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MR/MM

EACB comments on
EBA Draft Guidelines on ancillary services undertakings specifying the criteria for the identification of activities referred to in Article 4(1)(18) of Regulation (EU) No 575/2013

General comments

The EACB welcomes the opportunity to comment on the EBA draft Guidelines on ancillary services undertakings (ASUs) specifying the criteria for the identification of activities referred to in Article 4(1)(18) CRR.

While we appreciate the aim to enhance clarity, we believe that the EBA should take a more fitting approach to the definition of ASUs. This should be limited to activities that directly support banking operations, excluding broader interpretations like "complementing" or "relying on banking," which risk to indefinitely expand the list of entities that may be classified as ASUs, and thus subject to prudential consolidation – which should be instead required only where indirect regulatory access to certain entities is truly necessary to oversee activities that bear banking risks.

Answers to selected questions

Q1. Do you have any comments on the general provisions set out in Section 4.1?

While the clarification set out in Section 4.1, Paragraph 11, is generally welcome, it remains unclear what 'other undertaking' under Paragraph 12 of the same section refers to.

It appears open to interpretation whether this remark refers only to institutions within the same group, or to any institution outside the group. In other words, would Bank B have to qualify an undertaking as an ASU in any case, provided that Bank A does so when both hold a participation in the same undertaking? If so, we would argue against such a blanket rule, as there may be cases where this does not make sense. This could well happen when, as in the aforementioned example, Bank A includes its large participation in a common undertaking in its prudential consolidation, but Bank B only holds a small participation that is not subject to prudential consolidation (e.g. due to Art. 19 CRR). Here, it is not explainable why Bank B should be exempt from the general rule that it does not have to qualify an undertaking as an ASU which is not part of its prudential consolidation. The obligation to assess an undertaking as an ASU should be limited to cases of significant economic relevance for the individual institution (see also comments under Q7).

Additionally, we would like to point out that institutions which are not part of the same group cannot be obliged or expected to exchange assessments relating to undertakings in which they hold a common participation.

Q2. Do you agree with the criteria specified for identifying an activity as a 'direct extension of banking'? Do you believe that other criteria should be included to identify activities that should fall under this definition? If yes, please provide detailed proposals.

In relation to Section 4.2, Paragraph 13.a., we understand that the term "banking" seems meant to be understood as services pursuant to points 1, 2 and 6 of Annex I of the CRD. This clarification and limitation are welcome and agreeable.

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However, the term "activities that are fundamental to the value chain of the core banking services" per se creates another layer of uncertainty. The term "fundamental" is vague and leaves a lot of room for interpretation. As an extreme example, it could be argued that HR services are "fundamental" in this sense because the provision of core banking services is impossible without the bank's staff. From the examples listed in Paragraph 14 we take that the example of HR services is probably not supposed to be covered. However, there will certainly be various other activities that would not be easy to classify as "fundamental" or not.

Against this background, we suggest replacing the vague terminology used in the draft guideline with a more concrete one, e.g. "activities that are an indispensable part of core banking services…". This would help distinguish activities that deserve to be considered as an extension of banking from those that are only ancillary to banking.

Q3. Do you consider appropriate the inclusion of services and activities that involve maturity transformation, liquidity transformation, leverage or credit risk transfer – when conducted by shadow banking entities – as one of the criteria for identifying activities that are a 'direct extension of banking'?

NA

Q4. Do you have any comments on the use of activities that are fundamental to the value chain of core banking services as a criterion for identifying activities that are a 'direct extension of banking'? In particular, do you find the definition of and link to core banking services, and the related list of activities sufficiently clear?

It must be highlighted that Article 4(1) point (18) CRR makes a systematic distinction in letters a) and b) as to whether the principal activity of the undertaking is a direct extension of banking (letter a) or the undertaking performs an activity that is ancillary to banking (letter b). Although both points are inherently related to banking activities, this should not mean that a sharp distinction, where possible, is unnecessary. Otherwise, there is a risk that the definition of ASU will become too broad and ultimately ineffective.

In light of the aforementioned, we propose that the activities specified in Paragraph 14 a), f) and g) (namely, brokerage of loans and deposits, risk management, and services related to repossessed assets) be regarded as ancillary to banking. These activities are not intrinsic to the core banking operations (i.e. lending or deposit taking) but rather provide support at the outset or in the aftermath. **The activity of debt recovery, as outlined in Paragraph 14 d), should not be regarded as an extension of banking or an ancillary service at all, as it is not a specific activity of the banking sector and does not imply risks that require being covered by prudential supervision**. In essence, all forms of commerce necessitate debt recovery, meaning that this should be excluded from the scope of the ASU definition.

Q5. Do you consider appropriate the inclusion of 'other activities related to lending' as one of the criteria to identify activities that are a 'direct extension of banking'? Do you consider undertakings that perform one of these activities as their principal activity already qualifying as financial institutions within the meaning of Article 4(1)(26) of Regulation (EU) No 575/2013?

We object to the inclusion of activities that are "related to lending." From our point of view, this term is too vague because it is unclear what would be covered by it.

Additionally, point a) of Article 4(1)(18) refers to an extension of banking. However, **if a service does not pertain to an activity that requires a license under the CRD and is not subject to banking supervision, it should not be included under banking activities either**. Otherwise, the term becomes blurred. Hence, a corresponding clarification should be made.

Q6. Do you agree with the proposed criteria for identifying activities that are 'ancillary to banking'? Are the three main criteria specified for that purpose (i.e. support, complement and rely on banking) sufficiently clear? Are there any other criteria that should be included in that regard?

We agree with the criterion of a "supporting" attribute, but not with the two other ones of "complementing" and "relying on banking". This would go too far for several reasons.

The new definition of ancillary services undertaking is relevant for, inter alia, the inclusion in prudential consolidation. **The objective of prudential consolidation is to enable indirect regulatory access to non-institutions**. The scope of prudential consolidation only includes group entities operating in the financial sector – with the aim of identifying the bank-specific risks of a particular bank and its subsidiaries or undertakings in which it holds participation. This also includes ancillary services undertakings. However**, businesses should only be classified under this term if their activity is associated with specific banking risks**.

This means that **not every activity can be meant as "ancillary"**, but instead only those that have a supporting relationship to banking activities, i.e. that enable or facilitate them. In particular, the meaning of 'ancillary' suggests this, to the extent that this term means 'supporting or providing assistance' (synonym: 'auxiliary'). What is not meant, however, is that the term 'ancillary' covers any activity other than the banking activity defined above. Any such interpretation would go beyond the purpose of the consolidation provisions, which is to have regulatory access to non-banks that conduct or are involved in supervised business.

Including activities that "complement" banking may have the consequence of covering a very broad range of practices that do not comply with the background explained above. The explanation of the term "complement" in Para. 21 of the draft Guidelines also does not contribute to the required delimitation:

In our understanding, the specific issue referred to in Para. 21 a) is that the undertaking introduces a new group of customers to the bank. This activity itself does not imply bank-specific risks, which are only associated with the bank's own activities and products and are already covered by banking supervision.

Regarding Para. 21b), it should be noted that this would indirectly include the provision of non-banking services and products by a non-bank into banking supervision. This scenario, however, does not imply additional bank-specific risks and does not require inclusion into prudential supervision.

A similar line of argumentation applies to the term "relying on banking". Here we see the following additional problems.

In relation to **Para. 23**, it is not conceivable why the reliance on banking products, services or funding by a credit institution would trigger the activity to be considered as "ancillary to banking". This view **only focuses on the undertaking's relation to an institution but completely disregards the nature of activity of the undertaking in question**. In our opinion this is a wrong focus that is not intended by the definition. It is also not covered by the common understanding of the term "ancillary".

Additionally, **the terms "relies on banking products or services" and "funding" are too broad**. They may encompass a wide range of relationships that are not necessarily associated with the risk addressed by the ASU definition. In any case, any form of equity capital should be excluded from the term "funding."

Finally, it is very common for a credit institution to provide funding to its subsidiary or an undertaking in which it holds a participation, but this common circumstance does not qualify the activities provided by the undertaking in any way (which should, however, be the core element of the ASU definition). Ultimately, this **could result in nearly all subsidiaries or undertakings in which institutions hold a participation being qualified as ASUs – regardless of the nature of their business**.

Q7. Do you agree with the approach envisaged in Section 4.3, which limits the assessment of an activity as 'ancillary to banking' only to undertakings that have to or may have to be included in the scope of prudential consolidation or are collectively held by institutions belonging to the same IPS?

We welcome the limitation of the assessment of an activity as 'ancillary to banking' to undertakings that have to be included in the scope of prudential consolidation, as this reduces bureaucracy in other cases.

However, we are of the opinion that this limitation should not only be made in relation to point b) of the definition of an ASU, but also to point a) (i.e., activities that are a direct extension of banking). There is no obvious reason for distinguishing between the two categories in this regard.

Additionally, **we suggest clarifying that an institution which generally does not have to perform prudential consolidation of its subsidiaries and participations is also not required to assess the status of an undertaking in which it only holds participation**. This should be the case where there is a general lack of subsidiaries which qualify as institutions or financial institutions, or where there is no obligation to consolidate due to Art. 19 CRR or due to the absence of an authority's determination pursuant to Art. 18(5) CRR. This clarification is needed because paragraph 18(a) of the draft Guidelines also refers to "*any other situations specified in paragraphs 3, 5 … of Article 18*" of the CRR, which could be misconstrued as meaning that an institution must perform the ancillary assessment even if it is generally exempt from prudential consolidation.

The same applies to undertakings subject to the equity method pursuant to Article 18(5) CRR. Clarification is warranted here because Article 18(5) of the CRR explicitly states that the equity method does not constitute the relevant undertakings being included in supervision on a consolidated basis.

Generally, **we see a risk of circular reasoning in Para. 18(a)** of the draft Guidelines, which refers to undertakings that "*have to or may be included in the prudential perimeter of consolidation*". In light of the aforementioned concerns, we are afraid that, ultimately, all participations in undertakings providing relevant services would have to be qualified as ASUs, given the potential risk of their inclusion in prudential consolidation. We therefore also suggest deleting the phrase "*or may*".

Finally, **we object to the counter-exception of undertakings that are collectively held by IPS members**. There is no reason why these undertakings should be treated differently to those held by non-IPS institutions. In particular, the argument set out in footnote no. 5 of Part 3 of the consultation paper, i.e. that such undertakings "*may still maintain a close operational and functional relationship with the banking activities of the IPS institutions*", also applies to undertakings outside the IPS sphere. In the IPS sphere, common participations regularly have a very low financial importance to the individual institution and are only held for collective strategic purposes. **If there is no obligation to consolidate these participations due to their low importance to the individual institution there is no point in requiring the determination of their status as ASU**.

Therefore, imposing stricter rules on IPS members would constitute unjustified differential treatment. In this context, we would like to add that the term "collectively owned" is unclear and requires a precise definition.

Q8. Do you have any comments on concept of 'banking' specified in Section 4.3, which includes all relevant services or activities provided by institutions or financial institutions?

In our understanding, **Section 4.3 establishes a different concept of banking than Section 4.2 which only refers to points 1, 2 and 6 of Annex I to the CRD**. It is not understandable why the same term "banking" should be understood differently in points a) and b) of Sec. 4 No. 18 CRR. Such a distinction was certainly not intended by the legislator – if that would have been the case the legislator would instead have chosen different terms. Therefore, **we suggest sticking to the interpretation laid down in Section 4.2 which is plausible**.

The new definition of ancillary services undertaking is relevant for, inter alia, the inclusion in prudential consolidation. The objective of prudential consolidation is to enable indirect regulatory access to non-institutions. The scope of prudential consolidation only includes group entities operating in the financial sector – with the aim of identifying the bank-specific risks of a particular bank. This also includes ancillary services undertakings. However, businesses should only be classified under this term if their activity is associated with specific banking risks of the bank.

This means that not every activity can be meant as "ancillary", but instead only those that have a supporting relationship to banking activities, i.e. that enable or facilitate them. In particular, the meaning of "ancillary" suggests this, to the extent that this term means "supporting or providing assistance" (synonym: auxiliary). What is not meant, however, is that the term "ancillary" covers any activity other than the banking activity defined above. Any such interpretation would go beyond the purpose of the consolidation provisions, which is to have regulatory access to non-banks that conduct or are involved in supervised business.

Q9. Do you have any comments on the specifications provided for the activities explicitly referred to in Article 4(1)(18)(b) of Regulation (EU) No 575/2013? In particular, are the illustrative examples provided therein adequately defined?

In relation to the **ownership or management of property, we are of the opinion that the interpretation of this legal example should be limited to the case that is mentioned in Para. 26 a) i)**, i.e. cases where the properties owned or managed are used to support the operations of banking business.

It is unclear to which cases the second example pursuant to Paragraph 26 a) ii) refers. We agree to cover cases of realized collateral managed by the undertaking, as this supports the banking business. To this end, we suggest clarifying the property owner (e.g., "*the institution's ownership of the properties arises as a direct result of banking business*"). Otherwise, Paragraph 26 a) ii) might be misunderstood as also relating to cases in which an institution's customer owns a premise managed by the relevant undertaking and finances the ownership with a loan. In such a scenario, however, the undertaking provides its service only to a third party (the customer) and not to the institution and therefore there is no element that could be considered as ancillary.

Similarly, we disagree with the classification pursuant to Para. 26 a) iv) and v) as these cases relate to premises that are not owned by the institution, but only by customers and other investors. Here, the recipient of the management service is the customer only and not an institution. A relation to the banking business is too distant and it does not bear any bank specific risks.

The example stipulated in Para. 26 b) iii) relates to marketing and should not be treated at all in the context of the concrete legal example of "ownership or management of property". It would go too far to include the *marketing* of banking products and services in the activities of *owning or managing* property.

In relation to Para. 26 c), we refer to our general critic on the inclusion of the aspect of "relying on banking" into the interpretation of the term "ancillary" (see Q6).

Regarding the provision of data processing services, we believe it is necessary to limit this activity to services connected with bank-specific risks. This applies to examples such as the establishment and operation of core banking systems, as well as KYC and credit application tools. However, services that can be used by any business, such as running data warehouses or setting up HR applications, should not be included in this legal example. A corresponding clarification should be added to Para. 27a and 27b.

We suggest deleting Para. 27c, as reliance on a banking product or service alone should not be a relevant criterion, see above.

Q10. Do you have any comments on the process envisaged for the determination of activities to be considered similar to points (a) and (b) under Article 4(1)(18)(c) of Regulation (EU) No 575/2013?

We consider the suggested process for implementing Article 4(1)(18)(c) CRR to be ineffective. In practice, this means that **national supervisory authorities repeatedly submit new use cases to the EBA**. In our view, the Guidelines must provide a clear definition that can be applied unambiguously by all European institutions and national supervisory authorities and allows for a final case-by-case review and assessment. The repeated submission of individual cases and possible extensions by the EBA entails an indefinite review obligation. This makes stable planning impossible, particularly with regard to regulatory consolidation requirements and possible capital deductions and, in our opinion, weakens financial stability.

Q11. Do you have any comments on the clarification of the principal activity of an ASU? Do you consider the definition of this concept useful for the application of Article 4(1)(18) of Regulation (EU) No 575/2013?

We welcome the introduction of a scale for determining the existence of a main activity. This provides the necessary clarity and contributes to a harmonised approach.

Q12. In general, is there any other activity or criteria not explicitly mentioned in these guidelines that should be considered to identify activities as either a 'direct extension of banking' or 'ancillary to banking'?

NA