

EBA REPORT ON OTHER FINANCIAL INTERMEDIARIES AND REGULATORY PERIMETER ISSUES

EBA

EUROPEAN
BANKING
AUTHORITY

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Abbreviations

AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
AML	Anti-Money Laundering Directive (Directive (EU) 2015/849)
CCD	Consumer Credit Directive (Directive 2008/48/EC)
CF	crowdfunding
Competent authority	authority within the meaning of point (i) of Article 4(2) of Regulation (EU) No 1093/2010
CRDIV	Capital Requirements Directive (Directive 2013/36/EU)
CRR	Capital Requirements Regulation (Regulation (EU) No 575/2013)
EBA	European Banking Authority
EEA	European Economic Area
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
FinTech	financial technology
FSB	Financial Stability Board
FVC	financial vehicle corporation
EMD	Electronic Money Directive 2 (Directive 2009/110/EC)
IFRS	International Financial Reporting Standards
MCD	Mortgage Credit Directive (Directive 2014/17/EU)
MiFID	Markets in Financial Instruments Directives (Directive 2004/39/EC and Directive 2014/65/EU)
OFI	other financial intermediary
PSD	Payment Services Directive 1 (Directive 2007/64/EC)
PSD2	Payment Services Directive 2 (Directive (EU) 2015/2366)
SME	small and medium-sized enterprise
SPV-Sec	special purpose vehicle (securitisation)
SSPE	securitisation special purpose entity
UCITS	undertaking for collective investment in transferable securities

Executive summary

Objectives and policy context

The objective of the EBA is to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and businesses. To this end, among other things, the EBA shall contribute to ensuring that the taking of credit and other risks is appropriately regulated and supervised.¹ Accordingly, the EBA is competent to monitor and assess the perimeter of regulation as regards the carrying out of credit intermediation activities, i.e. activities that are ‘bank-like’ and involve: (a) maturity transformation;² (b) liquidity transformation;³ (c) leverage; (d) credit risk transfer;⁴ and (e) similar activities.

The regular monitoring of credit intermediation activities outside the traditional banking system has been recognised by policymakers at the international and EU levels as essential to ensure that risks to financial stability emerging outside the perimeter of banking regulation are identified and addressed appropriately. Accordingly, since 2011, the Financial Stability Board (FSB) has been conducting annual global shadow banking monitoring exercises.⁵

In the EU, the European Systemic Risk Board (ESRB) has also implemented an annual shadow banking monitoring exercise aligning with the entities-based and activities-based monitoring approach adopted by the FSB. The ESRB Shadow Banking Monitor published in May 2017⁶ focuses, in section 2, on other financial intermediaries broken down by category, including financial vehicle corporations and special purpose entities. It also provides a quantitative analysis of the credit intermediation and liquidity and maturity transformation carried out by those entities, and assesses leverage and interconnectedness with the regular banking system.

In light of calls at the international level to undertake regular monitoring of the regulatory perimeter,⁷ and taking account of other developments including the emergence of ‘FinTech’⁸ and

¹ Article 1(5) of 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/EU as amended by Regulation (EU) No 1022/2013: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414578207624&uri=CELEX:02010R1093-20140819>.

² Borrowing short-term and lending/investing on longer timescales.

³ Using cash-like liabilities to buy less liquid assets.

⁴ Transferring the risk of credit default to another person for a fee.

⁵ Background on the work of the FSB, including its annual shadow banking exercises, is available here: <http://www.fsb.org/what-we-do/policy-development/transforming-shadow-banking-into-resilient-market-based-finance/>.

⁶ The EU Shadow Banking Monitor (No. 2) (May 2017) is available here: https://www.esrb.europa.eu/pub/pdf/reports/20170529_shadow_banking_report.en.pdf?865277f048c237479d76405b7119b886.

⁷ See the FSB’s Thematic Review on the Implementation of the FSB Policy Framework for Shadow Banking Entities (Peer Review Report, May 2016): <http://www.fsb.org/2016/05/thematic-review-on-the-implementation-of-the-fsb-policy-framework-for-shadow-banking-entities/>.

⁸ See, for example, the European Commission’s consultation on FinTech: a more competitive and innovative European financial sector (March 2017): <https://ec.europa.eu/info/consultations/public-consultation-fintech-more-competitive->

the European Commission's proposal for a directive amending Directive 2013/36/EU (the Capital Requirements Directive or CRDIV) and the Capital Requirements Regulation (CRR),⁹ the EBA presents in this report an up-to-date account of issues relating to the prudential treatment of relevant non-bank financial intermediaries (other financial intermediaries (OFIs)) and the regulatory perimeter.

Past work on the regulatory perimeter

On 4 September 2013, the European Commission published a Communication on shadow banking, which presented the initiatives that the Commission may take to curb the development of systemic risks inherent in the shadow banking sector.¹⁰ In this context, the EBA received a request from the Commission to carry out a comprehensive study of various legal and quantitative aspects regarding 'credit institutions' and other entities carrying out bank-like activities in the EU.

The EBA study resulted in the publication, on 27 November 2014, of an EBA Report and Opinion on matters relating to the perimeter of credit institutions (the 2014 EBA Report).¹¹ In particular, the EBA set out the results of its analysis of certain terms used in the CRDIV/CRR, such as 'credit institution', 'deposits', 'other repayable funds' and 'public', where it concluded that there was a high level of variation in the way these notions are understood and applied across the Member States. For this reason, the EBA, in its Opinion, urged the European Commission to give consideration to possible clarifications of the definition 'credit institution' in view of the risk that the term could be interpreted in an inconsistent way in contradiction of the very foundation of the Single Rulebook. The Report also included a review of the prudential treatment of entities carrying out credit intermediation activities, but which are not subject, on an individual basis, to any EU prudential framework. This report builds on the analysis and findings underpinning the 2014 EBA Report in view of the need to monitor continuously the regulatory perimeter. This report does not repeat that analysis of the term 'credit institution' as the EBA is not aware of any recent changes under national law or in supervisory practice that affect the analysis.

Scope of this report

This report aims to present a comprehensive analysis of the prudential treatment of OFIs carrying out credit intermediation activities beyond the perimeter of prudential regulation established by specific EU sectoral legislation.¹² It also provides an assessment of the use of Articles 2(5) and 9(2)

[and-innovative-european-financial-sector en](https://www.eba.europa.eu/-/eba-publishes-a-discussion-paper-on-its-approach-to-fintech), and the EBA's Discussion Paper on its approach to FinTech (August 2017): <https://www.eba.europa.eu/-/eba-publishes-a-discussion-paper-on-its-approach-to-fintech>.

⁹ The European Commission's proposal is available here: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-854-F1-EN-MAIN.PDF>.

¹⁰ The European Commission's Communication is available here: http://ec.europa.eu/internal_market/finances/docs/shadow-banking/130904_communication_en.pdf.

¹¹ The 2014 EBA Report and Opinion are available here: <https://www.eba.europa.eu/-/eba-publishes-an-opinion-on-the-perimeter-of-credit-institutions>.

¹² That is, entities that are not: CRDIV/CRR credit institutions or investment firms; MiFID investment firms subject to prudential provisions in the CRDIV/CRR or equivalent; insurers within the scope of Directive 2009/138/EC or occupational pension funds within the meaning of Directive 2003/41/EC; or that are not subject to prudential requirements under any of the following: the Electronic Money Directive (Directive 2009/110/EC); the first Payment

CRDIV and consolidation issues that may arise from the application of the definitions of ‘financial institution’ and ‘ancillary services undertaking’ as set out in, respectively, points (26) and (18) of Article 4(1) CRR. Finally, the report considers issues of interpretation encountered by competent authorities on the list of activities in Annex I to the CRDIV (the activities subject to mutual recognition).

Methodology and data

The observations and findings set out in this report are informed by data gathered as a result of an EBA survey (the OFI survey) issued in December 2016 to the competent authorities in all Member States and the States of the European Economic Area (EEA) and a series of follow-up queries.

For the purposes of the survey, OFIs were defined as entities that:

- are established in the EU;
- carry out one or more credit intermediation activities (activities involving (a) maturity transformation; (b) liquidity transformation; (c) leverage; (d) credit risk transfer; (e) similar activities); and
- are not subject to entity-specific (i.e. individual) prudential requirements under specific EU sectoral legislation.

In the OFI survey, competent authorities were asked:

- to report whether any changes are required to the list of entities excluded from the scope of the CRDIV/CRR under Article 2(5) CRDIV;
- to identify and describe those OFIs that carry out credit intermediation activities but are not subject on an individual basis to prudential requirements specified in EU sectoral legislation. In particular, competent authorities were asked to indicate whether the OFIs are subject, under national law, to an individual prudential regime similar to that applied to credit institutions under the CRDIV/CRR, to a bespoke prudential regime, or to no prudential regime. Competent authorities were also asked to describe:
 - whether, when an OFI appears to be taking deposits or other repayable funds from the public, reliance is placed on Article 9(2) CRDIV;

Services Directive (Directive 2007/64/EC); the second Payment Services Directive (Directive (EU) 2015/2366); the Alternative Investment Fund Managers Directive (AIFMD) (Directive 2011/61/EU); the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (Directive 2009/65/EC) (for completeness it is noted that managers of UCITS and AIFs are also outside the scope of the survey, as are money market funds (MMFs) within the scope of the AIFMD and UCITS). Undertakings that are authorised as European long-term investment funds in accordance with Regulation (EU) No 2015/760, within the meaning of point (b) of Article 3(1) of Regulation (EU) 346/2013 (qualifying social entrepreneurship funds) or within the meaning of Article 3(b) of Regulation (EU) No 345/2013 (qualifying venture capital funds) are also out of scope.

- how OFIs are treated should they be in the same group as an institution for the purposes of prudential consolidation pursuant to Article 18 CRR;
- the key components of any applicable national prudential regime;
- to give an account of their experiences and questions of interpretation encountered regarding the definition of ‘financial institution’ and ‘ancillary services undertaking’ as defined in points (26) and (18), respectively, of Article 4(1) CRR and how such definitions may have impacted the perimeter of prudential consolidation.

Responses to the OFI survey were received from the competent authorities of all Member States and, in relation to the treatment of crowdfunding entities, one Member State (NO) of the EEA.

Main conclusions

The EBA observes that Article 2(5) CRDIV remains valid and requires minor amendment to reflect the need for the omission of two entities, the addition of one entity and the amendment of one entity. With respect to Article 9(2) CRDIV, the EBA concludes that, in its current drafting, the article may continue to have relevance in the regulatory systems of the Member States and any amendment thereto would have to be substantiated by a prior thorough impact assessment beyond the scope of the OFI Report.

As for the OFIs reported by the competent authorities, the EBA observes that the prudential treatment varies significantly between the Member States. The EBA concludes that at this stage no regulatory intervention is required at the EU level. However, should credit intermediation activity by OFIs continue to grow, the state of regulation of these risks will require further monitoring and analysis.

The EBA observes that the terms ‘financial institution’ and ‘ancillary services undertaking’ as referred to in points (26) and (18) of Article 4(1) CRR are prone to inconsistent interpretation. In view of these divergences, the EBA observes that there is a risk that regulatory consolidation rules may be applied inconsistently across the EU and therefore urges clarifications.

The EBA also notes that the list of activities subject to mutual recognition in Annex I to the CRDIV is outdated and may benefit from update to ensure that the list remains fit for purpose.

Structure

This report provides an account of the responses to the OFI survey and is divided as follows:

- Part 1 : observations on the entities excluded from the scope of the CRDIV/CRR according to Article 2(5) CRDIV;
- Part 2 : observations and analysis with regard to entities excluded from the application of Article 9(1) CRDIV on the prohibition of taking deposits and other repayable funds;

- Part 3 : observations and analysis regarding the regimes, if any, applied to OFIs carrying out credit intermediation activities but not subject, on an individual basis, to any prudential requirements under an EU framework;
- Part 4 : consolidation issues relevant to the definition of ‘financial institution’ and ‘ancillary services undertaking’;
- Part 5 : general considerations on Annex I to the CRDIV regarding activities subject to mutual recognition.

Next steps

This report has informed the EBA Opinion on matters relating to the prudential treatment of other financial intermediaries and regulatory perimeter issues dated 09/11/2017¹³. The EBA stands ready to carry out further work in relation to the matters identified in this report and the Opinion and will continue to monitor the regulatory perimeter, including in conjunction with the ESRB as part of the annual EU shadow banking monitoring exercises, and in light of FinTech developments, which may affect the delineation of credit institutions as well as other financial intermediaries.

¹³ The EBA’s Opinion is available here:

<https://www.eba.europa.eu/documents/10180/2019769/Opinion+on+OFIs+%28EBA-Op-2017-13%29.pdf>

1. List of entities excluded from the scope of the CRDIV/CRR according to Article 2(5) CRDIV

1.1 Summary

Article 2(5) CRDIV excludes from the scope of that Directive entities pursuing public policy objectives, such as central banks and post office giro institutions, and in 20 Member States a total of 41 other specified entities/types of entities where, due to the nature of their activities, it is not considered necessary to subject them to the EU legislation intended to promote a level playing field for the provision of banking services (the CRDIV/CRR).

The EBA notes that in the European Commission's legislative proposal amending CRDIV it is proposed that Article 2(5) CRDIV be amended. The EBA does not comment on the proposal but notes that, in its view, Article 2(5) remains valid and could benefit from specific minor amendments to take account of the need to add or omit a very limited number of specified entities, which consist of more omissions (2) than additions (1) as reported by the competent authorities.

1.2 Analysis

Article 2(5) CRDIV has the effect of excluding from the application of the CRDIV/CRR a number of entities. A list of exclusions has existed since the First Banking Directive (Directive 77/780/EEC)¹⁴ and has expanded over time reflecting changes in the membership of the EU.¹⁵

In the survey preceding the 2014 EBA Report, competent authorities were asked to comment on the list of entities, including by indicating the bank-like activities carried out by such entities and the solo prudential requirements applied. Based on the responses received, the EBA observed that all of the exclusions remained valid in light of the special characteristics of those entities, either because they discharge a 'public' function or because of their scale.^{16 17}

¹⁴ First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

¹⁵ Historically, certain entities such as central banks, post office giro institutions, national savings banks and other similar state controlled or owned entities have been excluded from the scope of European banking legislation. Article 2(2) of the First Banking Directive specified that it shall not apply to: (a) the central banks of the Member States; (b) post office giro institutions; and (c) specific entities (as at the date of this report in AT, BE, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, PL, PT, SE, SI, UK).

¹⁶ See paragraph 39 of the 2014 EBA Report.

¹⁷ Since the CRDIV was adopted before HR joined the EU, in the responses to the survey preceding the 2014 EBA Report it was pointed out that the inclusion of credit unions and of the Croatian Bank for Reconstruction and Development in the list of Article 2(5) CRDIV was part of the negotiations on Croatian accession to the EU. HR did not provide additional information on these entities in its response to the OFI survey.

As a follow-up to this analysis, in the OFI survey, the competent authorities were asked to indicate whether the list of entities to which Article 2(5) CRDIV applies requires amendment. The responses are summarised in Figure 1.

Figure 1: Amendments proposed to Article 2(5) CRDIV

Member State	Entity	Addition/Omission/Amendment
BE	Institut de Réescompte et de Garantie/Herdiscontering – en Waarborginstituut	Omission
DE	Undertakings recognised under the Wohnungsgemeinnützigkeitsgesetz	Omission
NL	Kredietunies (credit unions)	Addition
NL	Overijsselse Ontwikkelingsmaatschappij NV	Amendment to read: Ontwikkelingsmaatschappij Oost NV

The large majority of Member States did not indicate the need to change Article 2(5) CRDIV. Of the Member States that requested amendments, the EBA notes that:

- the request for the deletion of ‘undertakings recognised under the Wohnungsgemeinnützigkeitsgesetz’ was already included in the 2014 EBA Report;
- the request for the inclusion of Kredietunies (credit unions) was also included in the 2014 EBA Report.

In their responses, two Member States (PT, UK) pointed out that the revision of the list of entities provided for by Article 2(5) CRDIV is currently being discussed by European legislators as part of the revision of the CRDIV/CRR.¹⁸ However, given that the negotiations are ongoing as at the date of this report, the amendments that the European Commission has proposed are not assessed.

¹⁸ According to the explanatory memorandum for the European Commission’s proposal for a directive amending the CRDIV (<http://ec.europa.eu/info/node/6089>), to facilitate the exemption from the CRDIV/CRR regulatory framework of institutions in other Member States that are similar to the ones already included in the list of Article 2(5) CRDIV, it is proposed that the Commission be empowered to exempt specific institutions or categories of institutions from the CRDIV, provided that they comply with clearly defined criteria.

1.3 Main observations

Based on the responses to the OFI survey, the EBA does not identify the need for significant amendments to the list of entities excluded from the CRDIV/CRR currently included in Article 2(5) CRDIV other than those referred to in section 1.2.

2. Observations and analysis with regard to entities excluded from the scope of the CRDIV/CRR under Article 9(2) CRDIV

2.1 Summary

Article 9(2) CRDIV enables Member States to allow entities that are not referred to in Article 2(5), nor are credit institutions, to accept deposits or other repayable funds from the public, provided that the activities are subject to regulations and controls intended to protect depositors and investors.

Contrary to Article 2(5) CRDIV, Article 9(2) does not list expressly the individual entities encompassed in its scope. Data collected as a result of the OFI survey suggests that a number of different types of entities can take deposits or other repayable funds from the public but are not subject to the CRDIV/CRR.

Article 9(2) CRDIV is relied on expressly by four Member States (DK, IE, IT, NL) in order to allow certain OFIs to accept deposits and other repayable funds. In other cases, no express reliance is placed on Article 9(2), but the OFI survey shows that such cases may cover different types of situations because, among other reasons, there is no harmonised definition of the terms ‘deposits’ and ‘other repayable funds’ and ‘the public’ in the EU. Based on the information received, it has not been possible for the EBA to provide an estimate of the number of entities for which Article 9(2) is or would be relevant.

The EBA concludes that, in particular in the absence of a harmonised definition of ‘taking deposits or other repayable funds from the public’, Article 9(2) CRDIV, in its current drafting, may well continue to have relevance in the regulatory systems of the Member States and any amendment thereto would have to be substantiated by a prior thorough impact assessment beyond the scope of the OFI Report.

In the EBA’s view, Article 9(2) CRDIV covers a range of entities that do not share the characteristics of those within the scope of Article 2(5). As such, Article 9(2) remains relevant in itself.

2.2 Analysis

Article 9 CRDIV prohibits persons or undertakings other than credit institutions from carrying out the business of accepting deposits or other repayable funds from the public except in particular cases and has its roots in the Second Banking Directive (Directive 89/646/EEC).¹⁹ In that Directive, the prohibition was specified as not applying ‘to the taking of deposits or other funds repayable by a Member State or by a Member State’s regional or local authorities or by public international bodies of which one or more Member States are members or to cases expressly covered by national or Community legislation, provided that those activities are subject to regulations and

¹⁹ Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.

controls intended to protect depositors and investors and applicable to those cases'. This prohibition and the exclusions have been carried forward in subsequent EU measures and may now be found in Article 9(1) and (2) CRDIV, respectively.

In 2014, the competent authorities were asked to comment on the use of the exclusions in Article 9(2) CRDIV. As a result of the limited number of substantive responses received at the time, the EBA concluded that further work would be needed in order to form a comprehensive view of the application in the Member States of the exclusions from the prohibition set out in Article 9(1).²⁰

For the purpose of the present report, competent authorities were asked if, in relation to the OFIs listed in their responses to the OFI survey, reliance was placed on Article 9(2) CRDIV.

According to the responses received, four Member States (DK, IE, IT, NL) indicated reliance on Article 9(2) CRDIV for certain OFIs (see Figure 2). For the remaining Member States, reliance was not expressly indicated, but these responses should be interpreted with care, as discussed in section 2.3.

Figure 2: Reliance on Article 9(2) CRDIV by Member State and by type of OFI

	Member State	Total
Reliance on Article 9(2) CRDIV	DK, ²¹ IE, ²² IT, ²³ NL ²⁴	4
No express reliance on Article 9(2) CRDIV²⁵	AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, LT, LU, LV, MT, PL, PT, RO, SE, SI, SK, UK	24

2.3 Main observations

With respect to those jurisdictions in which reliance is placed on Article 9(2) CRDIV, the exclusion is expressly indicated as being used for:

- the taking of deposits by saving companies (DK);

²⁰ See paragraph 43 of the 2014 EBA Report.

²¹ Savings companies.

²² Structured finance vehicles (FVCs) excluding retained securitisation where identifiable, and hire purchase (to the extent that they take deposits/other repayable funds from the public).

²³ Financial intermediaries, microfinance companies, and confidi.

²⁴ Crowdfunding (loan-based/equity-based), intra-concern finance companies, credit providers – consumer credit, and credit providers – wholesale credit.

²⁵ No express reliance on Article 9(2) CRDIV covers in fact different types of situations and ought to be interpreted with care as discussed in section 2.3.

- securities or other obligations to which the definition of ‘banking business’ relates where they are issued by structured finance vehicles (FVCs) (IE);
- corporate bonds issued by financial intermediaries (IT);
- the receipt by hire purchase providers of money in respect of leasing or selling goods under a hire purchase agreement, leasing agreement or credit sale agreement (IE).

In the above cases, the taking of such deposits and other repayable funds is subject to certain specific restrictions. In one instance (IE), the competent authority may exempt the relevant OFI from being required to hold a banking licence (and hence rely on Article 9(2) CRDIV) if it is satisfied that the granting of the exemption would be consistent with the proper and orderly regulation of banking and that the conditions that it deems fit to impose are met. In another case (IT), the taking of other repayable funds from the public by the relevant OFI is subject to national limits set forth by prudential and corporate rules.

For the 24 cases where no reliance on Article 9(2) CRDIV was expressed, the EBA noted that such cases cover, in fact, different situations. First, these cases include Member States that did not provide express confirmation of whether their OFIs rely on Article 9(2) (CY, MT, SE). It also includes Member States that have referred to OFIs falling under Article 2(5) and are hence excluded from the scope of the CRDIV (e.g. LV, PL)²⁶ and, accordingly, for those OFIs, Article 9(2) is irrelevant. In three cases (EE, HU, PT) where no reliance was expressed but the description of an OFI’s activity as reported in the responses to the OFI survey showed or implied that these OFIs may issue bonds or other securities instruments to the public (which may hence fall under the definition of ‘repayable funds’²⁷), competent authorities were invited to confirm if it was correct that Article 9(2) was not relied on and to explain the basis for this non-reliance. Based on the responses received to these follow-up queries, the EBA observed the following elements.

For three Member States (FR,²⁸ HU,²⁹ PT³⁰), with respect to specific OFIs, a reliance on Article 9(2) CRDIV was expressed to be unnecessary, as the relevant national law expressly excludes the

²⁶ For the purpose of the OFI survey, not all competent authorities referred to their OFIs falling under Article 2(5) CRDIV since details on regimes applicable to such entities were already included in the 2014 EBA Report.

²⁷ Please refer to the 2014 EBA Report on the perimeter of credit institutions on the definitions of ‘deposit’ and ‘other repayable funds’, in particular paragraphs 26 and 27.

²⁸ In FR, a specific type of OFI, the *société de financement*, is permitted to issue negotiable debt instruments (*titre de créance négociable*) on the condition that such instruments do not fall within the definition of ‘repayable funds from the public’ (which is further defined by the national law).

²⁹ HU noted that, according to its banking law, deposits and other repayable funds from the public in excess of their own funds, without a guarantee or without any surety facilities provided by a credit institution or the State for guaranteeing repayment may be taken by credit institutions only. Only the following shall not be construed as taking of deposits and other repayable funds from the public: (a) the issue of debt securities under the conditions and restrictions laid down in the relevant legislation; (b) the carrying of funds received by a payment institution or an electronic money institution on a payment account; (c) funds received in exchange of electronic money and held by electronic money institutions. Accordingly, financial enterprises or intermediaries are not allowed to gather deposits. However, HU noted that, as stated in the EBA Opinion as well, the term ‘other repayable funds’ is not well defined in the CRD. If and when the CRD becomes more precise on this term, HU may initiate the change of the regulation accordingly.

taking/issuing of certain funds/securities from the definition of ‘repayable funds’, thereby rendering the prohibition in Article 9(1) CRDIV, and therefore Article 9(2), legally irrelevant, while for one Member State (EE) it was not possible to draw a definitive conclusion.³¹

For all the other cases where no reliance on Article 9(2) CRDIV was expressed, the description of the activities undertaken by the relevant OFIs showed no indication or sign that the OFIs were in fact taking deposits and/or repayable funds.

In light of the foregoing, it has not been possible for the EBA to provide a quantitative estimate of the number of entities for which Article 9(2) CRDIV is or may be relevant.³²

To place the answers to the OFI survey in context, it is important to recall the issue surrounding the definition of ‘taking of deposits’ and ‘other repayable funds’. As discussed in the 2014 EBA Report on the perimeter of credit institutions, the terms ‘deposits’, ‘other repayable funds’ and ‘from the public’, which are key in delineating the scope of Article 9 CRDIV, are not defined in the CRDIV/CRR, thereby leading to a degree of variation between the Member States in the interpretation of the terms.³³ In the 2014 EBA Report, the EBA noted, among other points, that the term ‘other repayable funds from the public’ appears to be interpreted in a broadly homogeneous way between the Member States although the vast majority do not have a specific statutory definition, and suggested that a definition could be established to avoid the potential for the term to be interpreted differently across the EU. The 2014 EBA Report also suggested a clarification reflecting the conclusions of the Court of Justice of the European Union, which determined that ‘other repayable funds’ refers not only to financial instruments which possess the intrinsic characteristic of repayability, but also to those which, although not possessing that characteristic, are the subject of a contractual agreement to repay the funds paid.³⁴

Considering the uncertainties surrounding the definition of ‘taking of deposits’ and ‘other repayable funds’, if the national law of a Member State provides that a given activity involving the taking of certain funds from the public (such as the issuance of debt securities by any given OFI) should not be regarded as the ‘taking [of] deposits or other repayable funds from the public’, then it follows that such a Member State will consider that Article 9(1) CRDIV is not applicable and, in

³⁰ In PT, funds raised through the issuance of bonds or commercial paper under the provisions, and within certain limits imposed by the commercial code and the specific legal framework for each relevant OFI, are, according to national law, excluded from the definition of ‘repayable funds received from the public’.

³¹ EE indicated that Savings and Loans Associations are allowed to take deposits from members and receive repayable funds. Crowdfunders are allowed to issue bonds. However, no reliance on Article 9(2) CRDIV was expressed.

³² For the four competent authorities that indicated express reliance on Article 9(2) CRDIV, it was not possible to estimate the number of entities as they were referred to in generic terms (e.g. entities were referred to as “savings banks”, “structured finance vehicles” (SFVs), “financial intermediaries” etc). In other jurisdictions where reliance was not indicated expressly, numerical estimates could not be prepared for a range of reasons, including because: (i) in three cases, no information was provided, (ii) in some cases competent authorities regard the issuance of debt securities (or other similar instruments) as not being regarded as the taking of deposits or other repayable funds (but in some cases this is regarded as such), and (iii) in many cases competent authorities do not hold information on, for example, the number of crowdfunding or securitisation entities in their jurisdictions (again, on account of the scope of the regulatory remit).

³³ Please refer to Part I of the 2014 EBA Report regarding the definition of ‘credit institution’.

³⁴ See paragraphs 26 and 27 of the 2014 EBA Report.

the same vein, that it is not necessary for the Member State to rely on one of the exclusions under Article 9(2) to carry out the activities without a licence as a credit institution. Certain EU directives and regulations, such as the PSD2 (Directive 2015/2366/EU)³⁵ or the EMD (Directive 2009/110/EC),³⁶ expressly provide that the funds received (in those cases by payment institutions from payment service users with a view to providing payment services or by electronic money institutions and immediately exchanged with electronic money) shall not constitute a deposit or other repayable funds within the meaning of Article 9 CRDIV.³⁷ A similar qualification by the national law of a Member State is a priori permitted under Article 9(2). However, since there is no common definition of ‘repayable funds from the public’, it is not always possible to clearly identify cases where Article 9(2) is not relied on under national law, but may still be relevant based on the activity actually carried out by an OFI.

It is also important to stress that Article 9(2) CRDIV does not require Member States to expressly rely, in their national legislation, on Article 9(2) when they allow the taking of deposits or other repayable funds from the public by an OFI. Accordingly, it may well be the case that such reliance does exist but is not obvious or apparent in the national law and, hence, has not been reported in the responses to the OFI survey. In this respect, it is to be noted that Article 9(2) has, in principle, been transposed in the national legislation of all Member States and, therefore, national laws may include a provision whereby the prohibition in Article 9(1) ‘shall not apply [...] to cases expressly covered by national [...] law, provided that those activities are subject to regulations and controls intended to protect depositors and investors’. It follows that if a national law or regulation authorises or regulates certain OFIs issuing securities to the public (e.g. securitisation vehicles³⁸ or CF platforms³⁹), that law or regulation per se could be regarded as a reliance on Article 9(2).

A question is whether there would be ground to justify an exemption from the licensing requirement as a credit institution for certain persons or undertakings that, one way or the other, take repayable funds from the public but for which it would be unduly burdensome to be licensed as a credit institution. A typical case would be the situation of certain corporates that issue bonds to the public (generally under a prospectus compliant with the Prospectus Directive (Directive 2007/31/EU)),⁴⁰ and hence take repayable funds from the public, to finance the activities of their entire group.

It follows from the above developments that a thorough impact assessment beyond the scope of this report, and taking into account, in particular, financial stability considerations, would be necessary to assess the magnitude of any amendment to the scope of the currently existing

³⁵ <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2366>.

³⁶ <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32009L0110>.

³⁷ See Article 18(3) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2) and Article 6(3) of Directive 2009/110/EC.

³⁸ On securitisation, please see developments under Parts 3.4 and 4.5 of this report.

³⁹ On crowdfunding, please see developments under Part 3.5 of this report.

⁴⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF>.

exemption under Article 9(2) CRDIV, especially with respect to ‘cases expressly covered by national law’.

2.4 Articulation of Article 2(5) and Article 9(2) CRDIV

The European Commission’s proposal for a directive amending CRDIV includes an amendment to Article 9(2) CRDIV with the intention of better framing the exceptions to the prohibition in Article 9(1). It aims to clarify that ‘the prohibition does not apply to persons or undertakings the taking up and pursuit of business of which is subject to Union law other than the CRD to the extent that their activities subject to such other Union law may be qualified as taking of deposits or other repayable funds from the public’. Furthermore, the proposal aims to clarify that only entities listed in Article 2(5) are exempted from the prohibition in Article 9(1) because they are covered by specific national legal frameworks (the reference to ‘cases expressly covered by national law’ in Article 9(2) is deleted). The proposed amendment therefore raises the question of the articulation, from a legal standpoint, between Article 2(5) and Article 9(2).

This question of the articulation between Articles 2(5) and 9(2) CRDIV and their relative scope of application has hardly ever been discussed. The question is two-fold:

- Does a person or undertaking currently listed in Article 2(5) CRDIV also need to be exempted under Article 9(2)? In other words, is it necessary to have the relevant national law expressly exempting such person or undertaking from being licensed as a credit institution?
- Are Articles 2(5) and 9(2) CRDIV covering the same scope of application so that, should the reference to ‘cases expressly covered by national law’ be deleted from the CRDIV, a person or entity taking deposits and other repayable funds from the public and exempted by virtue of its national law in accordance with Article 9(2), would be required to be expressly listed in Article 2(5)?

As to the first question, according to the responses received, several competent authorities take the view that, with respect to a person or undertaking exempted under Article 2(5) CRDIV, reliance need not be placed on Article 9(2). This approach appears correct since Article 2(5) provides a list of persons and undertakings that fall outside the scope of the CRDIV. Falling outside the scope of CRDIV, such persons and undertakings are no longer subject to Article 9(2). In other words, a reliance on Article 9(2) is irrelevant for an institution that is expressly listed in Article 2(5).

As to the second question, there are arguments to the effect that Articles 2(5) and 9(2) CRDIV cover different species of entities. From the list set out in Article 2(5), it may be possible to conclude that the entities referred to in that Article are, in light of the activities carried out, essentially credit institutions. If we take the view that Article 9(2) aims to capture certain persons or undertakings, such as, for example, securitisation vehicles issuing notes⁴¹ or certain CF

⁴¹ With respect to securitisation vehicles, see the discussion under Part 3.4 of this report.

platforms⁴² or corporates issuing bonds to the public to finance their activities which are not banks, then there is clearly a difference of scope between Article 2(5) and Article 9(2), which are complementary.

Since reliance is clearly placed by certain Member States on Article 9(2) CRDIV, it would therefore be advisable to further consider the impact that the deletion of 'cases expressly covered by national law' may have in terms of the perimeter of regulation and capacity of entities to carry out the activity, in particular, of taking other repayable funds from the public, taking into consideration any risks for the financial stability of the EU.

⁴² With respect to crowdfunding platforms, see the discussion under Part 3.5 of this report.

3. Entities carrying out credit intermediation activities and not subject, on an individual basis, to a prudential framework under EU law

3.1 Summary

There is a wide range of OFIs in the Member States carrying out credit intermediation activities which are not subject, on an individual basis, to a prudential framework under EU law. National prudential regimes differ substantially (both within and across the clusters identified).

The OFIs can be grouped into the following clusters: (i) consumers and corporate lenders, including factoring, leasing, consumer credit/retail credit/microcredit, guarantee providers, mortgage lenders, savings institutions and other types of lenders; (ii) securitisation vehicles; (iii) crowdfunding; and (iv) credit unions and mutuals.

The OFI survey responses show a high degree of variation in the nature of the prudential regimes in place under national law in the Member States. On average there is a trend showing that the more activities an entity may be authorised to undertake, the more regulatory requirements apply. The responses show that CRDIV/CRR-like national regimes, by comparison with bespoke national regimes, tend to have more quantitative prudential requirements. Non-quantitative requirements (controlling persons, approved persons, governance and remuneration) are envisaged under both regimes in the majority of cases.

The activities and regulatory treatment of OFIs should continue to be monitored closely by the EBA, including in conjunction with the ESRB regarding the scale of the activities, as part of the regular shadow banking monitoring work, but no specific recommendations are issued to the EU institutions at this stage.

3.2 Introduction

In the OFI survey, competent authorities were asked to identify entities carrying out credit intermediation activities, including unregulated entities (which were asked to be reported by the authorities on a best efforts basis), in their jurisdictions that are not subject, on an individual basis, to a prudential framework under EU law.

The authorities were asked to report activities by reference to Annex I to the CRDIV (the list of activities subject to mutual recognition), to describe the regulatory status of the entities concerned, and to indicate whether reliance is placed on Article 9(2) CRDIV (see Part 2 of this report).

3.2.1 Clustering of the OFIs

A range of entities were reported in the responses to the OFI survey. To assist in the analysis the EBA grouped the entities into the following clusters based on the activities undertaken (following, wherever possible, the activities classifications listed in Annex I to the CRDIV):

- Cluster 1: consumer and corporate lenders, including factoring, leasing, consumer credit/retail credit/microcredit, guarantee providers, mortgage lenders, saving institutions and other types of lenders; this forms the largest cluster in terms of the frequency of reporting of entities by the competent authorities;
- Cluster 2: securitisation vehicles;
- Cluster 3: crowdfunding;
- Cluster 4: credit unions and mutuals.

A classification of the OFIs by clusters presents a number of limitations:

- First, based on the responses received, it was not always clear whether competent authorities were referring to the specific legal status of entities under national law or to a specific type of activity. Therefore, a cluster may well include, without differentiation, entities that, on the one hand, have a formal status under national law and, on the other hand, carry out a certain type of credit intermediation activity that may be carried out by one or more other types of entity.
- Second, in certain Member States, some entities are 'multi-activity' entities (e.g. they are, by their status, permitted expressly to carry out leasing, factoring, consumer credit, mortgage credit etc., or, in the absence of ad hoc regulation for such activities, are de facto permitted to carry out a range of activities) whereas others have one specific status (e.g. a 'hire purchase company') and can carry out that activity only.⁴³ In certain Member States, the granting of status works 'à la carte', i.e. an entity acquires as many regulatory licenses as it needs to perform the desired activities. The consequence is that a given entity may well be found in different clusters (e.g. an entity may be licensed as a factoring company and as a hire purchase company) and its activities may (but need not) be regulated in different ways.
- Third, the applicable prudential requirements may apply to an entity taken as a whole (irrespective of the business activity carried out) or in relation only to specific types of activity. The OFI survey responses were not always sufficient to provide a fully comprehensive analysis on this point.

⁴³ For the same reason, the EBA does not guarantee that all the OFIs that can provide certain services are referenced in the relevant cluster/sub-clusters as the collection of information among Member States did not allow a clear and comprehensive assessment. This is particularly the case with respect to the consumer and corporate lender cluster, where, for example, the EBA could not guarantee that entities authorised to provide factoring services were in fact all referenced in the 'factoring' sub-cluster.

3.2.2 Classification of prudential regimes

Competent authorities were requested to describe the prudential regime applicable to the reported entities pursuant to national law, choosing between the following: (i) subject to a CRDIV/CRR-like regime (with or without modifications) under national law; (ii) subject to a bespoke prudential regime under national law; (iii) subject to no prudential regime. Competent authorities were further required to detail the prudential requirements, if any, in place under national law.

On the basis of the responses received, in particular where competent authorities have not always described in detail the prudential regimes under national law, it has not always been possible for the EBA to establish clearly the difference between a ‘bespoke’ regime and a ‘CRDIV/CRR-like regime with modification’. However, the EBA has, in conjunction with the competent authorities, assigned each regime (and, where relevant, for each type of designated entity in a Member State) to one of the above categories (see Figures 3, 5, 7, 9, 12, and 14).

In relation to the prudential regimes in place under national law, the EBA has also analysed the following prudential requirements: own funds, capital, large exposures, liquidity, leverage, controlling persons, approved persons, governance and remuneration, and supervisory reporting. For each of the requirements the EBA, again in conjunction with the competent authorities, has assessed them as ‘CRD/CRR-like’ or ‘bespoke’, or has indicated ‘none’ (see Figures 4, 6, 8, 10, 11, 13, and 15).

In some instances a prudential regime may be described overall as CRDIV/CRR-like but may include features that are described as bespoke; similarly in some cases a regime may be described as bespoke but may include features that are CRDIV/CRR-like. The overall designation, again, is based on an element of judgement as to the significance of any deviations from the CRDIV/CRR.

For completeness the EBA notes that, by application of national company laws, entities may typically be required to have a minimum capital requirement to be incorporated. It may also be the case that the specific company laws/provisions governing specific company types may impose certain activity restrictions and/or other ‘prudential-type’ requirements, but the national competent (prudential) authorities may have no role in the oversight and enforcement of those requirements. Accordingly, this report does not capture each and every instance where those situations may arise and it should not be assumed that, simply because no prudential regime is reported, a Member State has made the political choice not to regulate a specific type of entity; rather, ‘prudential-like’ requirements may apply under companies law and fall outside the purview of the competent authorities to which the OFI survey was addressed.

3.2.3 Carrying out of credit intermediation activities in the Member States

The OFI survey results represent a description of the prudential regulatory framework in force, but should not be taken as being representative of the types of activities effectively carried out in the Member States, as competent authorities reported on a best efforts basis entities falling outside their regulatory remits. Monitoring exercises in relation to the OFI sector, such as those

conducted by the ESRB in the context of the shadow banking work, provide useful further assistance as regards the assessment of the range and level of activities undertaken at the national level.⁴⁴ However, as noted previously by the ESRB in the EU Shadow Banking Monitors, statistical information that would allow for a detailed assessment of risks and vulnerabilities in relation to parts of the OFI sector is not readily available. Further initiatives at the national and EU level to improve financial statistical reporting would allow for a more precise assessment of the so-called 'OFI residual', including the nature and scale of activities involved.

3.3 Consumer and corporate lenders, including factoring, leasing, consumer credit/retail credit/microcredit, guarantee providers, mortgage lenders, savings institutions and other types of lenders

This cluster includes a wide range of entities. As a matter of methodology, these entities have been grouped into the following sub-clusters in order to consider more precisely the activities carried out by such entities and their prudential treatment:

- factoring;
- leasing (including hire purchase);
- consumer credit/retail credit/microcredit;
- guarantee providers;
- mortgage lenders;
- savings institutions;
- other types of lenders.

All of the sub-clusters are activity-based and so they may include entities carrying out that particular activity only, or the said activity in conjunction with other financial and/or non-financial activities.

The analysis below draws out the features of the prudential regimes applicable on an entity-by-entity basis notwithstanding that in some Member States a wide variety of entities are referred to as 'consumer credit' providers and are regulated in the same way irrespective of the differences

⁴⁴ The ESRB Shadow Banking Monitor adopts an 'entities-based' and 'activities-based' monitoring approach. In relation to the entities-based monitoring, the ESRB typically follows the ESA 2010 classification of 'other financial intermediaries' in accordance with S.125 of the ESA Regulation (FVCs engaged in securitisation transactions; security and derivative dealers; financial corporations engaged in lending; specialised financial corporations; and the 'OFI residual' which is calculated as the difference between total financial sector assets and the assets held by all known sub-sectors). In relation to the OFI residual (under which most entities referred to in this report fall), as a result of weaknesses in the financial statistical reporting framework (e.g. granularity of reporting and consistency of the sub-classifications used), currently it cannot be broken down into a complete set of financial sub-sectors (see further Box 1 of the EU Shadow Banking Monitor (No. 2) May 2017).

in the business activities undertaken in practice. For example, in one Member State (UK), ‘consumer credit providers’ encompass rent-to-own,⁴⁵ hire purchase, leasing, car leasing (personal contract hire and personal contract purchase), logbook lending, credit broking, payday loan companies and peer-to-peer lenders, which are all regulated under the status of ‘consumer credit providers’ unless they provide additional financial services, in which case they are required to obtain other relevant licences and will be subject to further prudential requirements.

3.3.1 Factoring

This sub-cluster includes entities where the activity (or one of the activities) is factoring, a financing method whereby the factoring entity pays to a customer (generally a company that has receivables on its balance sheet) the value of the receivables less a discount for commissions and fees.

Based on the responses received, there are three approaches to the regulation of the provision of factoring services (and also leasing and the provision of consumer credit/retail credit/microcredit):

- Authorisation as a dedicated activity: the entities have to be specifically licensed to provide factoring services (if they want to provide other kinds of services, they have to get other licences);
- Authorisation as a multi-activity entity: the entities have a licence which allows them to provide factoring services among other kinds of financial or non-financial activity (as permitted);
- Unregulated: when factoring is unregulated on an activity-basis or on an entity-basis, entities can carry out factoring services without obtaining a prior authorisation/licence.

a. Overview of permitted activities

Based on the responses to the OFI survey, the EBA identified that 18 Member States have referred to companies providing factoring services.

By reference to the list of activities subject to mutual recognition in Annex I to the CRDIV, eight Member States indicated that these entities carry out ‘lending’⁴⁶ only (AT,⁴⁷ BG, DE,⁴⁸ DK, EL, HR,

⁴⁵ ‘Rent-to-own’ is where a potential buyer of a residential property agrees to rent the home for a set amount of time before exercising an option to buy the property. The potential buyer gets to move to the property straight away, rents it for a set amount of time, and can then buy the house from the seller at an agreed price. To keep the right to buy, the buyer must make monthly payments to the seller and care for the property as if it were his own.

⁴⁶ Point (2) of Annex I refers to ‘lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting)’ and, as such, the reference to “lending” under Annex I can potentially cover a wide range of activities.

⁴⁷ In AT, factoring companies may also carry out activities other than factoring, even so if such activities are considered banking activities under the Banking Act. There are no further restrictions other than obtaining the relevant licences or permissions beforehand.

PL, SI). In the other Member States, lending can be carried out in conjunction with other financial activities (through other licences or the same licence or in the absence of express activity restrictions) such as:

- financial leasing (BE, CZ, FR, HU, IT, LU, PT, RO);
- payment services (CZ, IT, PT);
- provision of guarantees and commitments (FR, IT, PT, RO);
- in one Member State (PT), *caixas económicas bancárias* not incorporated as limited companies and created before 1986⁴⁹ and credit financing companies can carry out between 12 and 14 kinds of financial services listed in Annex I to the CRDIV, factoring being among them.

In one case (HU), entities with ‘financial enterprise’ status can provide eight kinds of financial services (credit intermediation, leasing, other means of payment, guarantees and commitments, trading on own account or for customers, money broking, safekeeping and administration of securities, credit reference services).

b. Overview of prudential regimes in the Member States

The applicable prudential requirements and the core prudential features are summarised in Figure 3 and Figure 4, respectively.

Figure 3: Prudential regimes applicable to factoring




Applicable prudential regime	Member State	Total
Subject to a CRDIV/CRR regime (with or without modifications)	AT, EL, FR, IT, PT	5
Subject to a bespoke regime under national law	BE, BG, DE, HR, HU, LU, RO	7
Subject to no prudential regime	CZ, DK, ES, ⁵⁰ NL, PL, SI	6

⁴⁸ In DE, factoring firms occasionally conduct leasing activities and vice versa. A firm willing to do factoring and leasing would, however, need to apply for two licences, one for factoring and one for leasing. They are not limited to these two activities and could well carry out additional activities provided they obtain the relevant licence beforehand.

⁴⁹ Referred to as *caixas económicas bancárias* elsewhere in this report.

⁵⁰ Factoring is not a reserved activity for any kind of company in ES.

Figure 4: Overview of the prudential features of national regimes applicable to factoring

CRDIV/CRR  Bespoke  None 

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
AT								
BE								
BG								
CZ								
DE ⁵¹								
DK								
EL ⁵²								
ES								
FR								
HR								
HU								
IT								
LU								
NL								
PL								
PT								
RO								
SI								

Regarding the CRDIV/CRR-like regimes referred to in Figure 3, the responses to the OFI questionnaire show that all include quantitative requirements relating to own funds and capital.

Regarding the requirements under the seven bespoke national regimes, these focus more on qualitative elements than on quantitative rules. The most monitored risks are the ones linked to the persons in charge of the management of the entities: all Member States with bespoke regimes impose requirements in relation to controlling persons, approved persons, governance and reporting, except in one Member State (BG). Quantitative aspects (solvency ratio, liquidity requirements, large exposures etc.) are less supervised or monitored and sometimes not at all, especially for single-activity factoring companies.

Looking across all Member States that have companies providing factoring, no Member State imposes requirements in relation to a leverage ratio. Of the 16 Member States that do not impose any requirements for liquidity, 11 do not have any large exposures limits and 11 do not have any requirements for own funds. Regarding minimum capital requirements, these are specified in the majority of cases but eight Member States do not impose any such requirements.⁵³

⁵¹ While here are no initial regulatory capital and own funds requirements, factoring firms are required under national legislation to meet an on-going adequate risk bearing capacity.

⁵² The criteria and the relevant requirements for supervision are still set on the basis of Basel II principles.

⁵³ The fact that there is no regulatory capital requirement is without prejudice to any minimum capital requirement required under national company law.

3.3.2 Leasing

This sub-cluster includes different kinds of financial companies carrying out financial leasing alone or in combination with other activities.

In the absence of a formal definition in the CRR of financial lease, guidance can be found in accounting regulation. According to IAS 17, a lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. Otherwise a lease is classified as an operational lease. To this aim IAS 17 provides examples of situations that normally lead to a lease contract to be classified as a financial lease.^{54 55}

a. Overview of permitted activities

Of the 19 Member States that referred to OFIs carrying out financial leasing under point (3) of Annex I to the CRDIV, only 7 have companies carrying out leasing that are not regulated/not subject to individual prudential requirements (AT, CZ,⁵⁶ DK, ES,⁵⁷ NL, PL, SI). Of the competent authorities reporting entities carrying out financial leasing as being subject to a prudential regime under national law (BE, CY, DE, EL, ES,⁵⁸ FR, HR, HU, IT, LU, LV, PT, RO), in the majority of cases (BE, DE, ES, FR, HR, HU, IT, LU, LV, PT, RO), financial leasing may be carried out in combination with other activities set forth in Annex I to the CRDIV (e.g. lending (point (2) of Annex I) and providing guarantees and commitments (point (6) of Annex I)). Typically this is where a Member State regime permitted a designated class of entity (e.g. ‘financial intermediary’ in IT) to carry out a range of credit intermediation activities under the same licence.

It is also to be noted that, in one Member State (PT), the activity of financial leasing can be carried out by several different types of regulated entities.⁵⁹

⁵⁴ Examples of situations that would normally lead to a lease being classified as a finance lease include the following: the lease transfers ownership of the asset to the lessee by the end of the lease term; the lessee has the option to purchase the asset at a price which is expected to be sufficiently lower than fair value at the date the option becomes exercisable that, at the inception of the lease, it is reasonably certain that the option will be exercised; the lease term is for the major part of the economic life of the asset, even if title is not transferred at the inception of the lease, the present value of the minimum lease payments amounts to at least substantially all of the fair value of the leased asset; the leased assets are of a specialised nature such that only the lessee can use them without major modifications being made. See, IAS 17 – Leases.

⁵⁵ It is important to keep in mind the intended purpose of the distinction between financial and operational lease made by IAS 17. Currently IAS 17 prescribes lessee and lessor accounting policies for the two types of leases, as well as disclosures. This accounting principle will be superseded by IFRS 16 which is expected to be effective for annual reporting periods beginning on or after January 2019. IFRS 16 introduces a single lessee accounting model, while substantially carrying forward the lessor accounting requirements in IAS 17. Accordingly, a lessor continues to classify its leases as operational leases or financial leases, and to account for those two types of leases differently. However, the distinction can still provide useful insight into the different economic function that the two types of contracts are supposed to fulfil.

⁵⁶ CZ clarified that entities carrying out financial leasing are not regulated unless such entities carry out also activities regulated under the PSD2 (Directive (EU) 2015/2366) (together with the leasing business). In these cases, entities are regulated under the PSD2, according to Articles 8(2) and 18(1)(c) of that Directive.

⁵⁷ Financial corporations engaged in lending.

⁵⁸ Specialised lending institutions (*establecimientos financieros de crédito*). In ES, other entities may also carry out leasing i.e. it is not per se a regulated activity, but specific types of institutions which may focus their business on (inter alia) carrying out leasing activities (*establecimientos financieros de crédito*) are regulated.

⁵⁹ Caixas económicas bancárias (included in the list of Article 2(5) CRDIV); Sociedades financeiras de crédito and Sociedades de locação financeira.

b. Overview of prudential regimes in the Member States

The applicable prudential requirements and the core prudential features are summarised in Figure 5 and Figure 6, respectively.

Figure 5: Prudential regimes applicable to leasing




Applicable prudential regime	Member State	Total
Subject to a CRDIV/CRR regime (with or without modifications)	EL, ES, ⁶⁰ FR, IT, PT	5
Subject to a bespoke regime under national law	BE, CY, DE, HR, HU, LU, LV, RO	8
Subject to no prudential regime	AT, CZ, DK, ES, ⁶¹ NL, PL, SI ⁶²	7

⁶⁰ Specialised lending institutions.

⁶¹ Financial corporations engaged in lending.

⁶² Although in SI statistical reporting requirements apply,

Figure 6: Overview of the prudential features of national regimes applicable to leasing

CRDIV/CRR  Bespoke  None 

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
AT								
BE								
CY								
CZ								
DE ⁶³								
DK								
EL ⁶⁴								
ES ⁶⁵								
ES ⁶⁶								
FR								
HR								
HU								
IT								
LU								
LV								
NL								
PL								
PT ⁶⁷								
PT ⁶⁸								
PT ⁶⁹								
RO								
SI								

Where entities are reported as subject under national law to a CRDIV/CRR-like regime, some deviations were reported. These variations from the CRDIV/CRR regime typically pertain to the amount of minimum capital required to obtain the licence (FR, IT, PT) and/or the application of the countercyclical and conservation buffer (ES). Few Member States impose leverage and liquidity requirements. One Member State (FR) applies however a liquidity regime. Requirements on controlling persons, approved persons, governance and remuneration, and supervisory reporting are imposed in all cases.

In the Member States applying a bespoke regime under national law (BE, CY, DE, HR, HU, LU, LV, RO), minimum initial capital requirements are among the most common features. Two Member States (BE, DE), however, do not impose minimum capital requirements. One Member State (DE) pointed out that, although no minimum own funds requirements are imposed, financial leasing

⁶³ While there are no initial regulatory capital and own funds requirements, financial leasing firms are required under national legislation to meet an on-going adequate risk bearing capacity.

⁶⁴ The criteria and the relevant requirements for supervision are still set on the basis of Basel II principles.

⁶⁵ Financial corporations engaged in lending.

⁶⁶ Specialised lending institutions.

⁶⁷ *Caixas económicas bancárias* fall under Article 2(5) CRDIV.

⁶⁸ *Sociedades Financeiras de Crédito* (Credit Financing Companies).

⁶⁹ *Sociedades de locação financeira* (Leasing Companies).

firms are required under national legislation to fulfill an on-going adequate risk bearing capacity.⁷⁰ Requirements on the controlling persons, approved persons, governance and remuneration are applied by five Member States (CY, DE, HR, LU, RO). Requirements on controlling persons are not applied by BE, HU and LV.

c. Hire purchase

Only one Member State (IE) referred specifically to OFIs providing 'hire purchase' services; providers of these services are unregulated.

The EBA is not aware of any set definition of 'hire purchase' in the EU legislation. According to IE, hire purchase services include an agreement for the bailment of goods to a hirer (i.e. the client) under which the property of the goods remains with the owner (i.e. the OFI). Based on that definition, there appears to be a rather thin difference between 'hire purchase' and 'leasing'. To the extent that a customer (i.e. the debtor) has an option to purchase the underlying goods, hire purchase should a priori be assimilated to financial leasing. If, however, the customer has no option to purchase the goods, then the activity is likely to be assimilated to operational leasing.

That said, one respondent noted that hire purchase companies should be differentiated from leasing companies in that leasing companies' activities are much larger in scope. By comparison, hire purchase providers only sell their goods on credit.

IE indicated that hire purchase companies would provide lending and financial leasing services. Although they are not required to seek a licence for hire purchase services specifically, the Member State noted that a majority of hire purchase providers also engage in other non-hire purchase activities, which, contrary to hire purchase services, require an authorisation. Given this, hire purchase companies are licensed for other services (e.g. a credit institution, insurer or mortgage intermediary, retail credit firm, moneylender).

3.3.3 Consumer credit/Retail credit/Microcredit

This sub-cluster includes different kinds of financial companies providing different kinds of credit: to consumers (i.e. to buy goods), microcredit (i.e. to finance small entrepreneurs or small consumer needs) or any other kind of retail credit.

It is essentially an activity-based sub-cluster and therefore includes companies that can grant retail credit only or among other financial services.⁷¹

a. Overview of permitted activities

Based on the responses, EBA observes that 18 Member States have entities carrying out activities relevant to this sub-cluster. The sub-cluster includes two types of OFIs for five Member States (ES,

⁷⁰ The same holds true for factoring firms.

⁷¹ The EBA does not guarantee that this sub-cluster fully covers all the OFIs that can provide retail credit as the collection of information among competent authorities did not allow having a clear and comprehensive assessment.

FR, NL, PT, UK), and, for one Member State (IT), the sub-cluster includes three types of OFIs, which are subject to different prudential regimes.⁷²

All competent authorities referred to OFIs within this sub-cluster as carrying out 'lending' under point (2) of Annex I to the CRDIV. In 11 jurisdictions, lending can be carried out in conjunction with other financial activities (BE, CZ, ES, FI, FR, HU, IE, IT, LV, PT, RO). In four of them OFIs can provide between 4 and 12 kinds of financial services (FI, HU, IT (financial intermediaries), PT).

In the UK, 'consumer credit firms' fall under a catch-all title that covers a wide variety of entities including some leasing activities. For the purpose of this sub-cluster, it rather refers to logbook lending, credit brokers, credit card issuers or, but from a micro-credit point of view, payday loan companies (high-cost short-term credit providers).

Only five competent authorities have reported entities dedicated to microcredit (BG, FR, IT, PT, UK).

⁷² The cluster would include: (i) in ES, 'financial corporation engaged in lending' and 'specialized lending institutions', (ii), in FR, 'finance companies' and 'microcredit entities', (iii) in IT, 'financial intermediaries', 'microfinance companies' and 'pawnbrokers'; (iv) for NL, 'consumer and wholesale credit', (v) for PT, 'microcredit financial companies' and 'credit financing companies', (vi) for UK, 'consumer credit' and 'Payday loan companies' (sort of microcredit).




b. Overview of prudential regimes in the Member States

The applicable prudential requirements and the core prudential features are summarised in Figure 7 and Figure 8, respectively.

Figure 7: Prudential regimes applicable to consumer credit/retail credit/microcredit

Applicable prudential regime	Member State	Total
Subject to a CRDIV/CRR regime (with or without modifications)	EL (consumer credit), ES (specialised lending institutions), FR (finance companies), IT (financial intermediaries; pawnbrokers), PT (credit financing companies)	5
Subject to a bespoke regime under national law	BE, BG, CZ, FI, FR (microcredit), HU, IE, IT (microcredit/microfinance), LU (professionals granting loans to the public), LV, NL (consumer credit), PT (microcredit financial companies), RO	13
Subject to no prudential regime	DK, ES (financial corporations engaged in lending), NL (wholesale credit), SI, UK	5

Figure 8: Overview of the prudential features of national regimes applicable to consumer credit/retail credit/microcredit

CRDIV/CRR  Bespoke  None 

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
BE								
BG								
CZ								
DK								
EL ⁷³								
ES ⁷⁴								
ES ⁷⁵								
FI								
FR ⁷⁶								
FR ⁷⁷								
HU								
IE								
IT ⁷⁸								
IT ⁷⁹								
IT ⁸⁰								
LU ⁸¹								
LV								
NL ⁸²								
NL ⁸³								
PT ⁸⁴								
PT ⁸⁵								
RO								
SI								
UK ⁸⁶								

Looking across all national prudential regimes, the vast majority include own funds and capital requirements.

⁷³ The criteria and the relevant requirements for supervision are still set on the basis of Basel II principles.

⁷⁴ Financial corporations engaged in lending.

⁷⁵ Specialised lending institutions.

⁷⁶ Microcredit.

⁷⁷ Finance companies.

⁷⁸ Financial intermediaries.

⁷⁹ Pawnbrokers.

⁸⁰ Microfinance.

⁸¹ Professionals granting loans to the public.

⁸² Consumer credit.

⁸³ Wholesale credit.

⁸⁴ Microcredit.

⁸⁵ Credit financing companies.

⁸⁶ Pure consumer credit firms are not subject to any specific prudential requirements apart from 'adequate resources' – so nothing specific on capital, liquidity, leverage etc. However, there are still requirements about controllers and approved persons and there is some limited regulatory reporting.

Regarding the bespoke regimes under national law, qualitative rules are generally applied, while more variability is observed for quantitative requirements.

More generally, only one Member State (ES) imposes requirements in relation to leverage. Three Member States impose liquidity requirements (EL, FR, IE), and seven Member States have requirements for large exposures (BE, EL, ES, FR, IT, PT, RO).

Regarding the special case of microcredit companies, they are not subject to extensive prudential requirements. They are, in summary, required to comply with rules on minimum/initial capital (BG, IT, PT) or on own funds (FR). In PT, the amount they can lend is also limited. In UK, payday loan companies do not have specific quantitative prudential requirements.

3.3.4 Guarantee providers

The provision of guarantees and other commitments is one of the activities listed in Annex I to the CRDIV (point (6) of Annex I). Accordingly, the OFIs reported by competent authorities as allowed to carry out such activities have been grouped and analysed together.

The CRDIV/CRR do not provide a definition of ‘guarantees’ or ‘commitments’ and the term ‘commitments’ is used in this form only in Annex I to the CRDIV.⁸⁷ Annex I to the CRR provides that guarantees are ‘off-balance sheet items’ and distinguishes them based on the level of risk they bear (e.g. the guarantees classified as ‘full risk’ are those having the character of credit substitutes, such as guarantees for the good payment of credit facilities).

From a legal standpoint, a guarantee can be defined in multiple ways. It can be a personal guarantee whereby a person (the guarantor) undertakes to fulfil the obligation of another person (the debtor) towards a third person (the creditor). A guarantee could also be materialised by the provision of security interest (e.g. by way of a pledge) over, or title transfer in relation to, certain assets from the guarantor (also called the pledgor or the transferor) to the creditor (pledgee or transferee) to secure the obligations of the debtor. It is not entirely clear from the responses received whether the provision of guarantee on a professional basis would fall under either type of guarantee, although the provision of guarantee is more likely to be of the first type (provision of a personal guarantee).

From an economic function perspective, entities providing guarantees and commitments perform credit intermediation activities, although in an indirect form compared with activities that entail direct financing. Such entities do not fund clients directly but, by providing guarantees, they can ease the access to credit granted by other entities. Given this, assuming the debtor performs its payment obligations, a guarantor would in principle not have to disburse any funds.

⁸⁷ Please see discussion in Part 5 of this report.

a. Overview of permitted activities

In total, 11 competent authorities reported entities carrying out services consisting in the provision of guarantees and commitments according to point (6) of Annex I to the CRDIV (BG, EE, ES, FI, FR, HU, IE, IT, PL, PT, RO). It is to be noted that three reported more than one category of OFIs allowed to undertake such activity (ES, IT, PT). In these Member States, a defined category of OFIs specialised in providing mutual guarantees was reported. In all other cases, the activity of providing guarantees and commitments is carried out in combination with other financial intermediation activities listed in Annex I to the CRDIV, such as lending and financial leasing.

In some cases the entities reported as being permitted to carry out the provision of guarantees and commitments fall within the scope of Article 2(5) CRDIV (IE in relation to Friendly Societies and Industrial and Provident Societies, PL in relation to Bank Gospodarstwa Krajowego, and PT in relation to *caixas económicas bancárias*) and are not considered further in this report. In EE, the OFI indicated as being permitted to offer guarantees is considered under the ‘crowdfunding’ cluster.

b. Overview of prudential regimes in the Member States

The applicable prudential requirements and the core prudential features are summarised in Figure 9 and Figure 10, respectively.

Figure 9: Prudential regimes applicable to guarantee providers




Applicable prudential regime	Member State	Total
Subject to a CRDIV/CRR regime (with or without modifications)	ES (specialised lending institutions), FR, IT (financial intermediaries), ⁸⁸ PT ⁸⁹	4
Subject to a bespoke regime under national law	BG, EE, ES (mutual guarantee companies), FI, HU, IT (mutual guarantee companies), RO ⁹⁰	7
Subject to no prudential regime	IE	1

⁸⁸ IT (for entities other than providers of mutual guarantees).

⁸⁹ PT applies a CRR-like regime to guarantee providers.

⁹⁰ In ES and IT, for entities providing mutual guarantees.

Figure 10: Overview of the prudential features of national regimes applicable to guarantee providers

CRDIV/CRR  Bespoke  None 

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
BG								
EE								
ES ⁹¹								
ES ⁹²								
FI								
FR								
HU								
IE								
IT ⁹³								
IT ⁹⁴								
PT ⁹⁵								
PT ⁹⁶								
PT ⁹⁷								
RO								

In Member States where entities providing guarantees are subject to a CRDIV/CRR-like regime (ES, FR, IT, PT), own funds, and large exposures rules apply. Deviations from the CRR are mentioned for own funds and capital by FR and IT.

As per the regimes applied to intermediaries specialised in providing guarantees, with the exception of the *Sociedades de garantía mútua* (PT) subject to a CRR-like regime, the other two categories of reported OFIs specialised in mutual guarantees (ES, IT) are subject to a bespoke regime, but the requirements appear to differ. In one case (IT) there are no quantitative prudential requirements to be complied with; however, this regime can apply only if the intermediary's volumes do not exceed a predefined amount. Should the volume be higher than the threshold, the intermediary shall apply for an authorisation to the relevant competent authority and become subject to a CRR like regime. For all entities reported (with the exception of IE), requirements for controlling persons, approved persons, governance and remuneration apply.

For the other Members States reporting OFIs subject to a bespoke regime, minimum initial capital is requested in three Member States (EE, HU, RO). Requirements for controlling persons are not requested in four Member States (BG, FI, HU, IE).

⁹¹ Specialised lending institutions.

⁹² Mutual guarantee companies.

⁹³ Financial intermediaries.

⁹⁴ CONFIDI – mutual guarantee companies.

⁹⁵ Sociedades Financeiras de Crédito (Credit Financing Companies).

⁹⁶ *Sociedades de investimento* (Investment Companies).

⁹⁷ *Sociedades de garantía mútua* (Mutual Guarantee Companies).

Based on the responses, the EBA observes that the activity of providing guarantees and commitments is generally carried out in combination with other lending activities and, accordingly, the observations and suggestions made in relation to other entities providing lending activities should be valid for providers of guarantees.




3.3.5 Mortgage lending



































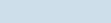







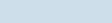





The activity of mortgage lending refers to the provision of loans to consumers and businesses for the purpose of buying residential or commercial property, where the repayment of the loan is in principle secured by a mortgage on the property.

A limited number of Member States (BE, CY, FR, IE, RO, UK) specifically reported ‘mortgage lending companies’ or equivalent.⁹⁸ It is not entirely clear how such a limited number of responses is to be interpreted, i.e. whether mortgage lending is carried out by traditional banks or whether multi-activity lenders can also grant mortgage lending so competent authorities did not feel the need to specifically indicate mortgage lending in their responses for these multi-activity lenders. Only one Member State (UK) shed light on this point indicating that most lending is done by banks and building societies (which are both CRDIV/CRR firms) in that Member State and that some non-bank mortgage lenders do exist but tend to be very small in comparison to banks and building societies.

According to the EBA’s observations, most of the Member States reporting OFIs active in mortgage lending apply a prudential regime of a bespoke nature with share capital requirements, as well as obligations with respect to qualifying shareholding, persons in charge of the management and key function holders and supervisory reporting. However, in FR and the UK, companies are subject to a CRDIV/CRR-like regime. The core prudential features of the applicable regimes are summarised in Figure 11.

Figure 11: Overview of the prudential features of national regimes applicable to mortgage lenders

CRDIV/CRR  Bespoke  None 

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
BE								
CY								
FR								
IE								
RO								
UK								

Given that the provision of mortgage credit is generally an important financial operation, especially for consumers, because of the high amounts involved and the length in time of the underlying obligation, the provision of mortgage credit has been under high scrutiny by the EU

⁹⁸ One Member State (UK) indicated that non-bank mortgage lending activities are referred to, in that Member State, as ‘provision of home finance’.

legislator. In particular, with respect to mortgage credit for residential property, the MCD (Directive 2014/17/EU),⁹⁹ although not per se subjecting the relevant stakeholders involved to prudential authorisation, provides a certain level of comfort to regulators in that it imposes certain conduct of business rules, which aim to protect consumer clients.

3.3.6 Savings institutions¹⁰⁰

Three competent authorities reported savings institutions (DK, EE, PT). The activities of saving institutions were not described specifically but a priori these entities take deposits and offer saving accounts to their clients; all competent authorities reporting savings institutions indicated that the entities take deposits and other repayable funds. However, reliance on Article 9(2) CRDIV was indicated only by one competent authority (DK) (see discussion under Part 2 of this report).

The applicable prudential requirements and the core prudential features are summarised in Figure 12 and Figure 13, respectively.

Figure 12: Prudential regimes applicable to savings institutions




























Applicable prudential regime	Member State	Total
Subject to a CRDIV/CRR regime (with or without modifications)	PT ¹⁰¹	1
Subject to a bespoke regime under national law	DK	1
Subject to no prudential regime	EE	1

⁹⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0017>.

¹⁰⁰ In relation to savings institutions not within the scope of Article 2(5) CRDIV, these are not savings institutions of a kind referred to in Article 5 of COMMISSION DELEGATED REGULATION (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0241&from=EN>.

¹⁰¹ PT impose a light CRDIV/CRR regime.

Figure 13: Overview of the prudential features of national regimes applicable to savings institutions

CRDIV/CRR  Bespoke  None 								
Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
DK ¹⁰²								
EE								
PT								

3.3.7 Other types of lenders

Six competent authorities also reported a number of other entities that appear to provide loans for the purposes of promoting certain sectors of the economy e.g. the development of national, regional and local governments, public economic programmes, the provision of credit to SMEs, and supporting mutual and benevolent causes. However, on account of the heterogeneity of this category, it is difficult to draw any conclusion.

The applicable prudential requirements and the core prudential features are summarised in Figure 14 and in Figure 15, respectively.

Figure 14: Prudential regimes applicable to other types of lenders

Applicable prudential regime	Member States	Total
Subject to a CRDIV/CRR regime (with or without modifications)	PL, PT ¹⁰³	2
Subject to a bespoke regime under national law	HU, PT ¹⁰⁴	2
Subject to no prudential regime	CY, IE, NL	3

¹⁰² DK impose own funds requirements of 1 million € and the funds must be placed according to the articles of association of the savings institutions (investment restrictions).

¹⁰³ In PL, Bank *Gospodarstwa Krajowego* (BGK). In PT, *Caixa Económica da Misericórdia de Angra do Heroísmo*, *Sociedades de investimento* (Investment Companies), IFD — *Instituição Financeira de Desenvolvimento*, S. A, Financial institution, which purpose is to serve as a development financing entity for SMEs and the FSB classification by economic function that more closely captures its essence is EF4.

¹⁰⁴ In PT, *Sociedades de desenvolvimento regional* (Regional Development Companies) and *Sociedades de empreendedorismo social* (Social entrepreneurship companies).

Figure 15: Overview of the prudential features of national regimes applicable to other types of lenders

CRDIV/CRR ☒ Bespoke ☐ None ☐

Member State	Own funds	Capital	Large exposures	Liquidity	Leverage	Controlling persons	Approved persons, governance, remuneration	Supervisory reporting
DK								
EE								
PT ¹⁰⁵								
PT ¹⁰⁶								
PT ¹⁰⁷								
PT ¹⁰⁸								

3.3.8 Main observations in relation to consumer and corporate lenders

The OFI survey responses show a high degree of variation in the nature of the prudential regimes in place in the Member States in relation to different forms of lending companies and the activities permitted to be carried out under different forms of licence.

On average there is a trend showing that the more activities an entity may be authorised to undertake, the more regulatory requirements apply. However this is not always the case.

As regards the difference between the CRDIV/CRR-like regimes and bespoke regimes, the latter tend not to have quantitative prudential requirements (with the exception of liquidity and leverage in some cases). In contrast, the non-quantitative requirements (controlling persons, approved persons, governance and remunerations) are envisaged under both types of regimes in the majority of cases.

3.3.9 Additional observations in relation to consumer and corporate lenders

Despite the heterogeneity of prudential regimes applicable to OFIs acting as consumer and corporate lenders, it must be stressed that OFIs providing the loan services described above should in principle be subject to a number of rules aimed at protecting certain types of borrowers.

In particular, the Consumer Credit Directive (Directive 2008/48/EU¹⁰⁹) (CCD) applies to credit agreements in which a creditor, defined as a “natural or legal person who grants or promises to grant credit in the course of his trade, business or profession”, grants or promises to grant credit to a consumer “natural person who (...), is acting for purposes which are outside his trade, business or profession”. Accordingly, national laws transposing the CCD must in principle offer a

¹⁰⁵ Caixas económicas bancárias.

¹⁰⁶ Instituição Financeira de Desenvolvimento, S. A (IFD) and Sociedades de investimento (Investment Companies).

¹⁰⁷ Sociedades de desenvolvimento regional (Regional Development Companies).

¹⁰⁸ *Sociedades de empreendedorismo social* (Social entrepreneurship companies).

¹⁰⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008L0048-20140320&from=EN>.

certain degree of consumer protection when consumers enter into a credit agreement with a professional creditor.¹¹⁰

Other EU sectoral legislation may also be relevant, such as the Distance Marketing Directive (Directive 2002/65/EC), where a loan service is provided by means of a distance contracts, and the Unfair Commercial Practices Directive (Directive 2005/29/EC), which regulates business-to-consumer commercial communications/practices pre- and post-sale, in particular, those which are misleading or aggressive, and applies to all sectors including financial services. Therefore, these Directives, although not regulating the OFIs providing the services, could potentially be applicable and offer a certain level of comfort with regard to consumer protection.

3.4 Securitisation vehicles

As for the 2014 EBA Report, some Member States have referred to special purpose vehicles (SPVs) used to set up securitisations (SPVs-Sec) as possibly carrying credit intermediation activities.

In total, 15 respondents referred to SPVs-Sec as possibly carrying out credit intermediation activities (AT, BE, CY,¹¹¹ CZ, DE, ES, FR, IE, IT, LU, LT,¹¹² MT, NL, PT, RO). Of which, in terms of the regulatory treatment:

- SPVs-Sec were indicated as being regulated in four Member States (LU¹¹³, MT,¹¹⁴ PT, RO).
- SPVs-Sec were specified as unregulated on an individual basis in 12 Member States (AT, BE, CZ, DE, EL, ES, FR, IE, IT, LU,¹¹⁵ MT, NL).

Where competent authorities indicated that SPVs-Sec are regulated, findings show a certain degree of variation in the regimes applied. The regimes appear to be generally bespoke. Given the limited number of competent authorities that referred to regulated securitisations, it is difficult to draw conclusions at this stage. For the other Member States where SPVs-Sec have been flagged as

¹¹⁰ Consumer protection includes the right for consumer (i) to receive a comprehensible set of information in good time before the contract is concluded and also as part of the credit agreement, (ii) to receive pre-contractual information in a standardised form to enable consumers to compare more easily the various offers and to better understand the information provided, (iii) to receive the applicable interest rate in a standardised format to assess the total cost of the credit, (iv) to withdraw from the credit agreement without giving any reason within a period of 14 days after the conclusion of the contract and (v) to repay their credit early at any time subject to the payment of a fair and objectively justified compensation to the creditor.

¹¹¹ The law in CY is still to be enacted. The expectation is that the law will regulate both securitisation vehicles and their administrators.

¹¹² LT is in the process of considering the creation of a legal framework for securitisation, which may result in a first draft bill in the course of 2017.

¹¹³ In LU, a securitisation vehicle must be regulated only if it issues securities on an ongoing basis to the public. Otherwise, it is unregulated and need not be registered with the competent authority.

¹¹⁴ Under Maltese law, there is, in principle, no approval or licensing process but a mere notification to the competent authority (assuming that the value of the relevant securitisation transactions or financial instruments issued by a SPV-Sec exceeds €1,000,000). If a SPV-Sec intends to issue financial instruments to the public on a continuous basis, it would need to obtain a licence from the competent authority. However, no licensing regime is currently in place in MT.

¹¹⁵ In LU, a securitisation vehicle must be regulated only if it issues securities on an ongoing basis to the public. Otherwise, it is unregulated and need not be registered with the competent authority.

being regulated (LU, MT, RO), the prudential requirements generally apply with respect to own funds, large exposures, liquidity or leverage.¹¹⁶

A total of 13 competent authorities¹¹⁷ did not mention SPVs-Sec as a possible vehicle to carry out credit intermediation activities. To ensure that all potential securitisation activities are covered, those respondents were further invited to confirm whether, in their Member State, it is possible to set up a securitisation arrangement. For example, they were asked if securitisation arrangements could be done using a standard commercial company that acquires assets (such as bonds, shares or even, where permitted, loans) and enters into a contract with the investors investing in the bonds where the company undertakes to pay a return on the assets (representing a tranche of interest in the assets) to the investors. All competent authorities confirmed that it is indeed possible to create a SPV-Sec by contract using a commercial company. Some competent authorities, however, indicated that they could not confirm whether these were used in practice. Others indicated that SPVs-Sec were rarely used in their jurisdiction.

In any event, it was stressed by certain respondents that SPVs-Sec created by virtue of applicable contract law are likely to face certain civil and tax law impediments and may not benefit from certain protections otherwise offered to securitisation vehicles in securitisation laws (such as, the creation of fully ring-fenced compartments, non-petition and recourse limited to the compartment in which an investor has invested, subordination and waterfall of claims in the case of a liquidation of a securitisation vehicle etc.).¹¹⁸

Certain competent authorities (BE, CZ, DE, FR, IE) noted that, despite not being regulated on an individual level, SPVs-Sec are indirectly subject to prudential rules to the extent that the CRR rules apply to institutions acting as originators, sponsors or investors in securitisation programs (i.e. risk retention, the treatment of investment schemes and connected clients in the large exposures framework, etc). This statement holds true only if a SPV does ‘securitisation’ within the meaning of point (61) of Article 4(1) CRR, i.e. ‘a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranched, having both of the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme;’. If a SPV-Sec does securitisation within the meaning of the CRR and such securitisation is originated by a sponsor or an originator (also within the meaning of the CRR), then the SPV-Sec is to be regarded as a securitisation special purpose entity or ‘SSPE’ (within the meaning of Article point (66) of Article 4(1) CRR). In all other cases, that is cases where a SPV-Sec does not do “tranched” securitisation (i.e. a single tranche securitisation), then a SPV would in principle not be regarded as a SSPE and would not be

¹¹⁶ In LU, regulated SPVs-Sec are not subject to any liquidity or large exposures requirements, but only to leverage requirements. The liquidity aspects are however analysed by the competent authority in the context of the licensing process.

¹¹⁷ DK, EE, EL, FI, HR, HU, LT, LV, PL, SE, SI, SK, UK.

¹¹⁸ In principle, securitisation arrangers and stakeholders are likely to take advantage of the national laws of Member States that offer the highest level of legal certainty that the securitisation arrangement (as designed in the underlying contractual documentation) will be enforceable. Such legal certainty is more likely to be found in specific securitisation law rather than in purely contractual law with no securitisation-specific element. This may explain why securitisation vehicle are more likely to be found in Member States that have a legal framework on securitisation in place.

(indirectly) regulated under the CRR. Such SPVs-Sec are however likely to qualify as a ‘special purpose entity’ (SPE), as per the CRR wording, noting that such notion is not defined in Article 4 CRR. This distinction is relevant, in particular in the context of consolidation issues (see Part 4 of this report).

With this in mind, competent authorities were further asked to confirm whether a SPV-Sec in their Member State would necessarily qualify as a SSPE, or if it can also be a SPE. According to the response received, three competent authorities (AT, CY, PT) responded that SPVs-Sec in their Member State is necessarily a SSPE. Six competent authorities (BE, DE, FR, IE, IT, LU) indicated that a SPV may be either a SSPE or a SPE. Three competent authorities (CY,¹¹⁹ CZ, MT) did not specify if a SPV is a SSPE or a SPE.

For completeness, it should be mentioned that, with the entry into force of the future Regulation on Simple, Transparent and Standard (STS) securitisation (the ‘STS Regulation’), the use of the label ‘securitisation’ will be reserved to securitisation within the meaning of point (61) of Article 4(1) CRR only. It follows that, in the wake of the STS Regulation, non-tranched securitisation (‘single tranche’) – although still possible in principle – can no longer be marketed and sold under the label “securitisation” and, hence, can no longer fall within the definition of “securitisation” for the purpose of the CRR and the STS Regulation. That said, despite the new framework for securitisation, the determination of whether a SPV-Sec is a SSPE or a SPE, as well as the issue regarding the consolidation of these SPV-Sec (see section 4.5 of this report), will continue to be relevant.

3.5 Crowdfunding

In line with definitions provided by the European Commission¹²⁰ and the EBA,¹²¹ CF can be understood as an open call to the public (the ‘crowd’) to raise funds for a specific project, where a (generally internet-based) CF platform enable the interaction between fundraisers (borrowers) and the crowd (lenders).

Four CF business models are commonly distinguished: lending-based CF (or peer-to-peer¹²² or peer-to-business lending), investment- (or equity-) based CF, donations- and rewards-based CF. There are also hybrid business models of CF combining elements of the above models. Further information on lending-based CF and investment-based CF is provided in the Opinions issued by

¹¹⁹ CY indicated that, since the law on securitisation is still to be enacted, it is not entirely clear whether a SPV will be a SSPE or a SPE, although CY noted that it is likely that SPV will issue securitisation within the meaning of the CRR.

¹²⁰ European Commission, staff working document, Crowdfunding in the EU Capital Markets Union, 3 May 2016, https://ec.europa.eu/info/system/files/crowdfunding-report-03052016_en.pdf.

¹²¹ EBA Opinion on lending-based crowdfunding, 26 February 2015, EBA/Op/2015/03, <https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-03+%28EBA+Opinion+on+lending+based+Crowdfunding%29.pdf>.

¹²² Or consumer-to-consumer.

the EBA and ESMA¹²³, respectively, as well as the European Commission Staff Working Document ‘Crowdfunding in the EU Capital Markets Union’¹²⁴.

For the purpose of this report, the focus is on those CF models that may carry out credit intermediation, i.e. lending-based CF and hybrid models including investment-based CF to the extent that such models bear a credit intermediation element. Donations- and rewards-based forms of CF are however excluded from the scope of this report as these typically do not entail financial rewards (or any rewards at all) and, hence, do not involve credit intermediation.

3.5.1 Overview of activities

The OFI survey results show that CF has become a widespread form of financing across the EU. Out of 29 competent authorities, 26 mentioned that CF platforms operate in their jurisdiction. One competent authority (LV) stated that it is generally not allowed until the entry into force of the specific regulation. Another jurisdiction (BE) does not allow lending-based CF (i.e. consumer-to-consumer lending). Two jurisdictions (CY, PL) did not provide information on whether CF platforms operate in their jurisdiction. Those competent authorities that positively referred to CF predominantly mentioned both types, i.e. lending-based and equity-based CF.

In terms of the credit intermediation activities carried out by CF platforms, a wide range of activities was described by the relevant competent authorities, reflecting the diversity of business models adopted by entities falling under the label ‘crowdfunding’. Competent authorities most commonly referred to liquidity and maturity transformation but also referred to credit risk transfer and other activities.

Some competent authorities (ES, LV) noted that CF platforms act as credit intermediaries in the sense that they merely bring together potential borrowers and lenders. This might involve the handling of funds but not the origination of loans. Some other competent authorities note that where a credit institution is involved, the platforms might facilitate credit intermediation but the loans would be originated by the partnering credit institution.

With respect to those competent authorities who referred to CF platforms carrying out credit intermediation activities, the table below provides a summary of responses:¹²⁵

¹²³ ESMA Opinion on Investment-based crowdfunding, 18 December 2014, ESMA/2014/1378 https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1378_opinion_on_investment-based_crowdfunding.pdf.

¹²⁴ European Commission, staff working document, Crowdfunding in the EU Capital Markets Union, 3 May 2016, https://ec.europa.eu/info/system/files/crowdfunding-report-03052016_en.pdf.

¹²⁵ Only a limited number of respondents have provided detailed information on CF, and the business models of CF platforms vary significantly, therefore Figure 16 should not be taken as fully representative of the credit intermediation activities of CF platforms.

Figure 16: Credit intermediation activities reported by competent authorities as being conducted or facilitated by one or more CF platforms in their jurisdictions

Maturity transformation	Liquidity transformation	Leverage	Credit risk transfer	Other
EE, NL	DE, FI, NL, UK	NL	EE, NL	EE, ES, LV, NL, SE

The diversity of credit intermediation activities conducted by CF platforms appears to correspond with the diversity of financial activities carried out. Respondents were asked to specify the financial activities that CF platforms carry out (alone or in combination) by reference to the activities described in relevant EU sectoral legislation. One respondent (ES) stated that CF platforms do not perform any of the services listed in Annex I to the CRDIV. The table below provides a summary of responses:

Figure 17: Financial services provided by CF platforms

Lending	Deposit-taking	Payment services	Leasing	Guarantees	Investment services
DE, EE, FI, FR, NL, UK	EE, NL	DE, NL	EE	EE	DE, EE, NL

The results of the OFI survey confirm that, in some instances, EU sectoral legislation may be applicable to CF platforms, for instance under the PSD¹²⁶ and MiFID (see Figure 18 for an overview of potentially applicable EU sectoral legislation).¹²⁷ Accordingly, some entities reported in the OFI survey responses are subject to individual prudential requirements under EU sectoral legislation (e.g. pursuant to the PSD, requirements with regards to, among others, initial capital, own funds and governance requirements) and, because of their status under that EU sectoral legislation, may be subject to certain activities restrictions (e.g. payment institutions may grant credit under strict conditions¹²⁸ and are prohibited from taking deposits or other repayable funds¹²⁹).

Furthermore, some Member States have taken steps to clarify whether a banking licence would be required. For instance, while not relying on the exemption provided under Article 9(2) CRDIV,¹³⁰ IT has provided general clarification on the extent to which CF platforms matching

¹²⁶ In the OFI questionnaire competent authorities were asked to provide a response by reference to the PSD. It is noted for completeness that the PSD2 is required to be transposed into the national law of the Member States by 13 January 2018.

¹²⁷ In this respect, please refer to the Opinions issued by the EBA and ESMA on the applicability of EU law to lending-based and investment-based crowdfunding.

¹²⁸ See Article 15(3) PSD.

¹²⁹ See Article 15(4) PSD, noting however that any funds received by a payment institution from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds.

¹³⁰ Regarding reliance on Article 9(2) CRD IV, please see discussion under Part 2 of this report.

borrowers and lenders may operate in compliance with the general principle according to which only credit institutions are allowed to collect deposits from the public. NL, on the other hand, indicated relying on Article 9(2) in relation to CF platforms and, accordingly, provides for the possibility of an exemption from the prohibition on persons or undertakings that are not credit institutions from taking deposits or other repayable funds.

In some jurisdictions, prudential requirements may apply under national law. Notably, ES, FR and the UK have bespoke national regimes that are relevant to CF platforms. In FR, lending-based CF entities operating as '*intermédiaires en financement participatif*' need to register for this status with the French competent authority responsible for supervising the banking and insurance sectors in France (*Autorité de contrôle prudentiel et de résolution – ACPR*). Given this, platform operators are subject to fit and proper requirements and are required to have liability insurance. Similarly, equity-based CF entities operating as '*conseillers en financement participatif*' need to register with the supervisor in charge of regulating participants and products in France's financial markets (*Autorité des Marchés Financiers – AMF*). Once the examinations by ACPR and AMF are complete and their status is confirmed, platforms need to register with the ORIAS (*Organisme pour le registre unique des intermédiaires en assurance, banque et finance*), which is the body responsible for holding and maintaining the single register of financial intermediaries.

In the UK, the Financial Conduct Authority (FCA) supervises lending-based and non-MiFID equity-based CF platforms in line with the Interim Prudential sourcebook for Investment Businesses (IPRU-INV).¹³¹ The IPRU-INV sets forth the financial resources requirements for operators of electronic systems in relation to lending, which is basically calculated as a percentage of the loaned funds outstanding. In addition, requirements for senior management, systems and controls apply as well as certain notification and reporting requirements to the FCA. Regarding non-MiFID equity-based CF, the requirements for non-MiFID securities and futures firms apply. The respective financial resources requirements are stipulated in IPRU-INV. They consist of basic requirements and requirements for position and counterparty risk. Additional (qualitative) requirements are similar to those that apply to lending-based CF platforms.¹³²

A number of jurisdictions currently do not have any specific regime in place at national level for CF platforms (e.g. CY, HR, HU, IE, IT, LU, PL); several competent authorities noted, however, that a case-by-case assessment of a CF business model ought to be done to determine whether a CF platform would fall under any other applicable national law (whether under a bespoke regime¹³³ or EU sectoral legislation¹³⁴). The reasons for not applying any specific regime to CF platforms are manifold. Some competent authorities highlighted that, given the current regulatory perimeter in their jurisdiction, CF platforms that simply match the interests of borrowers (fund seekers) and lenders (investors), do not themselves engage in regulated activities and, hence, are not subject to financial regulation (IT). Some authorities also seem to be waiting for a European approach to

¹³¹ Available here: https://www.handbook.fca.org.uk/handbook/document/ipru-inv/IPRU-INV_FCA_20160901.pdf.

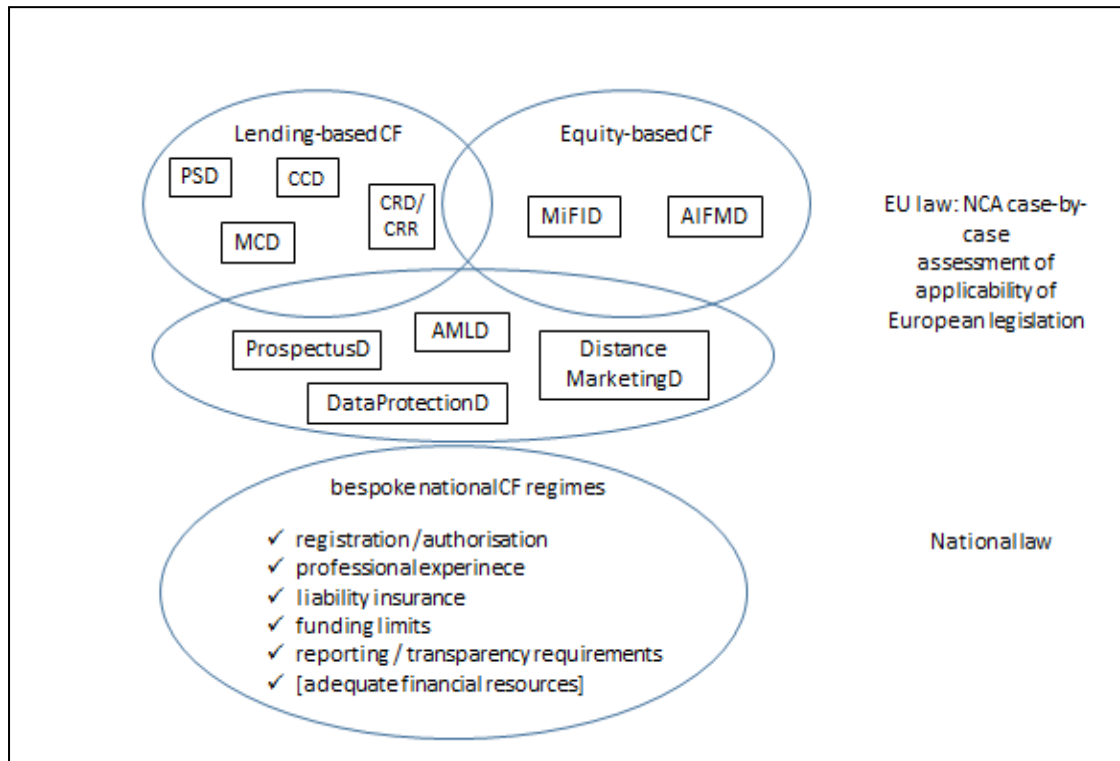
¹³² For further information on the national regulation specific to lending-based crowdfunding, see the EBA's Opinion on lending-based crowdfunding.

¹³³ For example, a bespoke regime applicable to the granting of loans.

¹³⁴ For example, under the national law transposing the PSD2 or the EMD.

develop (SK). Having said this, there are also some jurisdictions that are currently in the process of developing bespoke national regimes (EL, LV, RO) or have entered into policy discussions on whether to revise or extend existing regulatory guidance (LU, MT, SK).

Figure 18: Stylistic overview of legislation applicable to CF



3.5.2 Main observations on crowdfunding

The considerable heterogeneity of credit intermediation activities performed and financial services provided as well as the differences in the regulatory regimes, makes it difficult to arrive at concise conclusions regarding the prudential treatment of CF entities regulated under national law. One way to get a clearer picture is to look into CF arrangements from a legal as well as from a flow of funds perspective.

Several international and European organisations, such as the FSB,¹³⁵ IOSCO,¹³⁶ EBA,¹³⁷ ESMA,¹³⁸ and the European Commission,¹³⁹ have embarked on an analysis of the different CF business models. Building on the work conducted by these committees and the information provided by respondents within the remit of the OFI survey, there seems to be broadly two models of lending-based CF to be distinguished in respect of flow of funds and contractual arrangements.

¹³⁵ FSB-CGFS FinTech credit, market structure, business models and financial stability implications, 22 May 2017.

¹³⁶ IOSCO staff working paper, Crowd-funding: An Infant Industry Growing Fast, February 2014.

¹³⁷ EBA Opinion on lending-based crowdfunding, 26 February 2015.

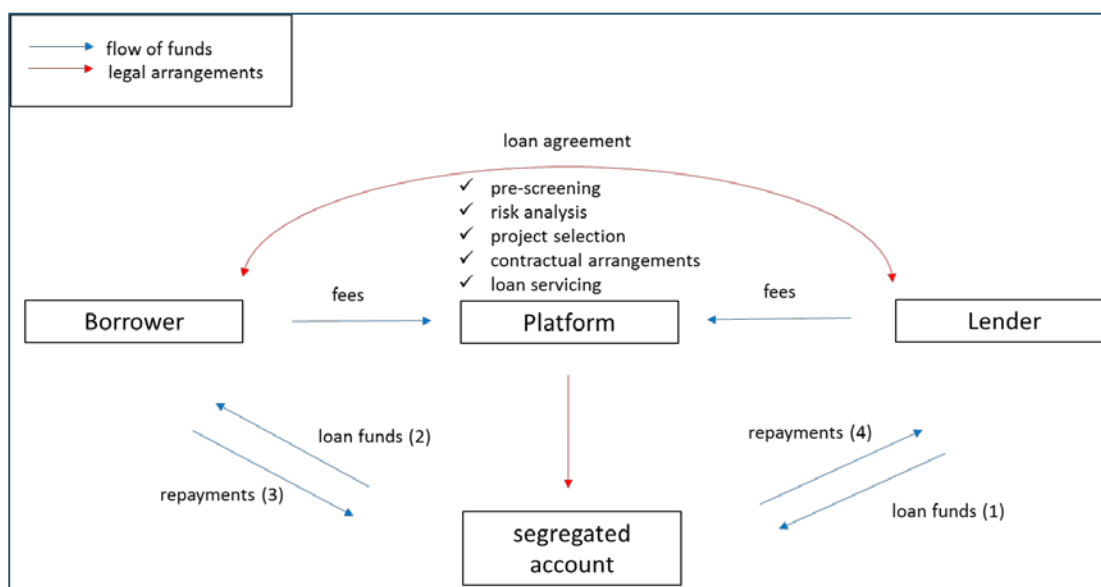
¹³⁸ ESMA Investment-based crowdfunding, Insights from regulators in the EU, 13 May 2015, ESMA Advice Investment-based crowdfunding, 18 December 2014.

¹³⁹ European Commission, staff working document, Crowdfunding in the EU Capital Markets Union, 3 May 2016.

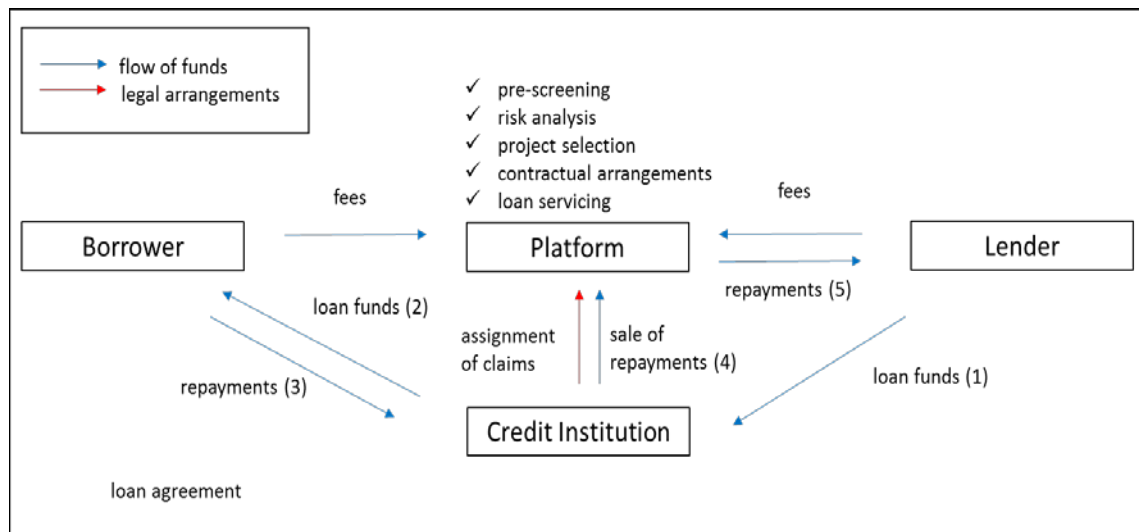
Under the first model (which is sometimes referred to as the ‘traditional’ or ‘segregated account’ model) platforms match preferences of creditors and debtors. The level of engagement by the platform may vary, e.g. the platform only conduct a pre-screening of projects or conduct a more in-depth credit risk assessment / scoring of creditors, based on its own rating methodology or drawing on external assessments. Interest rates for the loans might be set by the platform but also reverse auction type bidding is common. The platforms might provide individual loan proposals to the debtors, according to their preferences, or also provide a portfolio selection of several loans to achieve a certain risk/reward profile for the investor.

While platforms often arrange contract details between lenders and borrowers, they are commonly not themselves contractual parties to the lending agreement. Funds of lenders and borrowers are typically held in segregated accounts which are established by the platform. Figure 19 shows a stylised construction of the “traditional” lending-based CF model:

Figure 19: Illustration of a “traditional” lending-based CF model



Another model involves a credit institution that cooperates with the platform. Contrary to the model where lenders and borrowers directly enter into a loan agreement, in this model, the bank originates the loan and, as such, concludes the loan agreement with the borrower. The credit institution subsequently assigns its repayment claims against the borrower to the platform (or an intermediary connected to the platform). Under either model, the platform might take fees from the borrower as well as from the lender. In the second model, the credit institution might receive fees as a fixed percentage of the loan amount as well as fees from the monthly repayments of the borrower. Figure 20 shows a stylised construction of the lending-based CF model involving a credit institution.

Figure 20: Illustration of a lending-based CF model involving a credit institution

As shown above, under the “traditional” lending-based CF model, platforms typically act as agents, in bringing together the interests of lenders and borrowers. The loan agreements are directly entered into between the borrower and the lender. The platforms typically do not assume any credit risk. In the absence of applicability of general banking legislation, and setting aside any applicable EU legislation, the extent to which lending activity is supervised, varies considerably. In some jurisdictions, such as ES, FR and the UK, bespoke regimes apply. In DE, EE and NO where the banking regulatory perimeter seems to be rather broad, CF entities fall under the scope of the banking regulation.

However, typically the current business models and supervisory practices suggest that funds invested by lenders generally do not constitute deposits according to the CRDIV.¹⁴⁰ Hence, lenders have to bear the full credit risk, their investments are not covered by any losses or protection schemes (such as deposit guarantee schemes) (see further the EBA’s Opinion on lending-based CF which identifies a range of risks, risk-drivers and potential mitigants, including under applicable EU law, relating to this form of CF).

3.5.3 Main observations on lending-based crowdfunding

Lending-based CF contributes to credit extension. The extent to which liquidity and maturity transformation is conducted, however, basically depends on possibilities for early redemption at investor side and early loan repayment possibilities at borrower side. From the evidence gathered, it can be assumed that such features are not widely in place, i.e. investments need to be usually held until maturity. At the same time early loan repayment is not possible or only at additional fees.

There are a range of approaches to the regulation of lending-based CF. At this stage, as set out in the EBA’s Opinion on lending-based CF, the EBA is of the opinion that convergence should be

¹⁴⁰ In case where it is considered deposits, reliance on Article 9 (2) CRDIV is drawn (NL).

based on existing EU law. Should EU legislators consider developing a CF-specific regulatory framework, the potential regulatory measures set out in the EBA's Opinion should be considered. In the meantime, the EBA will continue to monitor the market, including in the context of the EBA's work on FinTech, and will revise its conclusions if required.

3.6 Credit unions and mutuals

3.6.1 Credit unions

Credit unions are a type of mutual society and are member-owned financial cooperatives. They do not have shareholders but are not-for-profit organisations that are democratically controlled by their members. The members of a credit union are those it has accepted deposits from or granted loans to. Members of a credit union share a 'common bond'. This could be living or working in a particular geographic area, or being a member of the same group such as a trade union, industry or church. Any profits are used to pay a 'dividend' to the members.

A number of Member States currently recognise credit unions under Article 2(5) CRDIV (see Part 2) and therefore they fall outside the scope of the CRDIV/CRR (IE, LT, LV, PL, UK). For HR and NL the recognition of credit unions is included in the CRDIV/CRR review proposals.¹⁴¹ Most of these countries have a simplified prudential regime for credit unions given their limited scale and size compared with credit institutions generally.

Credit unions will only grant loans and provide any additional services to their members. These are individuals who have previously placed money with the credit union. The amount of capital that credit unions are required to hold varies greatly across Member States. NL has an initial capital requirement of EUR 1 million, whereas the requirement in LV is EUR 2 500. Credit unions are required to hold capital as a proportion of their assets with some Member States requiring additional capital if the credit union provides services other than just savings and loans.

Some Member States restrict the size of loan that a credit union can grant to an individual or a group of connected individuals. This can be an absolute amount and/or a percentage of the capital held. UK defines a large exposure as being: (1) at least GBP 7 500; and (2) at least 10% of the credit union's capital. In total large exposures must not exceed 500% of its capital, and individual large exposures must not exceed 25% of its capital. LV has a similar requirement, whereby the exposure to an individual should not exceed 25% of own funds, and the sum of individual exposures over 10% should not exceed 800% of own funds.

LV has liquidity management requirements and maturity ladder reporting requirements. As part of this, credit unions are required to set internal limits on the maturity mismatch within each maturity band. The other Member States specify how much a credit union should have in liquid assets. There are general requirements around controlling persons and/or approved persons, and

¹⁴¹ The European Commission's proposal amending the CRDIV includes a proposal for the inclusion of a new paragraph (5b) in Article 2 of CRDIV on credit unions. In the Explanatory Memorandum to this proposal, the European Commission stated that "all Member States should be able to benefit from the possibility of allowing such types of entities (i.e. credit unions) to operate only under national regulatory safeguards commensurate with the risks that they incur".

governance and remuneration. Generally credit unions are restricted in the financial services they can provide and can only make loans to their members. The exceptions are IE and the UK. In IE credit unions can also make loans, accept savings, and borrowing. They are also allowed to provide a number of additional services such as '*bureau de change*', bill payment, money transfers, standing orders and direct debits. The UK allows credit unions to provide similar services and activities.

3.6.2 Other forms of mutuals

Article 2(5) CRDIV also extends to other forms of mutual society in some Member States as set out in Figure 21.

Figure 21: Applicability of Article 2(5) CRDIV to credit unions and mutuals

Member State	Exemption under Article 2(5) CRDIV	
	Credit union	Other mutuals covered
EE	No	Savings and Loan Societies
IE	Yes	Friendly Societies
LV	Yes	Savings and Loan Societies
LT	Yes	No
HU	Applying for exemption	No
NL	Applying for exemption	No
PL	Yes	No
RO	No	No
UK	Yes	No

IE and the UK have 'Friendly Societies' and 'Industrial and Provident Societies'. In the UK the latter are now known as 'Registered Societies' and include Co-operative Societies, and Community Benefit Societies.

Friendly Societies are a type of mutual insurance company in which members share an agreed risk by paying a fee. They originate from the time before there was any kind of welfare state and allowed people to save for their funeral or for an old age pension. The Prudential Regulation Authority (PRA) is responsible for the prudential regulation of UK Friendly Societies. These may be either within the scope of the Solvency II Directive or out of scope 'non-Directive firms', depending on certain criteria¹⁴². Some non-Directive Friendly Societies may also provide other services such as running a sports club, or providing discretionary benefits.

Friendly Societies are funded by voluntary subscriptions from their members and may also be funded by donations. These funds can be invested as shares and debt securities or asset backed securities.

Non-Directive Friendly Societies are free to apply for authorisation under Solvency II (i.e. opt-in). In such cases, the rules that apply to Solvency II firms will apply to these firms. Otherwise, the prudential requirements for UK non-Directive Friendly Societies are set out in the non-Solvency II

¹⁴² See <http://www.bankofengland.co.uk/pru/Pages/supervision/smallinsurers/nondirective.aspx>.

firms sector of the PRA Rulebook. Among other things, they must ensure that their insurance liabilities are covered by appropriate assets, their investments are appropriately diversified and they have sufficient liquid assets to be able to meet their liabilities as they fall due.¹⁴³

IE Friendly Societies are listed in Article 2(5) CRDIV and therefore fall outside the scope of the CRDIV/CRR.

UK Registered Societies include:

- Co-operative Societies – businesses run for the benefit of their members, distributing profits between their members;
- Community Benefit Societies – businesses run for the benefit of the wider community, re-investing profits in the community;
- Industrial and Provident Societies (registered in the UK before 1 August 2014, which may fall into either of the previous categories).

Examples of Registered Societies are social clubs, supermarkets and sports clubs. Where these firms carry out regulated activities – such as providing insurance or banking-type services – they are regulated in the same way as any other bank or insurer. Those that do not carry out a regulated activity are not subject to prudential regulation. Their names are entered into a ‘Mutuals Public Register’¹⁴⁴ (currently overseen by the Financial Conduct Authority as the ‘registrar’) and they submit various returns (such as any changes to rules and their annual accounts) so that interested parties can view these.

3.7 Overall observations about the prudential treatment of entities within Part 3

The prudential treatment within and across clusters is very different. Globally, the analysed entities are recognised as relatively specialised financial institutions, with the significant exception of Cluster 2 (securitisation vehicles).

Regarding the level of regulation, entities in Cluster 1 (consumer and corporate lenders) are generally regulated, with a majority subject to a bespoke regime. In the other clusters, most of the entities are subject to simplified prudential regimes or to no individual prudential regulation with limited requirements and sometimes no authorisation needed. As a general trend, the more activities the entities perform, the more they are regulated. In particular, the more the lending activities can be likened to the lending activities of CRDIV credit institutions, the more likely they are to be subject to quantitative and qualitative regulatory requirements.

Notably, across all clusters, few entities are subject to requirements relating to leverage and liquidity and approximately 50% of the Member States impose exposure limits on OFIs. Should

¹⁴³ Non-Solvency II Firms Sector, Friendly Societies Parts of the PRA Rulebook, available at <http://www.prarulebook.co.uk/>.

¹⁴⁴ Mutuals Public Register available at <https://mutuals.fsa.gov.uk/>.

credit intermediation activity by OFIs continue to grow, the state of regulation of these risks will require ongoing monitoring and analysis.

CF activities will also require further monitoring and assessment, taking account of evolutions in the business models applied and regulatory treatment under national law.

4. Definition of ‘financial institution’ and ‘ancillary services undertaking’

4.1 Summary

The terms ‘financial institution’ and ‘ancillary services undertaking’ as defined in points (26) and (18), respectively, of Article 4(1) CRR are crucial for the purposes of establishing the entities that must or, in relation to ancillary services undertakings, may be consolidated for the purposes of assessing a banking group’s consolidated situation.

For the OFIs referred to in Part 3 of this report, the position with regard to the treatment of consumers and corporate lenders is clear: they would be regarded as ‘financial institutions’ and therefore, should they be in the same group as a credit institution, would be required to be consolidated. For the other types of OFIs (SPVs to set up securitisations, CF entities, credit unions and mutual and savings institutions), the competent authorities expressed a range of views. While there are legitimate reasons for this (specifically, differences in the activities undertaken and whether these fall within the scope of those listed in the definition of ‘financial institution’) the responses from the competent authorities, including on other matters relating to the interpretation of the existing definition, imply that there would be some benefit in providing further clarity to the definition of ‘financial institution’.

The responses from the competent authorities also imply that there would be benefit in further clarifying the definition of ‘ancillary services undertaking’.

4.2 Analysis of the consolidation rules under the CRR

According to Article 18(1) CRR, institutions are required to comply with the prudential requirements set out in that regulation on the basis of their consolidated situation and shall fully consolidate all institutions and financial institutions that qualify as their subsidiaries or, where relevant, the subsidiaries of their parent financial holding company or parent mixed financial holding company. However, under certain circumstances, Article 18 CRR allows the application of a different method of consolidation. In this respect, the EBA is mandated under Article 18(7) CRR to submit draft regulatory technical standards to the European Commission to specify how relevant subsidiaries shall be integrated into the consolidated prudential situation where the CRR allows different methods of consolidation (i.e. method of consolidation other than the full method of consolidation prescribed under Article 18(1) CRR). This report should, on the specific topic of the consolidation of OFIs, be read in conjunction with the considerations expressed by the EBA on this separate – although related – piece of work.

For completeness, it is worth mentioning that ancillary services undertakings (as defined in point (18) of Article 4(1) CRR) are required to be consolidated only as and when consolidated supervision is required pursuant to Article 111 CRDIV (Article 18(8) CRR). In other words, according to Article 18(8) CRR, the investment by an institution in one or more subsidiaries that

qualify as ancillary services undertaking does not trigger, by itself, a requirement for consolidated supervision.

Notwithstanding the criteria and methods for prudential consolidation that will be specified by the final draft EBA regulatory technical standards under Article 18(7) CRR, it is important that the definition of ‘financial institution’ and, for that matter, the definition of ‘ancillary services undertaking’, are commonly understood in order to ensure a consistent approach to prudential consolidation across Member States for similar types of OFIs. Ambiguities could otherwise give rise to the risk of regulatory arbitrage resulting in a circumvention of consolidation requirements based on an assessment that an entity is not to be regarded as a ‘financial institution’. This could lead to underestimation of the actual risk exposure of the banking group and, from an EU perspective, to level playing field issues.

4.3 Scope of the OFI survey with respect to consolidation

With the above issues in mind, competent authorities were invited to indicate whether the OFIs reported in the OFI survey responses would be considered as a financial institution or as an ancillary services undertaking, should they form part of the same group as an institution. Competent authorities were also asked to describe any situation they may have encountered where questions of interpretation of the definition of financial institution or ancillary services undertaking were raised.

4.4 Main observations

By way of main findings per cluster of entities (see further Part 3 of this report):

- Consumer and corporate lenders : the responses from the competent authorities were consistent in reporting all forms of OFIs within this cluster as financial institutions on the basis of Annex I to the CRDIV. The reason for such consistency is to be found in the fact that Annex I is fairly comprehensive with respect to lending activities and captures almost all sorts of lending activities (points (2), (3) and (6) of Annex I are sufficiently extensive to cover: ‘lending including, inter alia, consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting), financial leasing, guarantees and commitments’).
- SPVs to set up securitisations (SPVs-Sec) : the responses from the competent authorities raised various issues, which are considered in further detail in the next subsection of this report.
- Crowdfunding : it was less clear from the responses whether crowdfunders should be regarded as financial institutions. Whereas some competent authorities (FI, NL) consider that they are financial institutions, others (EE, LT, LV) were not in a position to confirm. This can be explained by the range of activities carried out and business models in place.

- Credit unions and mutuals: competent authorities noted that entities within this cluster would not be financial institutions merely as a result of accepting deposits or other repayable funds from the public (as the definition of financial institution does not refer to point (1) of Annex I to the CRDIV), but these entities may be regarded as financial institutions where they carry out other types of activity referred to in Annex I to the CRDIV.
- Savings institutions : as previously indicated, three competent authorities (DK, EE, PT) referred to savings institutions in their responses. Competent authorities noted that entities within this cluster would not be financial institutions merely as a result of accepting deposits or other repayable funds from the public (as the definition of financial institution does not refer to point (1) of Annex I to the CRDIV), but these entities may be regarded as financial institutions where they carry out other types of activity referred to in that Annex I to the CRDIV. One competent authority (DK) noted that no official classification has been made for savings institutions.

4.5 Do SPVs used to set up securitisations qualify as ‘financial institutions’?

The survey responses show that, out of the 15 competent authorities referencing SPVs-Sec as potentially carrying on credit intermediation activities, only six competent authorities consider that SPVs-Sec qualify as financial institutions. However, the basis on which they are recognised as such varies among the authorities. Some competent authorities consider that SPVs-Sec may be regarded as carrying out the financial intermediation activity only under point (8) of Annex I to the CRDIV; others consider that they carry out both activities under points (2) and (8). One competent authority indicated that SPVs-Sec qualify as financial institutions but did not substantiate its response. One competent authority noted that it could consider that SPVs-Sec qualify as an ancillary services undertaking.

As discussed above, a finding from the OFI survey is that competent authorities’ views vary, in particular when it comes to determining whether or not a SPV-Sec is a securitisation special purpose entity (SSPE) (within the meaning of point (66) of Article 4(1) CRR) or a simple special purpose entity (SPE).

It may be considered that SPVs-Sec that are SSPEs do not fulfil the definition of financial institution as they do not acquire participations per se and may not be regarded as carrying out any of the activities listed under Annex I to the CRDIV, having regard to the definition of SSPE in point (66) of Article 4(1) CRR, which specifies that the corporate purpose of a SSPE is limited to the achievement of the securitisation purpose (i.e. “to isolate the obligations of the SSPE from those of the originator”) and so they are in principle not allowed to carry out any other financial activities. The same consideration could be made with respect to a SPV-Sec that qualifies only as a SPE but the result may depend on the individual circumstances so a case-by-case assessment should be made (e.g. having regard to the principal activity – such as whether it 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” (definition of “financial institution”).¹⁴⁵

Conceptually, whether or not a traditional SPV-Sec should be consolidated need not be solely dependent on whether it qualifies as a ‘financial institution’. Rather a broader qualitative approach could be adopted, which, in addition to the assessment of business activities, would take into account whether risks have been transferred to third party investors under the Significant Risk Transfer regime under CRR or otherwise. In this respect, whether a securitisation arrangement meets the condition of a Significant Risk Transfer (SRT) under Article 243 et seq. CRR may be a useful criterion.

Taking account of varying supervisory approaches to vehicles that are SPEs or SSPEs, and in view of the range of considerations relevant to the assessment of the status of the entity for the purposes of regulatory consolidation and also to ensure that the consolidation requirements are not circumvented based on the assessment that an undertaking is not a financial institution or an ancillary services undertaking, the EBA observes there is a clear need for clarification with regard to these vehicles in the context of consolidation.

From a supervisory standpoint, it is important to clearly understand the reasons for such differing approaches with the objective of identifying commonly agreed indicators to ensure that all vehicles with similar features are treated alike. From market participants’ and supervised entities’ perspectives, this need is equally important in terms of interactions between the criteria for prudential consolidation and the recognition of SRT under the CRR, as originators should have the legal certainty whether a given securitisation transaction would be included or not in the individual and the consolidated prudential situation of credit institutions and for what purposes.

The EBA would like to stress, however, that the objective of the OFI Report is merely to identify the various interpretations and the need for further clarifications. It is not to draw conclusions on whether SPEs/SSPEs should be consolidated. As indicated above, these questions are currently being discussed in other fora¹⁴⁶ and, accordingly, the OFI Report should be read in conjunction with those separate pieces of work.

4.6 Concluding observations: A need to clarify the definition of ‘financial institution’ and ‘ancillary services undertaking’

As discussed above, when determining the scope of prudential consolidation of a banking group, it is not always clear what should be regarded as a financial institution or an ancillary services undertaking (see, for instance, the questions raised by the EBA’s Q&A tool on related issues¹⁴⁷).

¹⁴⁵ See EBA [Q&A 2014_857](#) on the definition of financial institution.

¹⁴⁶ See, for example, the EBA work in the context of the draft Regulatory Technical Standards under Article 18(7) CRR. See also the BCBS Guidelines on Identification and management of step-in risk (October 2017): <https://www.bis.org/bcbs/publ/d423.pdf>.

¹⁴⁷ See [2014_1628](#), [2014_796](#) and [2014_857](#).

On the definition of ‘financial institution’ : according to point (26) of Article 4(1) CRR, their ‘principal activity’ is ‘to acquire holdings *or* to pursue one or more of the activities listed in Annex I to the CRD’. The EBA observes that the interpretation of this term raises a number of issues, for example:

- It could be considered that clarification should be provided on what ‘principal activity’ means – e.g. more than 50% of all activities or case-by-case decision. According to the current definition of ‘financial institution’, it is also debatable whether an entity could be recognised as a financial institution where the activity of acquiring holdings or activities listed in points (2) to (12) and (15) of Annex I to the CRDIV are only marginal activities.
- The issue of whether the term ‘acquiring holdings’ has to be understood as implying any kind of holdings (including holdings in industrial companies for instance) or only financial holdings (e.g. holdings in, say, a company carrying on activities listed in Annex I to the CRDIV) seems to find a provisional answer in the European Commission’s proposal to amend the CRR, where it is clarified that acquirers of pure industrial holding companies do not fall into the definition of financial institutions. It could also be noted that the definition is not clear on whether acquisitions need to take place on a regular basis or only occasionally. Clarifications could be provided on the frequency of acquisition of holdings and alternative conditions that should be met to fulfil the definition. In the same vein, clarifications should be provided on whether an undertaking that acquires and holds a significant number of shares that constitutes the major part of its assets meets the condition to be a financial institution.
- Options for further clarifications (e.g. through the issuance of EBA guidelines) could be considered, for example, to clarify the factors to be taken into account in assessing whether, for example, the following entities are financial institutions: financial consultancy services companies in the real estate sector and asset management companies in the real estate sector.

Some possible leads to clarify the problems in relation to the definition of ‘financial institution’ could be considered, ranging from a list of entities, under each Member State’s regulation, that fulfil the criteria to be considered a financial institution, to a more flexible approach where competent authorities should have capacity to decide that an entity is a ‘financial institution’ or an ‘ancillary services undertaking’ and should, hence, be granted the power to expand the scope of prudential consolidation to avoid structures designed to circumvent definition of ‘financial institution’. Some intermediate solutions could also be envisaged.

On the definition of ‘ancillary services undertaking’ according to point (18) of Article 4(1) CRR, the principal activity of ancillary services undertakings consists in ‘owning or managing property’ and ‘managing data-processing services’ or ‘a similar activity which is ancillary to the principal activity of one or more institutions’. The EBA observes:

- There is probably a need to clarify how the terms ‘owning or managing property’ and ‘managing data-processing services’ as well as ‘similar activity’ should be understood. This

would help clarify, for example, whether entities managing real estate properties in relation to development/housing promotion or to real property lease, data processing service companies etc. fall within the scope.

- The treatment of securitisation vehicles could also be clarified. For instance, to some competent authorities, it is not quite clear whether the activities of a SPV can be regarded as an ancillary services undertaking (e.g. whether the SPV's principal activity can be regarded as consisting in owning or managing property).
- Point (3) of Annex I to the CRDIV refers to 'financial leasing' only, but leaves out 'operational leasing' whereas both activities bear very similar features. Accordingly, an undertaking within a banking group carrying out operational leasing would not be regarded as a financial institution; as a result, the undertaking could fall outside the scope of prudential consolidation, which may, based on the circumstances, not necessarily be desirable. Consideration could be given to the circumstances in which an entity engaged in operational leasing could be regarded as an ancillary services undertaking.

In view of the above issues, the EBA considers that there would be merits in undertaking further steps to better clarify the definition of 'financial institution' and 'ancillary services undertaking'. Work in relation to the preparation of EBA guidelines specifying the concepts such as activities that are a 'direct extension of banking' and activities that are 'ancillary to banking' (Article 89(4) CRR) could also present an opportunity to further reflect on the above aspects.

5. General considerations on Annex I to the CRDIV regarding activities subject to mutual recognition

5.1 Summary

Annex I to the CRDIV sets out the activities subject to mutual recognition. It is also relevant to the scope of the perimeter of prudential consolidation as ‘financial institutions’ are defined by reference to the activities referred to in points (2) to (12) and (15) of that annex (point (26) of Article 4(1) CRR).

Annex I to the CRDIV has been virtually unchanged for 30 years and would benefit from update to clarify certain terms and to align with recent EU sectoral measures in order to ensure the list of services is fit for purpose.

5.2 Analysis

For the reasons explained in Part 4 of this report, Annex I to the CRDIV is of paramount importance for, among other things, determining:

- the scope of the activities subject to mutual recognition (i.e. the activities that credit institutions authorised in their home Member State may carry out throughout the EU by establishing branches or by providing services on a cross-border basis); and
- the scope of the prudential consolidation of banking groups.

The first reference to Annex I may be found in the Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (Directive 89/646/EEC)¹⁴⁸ and, although ‘financial institution’ is mentioned there, it is not a defined term. The first time ‘financial institution’ was defined was in Article 1 to the Banking Consolidation Directive (92/30/EEC),¹⁴⁹ where financial institution meant “an undertaking, other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities referred to in numbers 2 to 12 of the list appearing in the Annex to Directive 89/646/EEC”.

The Annex to Directive 89/646/EEC is, subject to minor variations, identical to the current Annex I to the CRDIV regarding activities subject to mutual recognition. Accordingly, Annex I has remained unchanged for almost 30 years and points raised by the competent authorities in their responses to the OFI survey show that it is no longer fit for purpose and needs an overhaul.

¹⁴⁸ The Directive is available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0646:EN:HTML>.

¹⁴⁹ The Directive on the supervision of credit institutions on a consolidated basis is available here: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31992L0030>.

The following issues were identified:

- Although it is possible to understand the scope of some activities by reference to other EU sectoral legislation,¹⁵⁰ for others interpretation is more difficult, as the activities may not be defined in other existing EU legislation. For example:
 - i. ‘commitments’ in ‘guarantees and commitments’ (point (6) Annex I);
 - ii. ‘industrial strategy’ in ‘advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings’ (point (9) Annex I);
 - iii. ‘money broking’ (point (10) Annex I);
 - iv. ‘credit reference services’ (point (13) Annex I);
 - v. ‘participation in securities issues and the provision of services relating to such issues’ (point (8) Annex I), on which only certain Member States rely for SPVs.
- Other activities listed in Annex I appear to relate to EU sectoral legislation (e.g. ‘safe custody services’), but it is not specified whether such activities are in relation only to financial instruments or to other types of assets (such as, gold or any other precious metals). There are good arguments on both the text and purpose of Annex I to say that they relate to other types of assets as the activity of ‘safekeeping and administration of financial instruments’ is also covered by a different activity (point (12) Annex I).
- It would be worth considering if new services referred to in any relevant recent pieces of EU legislation (e.g. under the MCD (Directive 2014/17/EU)¹⁵¹) should be expressly included in Annex I.

In addition, in terms of the definition of ‘financial institution’ it is unclear why certain activities under Annex I, in particular the activities under point (13) (credit reference services) and (14) (safe custody services), are excluded from the definition.

5.3 Main observations

In light of the foregoing, the EBA considers that a first step would be to undertake a “clean-up” of Annex I to the CRDIV, in particular to remedy ambiguities in the scope of specified activities and to align Annex I with the recent EU sectoral legislation (e.g. the MCD) to reflect new activities. The EBA also recalls the observations and findings set out in the 2014 EBA Report and Opinion on the

¹⁵⁰ For example, ‘issuing electronic money’ (point (15) of Annex I to the CRD) – by referring to the definition of ‘electronic money’ set out in Article 4(2) of Directive 2009/110/EC (the second Electronic Money Directive): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0110&from=en>.

¹⁵¹ The Mortgage Credit Directive is available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0017&from=EN>.

terms ‘deposits’ and ‘other repayable funds’ as referred to in point (1) of Annex I to the CRDIV¹⁵² and notes the need for ongoing monitoring of Annex I in order to ensure that it takes account of evolutions in the provision of financial services (e.g. in view of the evolutions in the sector due to FinTech¹⁵³).

¹⁵² See in particular the EBA’s Opinion: <https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-12+%28Opinion+on+perimeter+of+credit+institution%29.pdf>.

¹⁵³ See further the EBA’s Discussion Paper on its approach to FinTech available here: <https://www.eba.europa.eu/-/eba-publishes-a-discussion-paper-on-its-approach-to-fintech>.



EUROPEAN BANKING AUTHORITY

Floor 46 One Canada Square, London E14 5AA

Tel. +44 (0)207 382 1776

Fax: +44 (0)207 382 1771

E-mail: info@eba.europa.eu

<http://www.eba.europa.eu>