ASF
ASSOCIATION FRANÇAISE
DES SOCIÉTÉS FINANCIÈRES

Paris, 26th October 2021

Dear Madam, Dear Sir,

The ASF welcomes the opportunity to respond to the EBA consultation paper dated on 26 july 2021 on draft RTS on criteria for the identification of shadow banking entities.

The ASF (*Association Française des Sociétés Financières*) is, according to the Banking Act of 24 January 1984, the representative body of all specialised financial institutions in France. The outstanding of financing in the hands of its 270 members amounted to approximately 280 billion euros at the end of 2020 i.e. 20 % of the total amount of credits to the economy in France. They employ 40,000 people.

Our comments attached focus on issues that are of direct relevance for the activities of the specialised institutions (specialised credit institutions, financing compagnies) represented by ASF such as consumer credit, house financing, leasing, guarantee, factoring...

These activities represented by ASF are under control of the French regulator, ACPR, which it is not the case for some of them in other European Members-states.

Therefore, we are not opposed if authorities decide to cope with this situation in order to achieve the European common market of financial services and apply the prudential and competition principle "*same business, same risks, same rules*".

Please, do not hesitate to contact us for any questions you may have on our position.

ASF
ASSOCIATION FRANÇAISE DES SOCIÉTÉS FINANCIÈRES

DRAFT RTS ON CRITERIA FOR THE IDENTIFICATION OF SHADOW BANKING ENTITIES

ASF's position to the EBA consultation paper dated 26 July 2021

PREAMBLE

The ASF welcomes the EBA consultation to debate on entities and activities classified as "shadow banking" and thanks for the opportunity that it is given to express its opinion.

The ASF will not be opposed to the overall idea of updating the European legal framework for prudential supervision in order to achieve the dual objective of improving the resilience of the global financial system and ensuring a level playing field based on an adapted and proportionate set of prudential requirements. This will also achieve the European common market of financial services.

Our position gives consideration to special rules and specific cases, following the essential principle that all entities that carry out banking activities may be not considered shadow banking entities if they are authorised and supervised within an appropriate regulatory framework.

Please find hereafter the ASF's comments on this draft RTS that appeared to us to be fundamental.

WHAT IS SHADOW BANKING?

Criteria for identifying entities (questions 1 to 3)

The identification of an appropriate definition of shadow banking and its implementation in an appropriate framework and within a defined perimeter are keys.

Currently, we observe that the perimeter of shadow banking is broadly defined.

In Europe, this very peculiar situation is due to the fact that there is no definition of a "*banking or credit transaction*"[1]. As a consequence, similar banking or financial businesses are subject to different legal requirements leading to a significant variation in definitions from one country to another within the European market.
Hence, any future work in relation to the shadow banking sector should take into account the need to ensure that the perimeter of credit institutions is also clearly defined.

As first step, we do think that the same definition of "*shadow banking*" shall be introduced in all Union Acts listed in Annex 1 such as CRR/CRD, IFR/IFD, MIFID... It is essential to eliminate distortions of competition among Member States while ensuring financing for the real economy (households, SME's…).

[1] *The second coordinating Directive of 15 December 1989 (n°89/646/CEE) has only harmonised the definition of "credit institution" –definition that was taken up by CRR.*

Besides, we suggest EBA to refer to its previous guidelines dated 2015[2] implemented in 2017 regarding the definition of "*excluded undertakings*". In particular, we think relevant to clarify who is competent to exclude or exempt entities in order to avoid national options implementation leading to supervisory arbitrage.

According to ASF's members, are part of the shadow banking system, **financial entities** that are **active in intermediation or credit providing** but do **not accept deposits from the public** and are **not submitted to authorisation and supervision requirements** by competent authorities, **neither to prudential requirements comparable to those applied to credit institutions** in terms of robustness, **though adapted to the risks they represent**.

In addition to the **distinction based on the status of authorised entity and the non-deposit-taking specificity**, we consider that the following criteria should be used to determine what is in the scope of the shadow banking system and what is not :

- **the nature of the activities** (consumer credit lending, factoring or financial leasing cannot reasonably be treated the same way as money market funds) ;
- **the existence, nature and level of risks** (systemic risk in particular) ;
- **the possibility of "run" effects** (sudden and massive withdrawals of funds by clients) ;
- **the prudential framework applied on a solo or consolidated basis**. On this aspect, the exclusion of financial institutions from the scope of European supervisory and prudential requirements does not mean that these institutions are not subject to a comparable regulation at national level, in which case they are not part of the shadow banking system. For instance, specialised activities are regulated and supervised in certain European countries and not in others. It is the case in France where leasing, factoring and consumer loans are credit transactions.

Tackling shadow banking throughout activities rather than entity status is key.

The first question that remains fundamental for us is to define whether the activity carry out by an entity is a banking activity or not ? If so, the second question arises : **what is the appropriate regulation for those activities** ?

WHAT ARE BANKING ACTIVITIES AND SERVICES ?

For the purpose of this draft RTS, we do agree with 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 (the so-called "CRD") such as consumer credit, leasing or factoring shall be regarded as banking activities.

However, this list shall not be exhaustive. Any service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer shall also be interpreted as banking services or activities.

[2] *EBA/GL/2015/20 Guidelines- Limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of Regulation (EU) No 575/203.*

Thus, entities which, without collecting deposits, provide consumer lending, propose financial leasing or factoring within European Union (EU) should be subject to authorisation and supervision. Those specialised businesses are involved in financing the real economy, supporting the economic growth in France and in Europe and also designed to avoid any banking credit crunch.

Moreover, those activities cannot, because of their nature, lead to sudden and massive "runs" and are no more volatile or cyclical than the real economy itself.

Therefore, if there is any regulation for the specialised institutions that are not credit institutions (as they don't collect deposits), it should be relevant and proportionate.

But an appropriate prudential framework requires more comparability between regulatory within Europe[3]. In order to ensure this comparability, the consistency of the consolidation perimeter of credit institution's balance sheets should be taken into account.

According to the ASF, adopting an appropriate regulation based on businesses rather than enlarging the scope of the current legislation is a much more relevant choice.

For instance, in France, financial institutions carrying out credit transactions such as consumer credit, factoring, financial leasing... are subject to authorisation and supervision by the national competent authority, ACPR. Currently, some of them authorised as "*financing companies*" are subject to a comparable prudential regulation as credit institutions (banks), which is based on Basel 2,5 rules and soon Basel 3.)

CRITIERIA FOR EXCLUDING ENTITIES ESTABLISHED IN THIRD COUNTRIES FROM BEING DEEMED AS SHADOW BANKING ENTITIES

Regulation should be harmonised and respect the principle « *same business, same risk, same rules* » expressed by the G20 since Seoul summit in 2010. It is crucial to fight supervisory arbitrage in order to ensure a level playing field between all the market actors for a similar business.

Therefore, our members agree with EBA position that a third-country institution shall not be identified as a shadow banking entity where the institution has verified that this 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, but only if it does not lead to unfair competition.**

We also agree that other entities 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 strictly equivalent to the one applied in the Union** for such entities in accordance with the equivalence provisions of the relevant Union legal act. This should not also lead to unfair situation of competition.

[3] In 2012, Commissioner Michel Barnier acknowledged this need, mentioning that "*the minimum capital to be tied up for a single operation* ***must be comparable across all sectors*** *to avoid encouraging any form of supervisory arbitrage*".

We do keep in mind the massive and rapid development of Big Tech/Fintechs and its impressive incursion into financial and banking sector. They must be regulated as any “traditional banking actor” if they offer banking services. The challenge will be to ensure a level playing field within the EU, financial stability, innovation and consumer protection.

Maintaining a parallelism between regulation in the EU and international regulation is of the utmost importance as a disparate application of the legislation could lead to distortions of competition which would affect the EU financial system.

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