragroup liquidity support since they are generally unable to access sufficient market liquidity on a stand-alone basis or can only do so on a prohibitive basis.

Article 2 requires both, liquidity receiver and provider, to have a low liquidity profile. From a risk perspective, this criterion should apply to the liquidity provider only, i.e., the requirement for the liquidity receiver to have a low risk profile should not be a pre-requisite; such facilities increase the liquidity risk profile of the liquidity provider, but decrease the liquidity risk of the receiver.

More guidance should be given in the RTS in order to assure total transparency in advance regarding the application of the preferential intra-group treatment (e.g. just mentioning LiSREP as a requirement will not be sufficient).

Further, EBF Members suggest that the individual LCR requirement is enough to prove the sound liquidity risk profile of entities (using a 60% ratio before 1/10/15), until supervisory review and evaluation process are performed by the supervisor at the entity’s solo level. We suggest that RTS is amended accordingly in order not to delay the possibility to take this national discretion until SREP solo evaluation are performed.

Practically, should banks wait for the new LCR templates to be published by the commission before asking for the benefit of this option? We suggest that the RTS explains more in detail what can be required by banks (using templates) if the new LCR templates have not been validated at time of publication of the RTS.

**Question 2: Do respondents agree with the specifications of the criterion relating to binding agreements and commitments?**

**Article 3 Legally binding agreements and commitments between the group entities regarding the undrawn credit or liquidity line**

The headline refers only to “undrawn part of the credit or liquidity line”, i.e., off-balance sheet items). This is consistent with the scope of Art 29 and Art 34 DA LCR, but **not consistent with the scope of Art 422/8 CRR** that refers to certain on-balance sheet items as specified in Art 422/7 CRR. The scope of the Draft RTS should be changed to reflect the broader scope of the CRR when compared to the Delegated Act. To our understanding, the scope of the draft RTS is not limited to the Delegated Act, but should cover both the CRR and the Delegated Act.

In general, there is no reference in the Draft RTS on the **different scope of CRR versus DA LCR** regarding the preferential treatment of intra-group flows (on- vs off-balance sheet items). We strongly recommend adding such guidance in the Draft RTS so that banks get clarity on this issue. We also make reference to the ECB consultation on NODs (National Options and Discretions). Our understanding of the ECB NOD Draft Guide (p. 24) is that application is possible for both, intra-group off- and on-balance sheet items.

The headline distinguishes between “**agreements**” and “**commitments**”. The distinction between and the scope of both terms is unclear. To our understanding, both terms refer to the contractual basis for the line.

We further favour that ECB provides a model of such contracts which covers point a) to e) mentioned in the RTS. This would ensure homogeneity within banks while ensuring all required conditions are met.

**Paragraph a):**

The credit or liquidity line shall be a committed line which is legally and practically available at any time, even during a period of stress, on a cross-border basis. We assume that ‘at any time’ means within a period of 6 months, as the notice period for cancellation is at least 6 months (as referred to in paragraph e).

The sentence “**specifically dedicated** to the application of the preferential treatment” is either unnecessary or unclear. If the requirement is just to include a sentence in the agreement stating the specific dedication, the added value of such remark is questionable. If the requirement is more than such a remark, it is unclear what banks are expected to fulfil in this respect. The requirement should be either removed by EBA or specified in more detail.

On the requirement “**legally** and practically **available**” we refer to a report published by the European Commission in 2014[[1]](#footnote-2) that examines the issue of free movements of funds in the liquidity waiver context. The report on page 10 concludes for the EU that its “review has **not revealed relevant legal obstacles** that would prevent institutions from entering into contracts that provide for the free movement of funds between them within a single liquidity sub-group”.

Against this background it is generally unclear what additional measures banks are expected to take to ensure legal and practical availability. Within the EU there should be generally the assumption of legal availability, otherwise it should be the task of the competent authority to demonstrate evidence on legal obstacles to applicants of a preferential intra-group treatment. Therefore, the requirement to have legal agreements for intragroup flows within the EU should be removed from the RTS. Previous regulatory regimes have not required legal opinions to be externally reviewed and it is unclear what purpose this requirement will serve.

**Legal review:** It is unclear, what is meant by “legal, binding and enforceable aspects …. are valid and enforceable”. A basic principle of contract law is that a contract – once concluded between the contract counterparties – is binding in its entirety for all contract counterparties. Does “valid” mean more than the obvious that a contract once concluded is binding to the counterparties? If not, there is no added value of the requirement; if yes, it is unclear what is meant. In addition, what is the difference between legal and binding aspects? And why should a binding contract within EU not be enforceable?

The requirement to have **external** **legal opinions should be removed** from the Draft ITS. The involvement of an external third party is overly cumbersome and expensive, and internal legal departments are not in a position to deliver such confirmation with reasonable effort and/or are even not willing to deliver such confirmation. Given the open questions raised above the outcome of such review as well as the nature and content of the required confirmation remains unclear.

Further the consultation document does not specify the frequency of the required update of the external legal opinion other than that it be on a regular basis. If the legal opinion is required we propose that the frequency of external legal review should be every 3 years. A more frequent review is not warranted and will result in unnecessary legal costs.

**Paragraph b):** We question why the **currency** of the line should be an explicit requirement. In addition, the requirement seems to be overly restrictive. Art 3 b) requires banks to have lines in multiple currencies in accordance with the **FX distribution** of LCR net outflows. Does this mean that in case of net outflows in e.g. five different currencies the line has to cover all five currencies? To our understanding, this is at odds with current market practice, as lines are normally given in one currency, whereas multi-currency lines are of minor relevance in practice, if any.

The currency **requirement** should be removed or – if maintained - it should be substantially reduced to be more in line with current market practice, e.g., a line should be given in the currency where the receiver has most of its liquidity risk in terms of LCR net outflows, an immateriality threshold should be imposed for insignificant currencies, etc. There is no requirement to establish an LCR by currency therefore it is unclear why this requirement is necessary and the text within Article 3c) should reflect the Delegated Act.

**Paragraph c):** Paragraph c) requires the **consent** of the relevant competent authorities, if the amount of the facility is changed (reduced or increased). To our understanding, “consent” means that a supervisory approval is needed; this is overly intrusive, restrictive and cumbersome from a process perspective. A notification requirement to competent authorities in case of amount changes should be sufficient.

As an **alternative**, a general clause could be included in the Draft RTS that would require banks to notify the Competent Authority (CA) of any material changes to the underlying agreements based on which the CA would have the possibility to withdraw the approval on the preferential treatment.

**Paragraph d):** This paragraph could be enhanced by a requirement requiring the absence of any explicit language in the agreement that restricts its **enforceability**. In turn, the enforceability-requirement should be removed from paragraph a.

**Paragraph e):** The **minimum 6 month notice period** for cancellation is deemed to be overly strict and should be reduced to 3 months or less.

Finally, we recommend that the EBA and ECB provides a model of such contracts which covers point a) to e) mentioned in the RTS. This would ensure homogeneity within banks while ensuring all required conditions are met.

**Question 3: Do respondents agree with the specifications of the criterion relating to liquidity risk management of the liquidity provider?**

**Article 4 Consideration of the liquidity risk profile of the liquidity receiver into the liquidity risk management of the liquidity provider**

**Scope:** The scope of Article 4 is not fully clear. In the first instance, Article 4 defines requirements for the liquidity provider, but in paragraph b) also defines a requirement for the liquidity receiver (inclusion in CFP). Therefore, **doubts on the scope of Article 4 remain**, in particular, to what extent Article 4 also covers the internal liquidity risk management of the liquidity receiver and what exactly is required from the liquidity receiver regarding its CFP.

**Paragraph a):** We refer to the **ECB NOD Draft Guide** (p. 28) which takes a more flexible approach regarding the paragraph a) requirement as follows: “In order to assess whether the liquidity risk profile of the liquidity-receiving entity is taken into account adequately in the liquidity risk management of the liquidity-providing entity, the ECB expects to be shown that the liquidity-providing entity and the liquidity-receiving entity monitor on a regular basis the liquidity position of the counterparty. This could be achieved, where appropriate, via an access to monitoring systems, established by the liquidity-receiving entity and the liquidity-providing entity on an individual and a consolidated basis. **Alternatively, the institutions are expected to demonstrate to the ECB how the appropriate information on the liquidity positions of the institutions involved is made available to the parties on a regular basis, for instance by sharing regular liquidity monitoring reports**.

Supervisors should appreciate the necessary frequency of these requirements, based on the materiality or the liquidity business model of the entities.”

We suggest aligning paragraph a) with the ECB Draft Guide, with the above adjustments. Indeed, the requirement for daily monitoring of liquidity positions (either via access to daily monitoring systems of the liquidity positions or sharing of daily liquidity reports) is too demanding from an operational perspective, especially for specialised lending subsidiaries which may have very stable liquidity profiles. We suggest rewording ECB NOD so as to give supervisory teams discretion to appreciate the relevant frequency of this monitoring.

**Paragraph b: Examples** should be given in paragraph b) how liquidity providers should demonstrate to CA that it can reasonably be expected to continue to provide the facility even in times of stress.

**Paragraph c:** Purpose and content of the sentence in paragraph c) is unclear. As paragraph c) refers to the liquidity provider, it appears to be somehow **redundant** with last sentence of b). In general, there seems to be no need to have a separate paragraph c) – instead, it should be included/merged in/with paragraph b) to avoid confusion. In general, paragraphs b) & c) should be structured in a better way clearly stating the requirements the liquidity provider has to fulfil.

Finally, we suggest the review of the liquidity profile is done through regular access to liquidity reports (example: LCR, local national requirements) and contingency plans of the receiving entity, rather than through daily access to liquidity positions. Such reports prove to be more qualitative indicators of liquidity risk management of liquidity receiver.

1. Report from the Commission to the European Parliament And the Council on Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-Group: <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-327-EN-F1-1.Pdf> [↑](#footnote-ref-2)