



Brussels, 6.9.2023
C(2023) 5912 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 6.9.2023

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

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 394(4) of Regulation (EU) No 575/2013 ('the Regulation') empowers the Commission to adopt delegated acts to specify the criteria for identifying shadow banking entities referred to in Article 394(2) of the Regulation. This can be done following the submission of draft regulatory technical standards (RTS) by the European Banking Authority (EBA) and in line with Articles 10 to 14 of Regulation (EU) No 1093/2010,

To ensure consistency through the different pieces of the regulatory framework, this delegated act takes into account international developments and internationally agreed standards on shadow banking. It also considers whether: (a) the relation with an individual entity or a group of entities may carry risks to the institution's solvency or liquidity position; and (b) entities that are subject to solvency or liquidity requirements similar to those imposed by this Regulation and Directive 2013/36/EU should be entirely or partially excluded from the obligation to be reported on shadow banking entities.

In line with Article 10(1) of Regulation No (EU) 1093/2010 establishing the EBA, the Commission must decide whether to endorse the drafts standards submitted within 3 months of their receipt. The Commission may also endorse the draft standards in part only or with amendments, where the EU's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In line with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA carried out a public consultation on the draft regulatory technical standards submitted to the Commission in line with Article 394(4) of the Regulation. The Authority analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in line with Article 37 of Regulation (EU) No 1093/2010. A consultation paper was published on 26 July 2021, and the consultation closed on 26 October 2021.

As specifically requested by the Commission, only these draft RTS and explanatory memorandum are submitted to the Commission for the adoption of these draft RTS. All background information – notably the background and rationale of the draft RTS, the impact assessment and the feedback on the public consultation – is included in the final report accompanying these draft RTS. This report was approved by the EBA's Board of Supervisors on 20 May 2022 and published on the EBA's public website.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The provisions of this delegated act specify: (i) the criteria for identifying both shadow banking and non-shadow banking entities; (ii) the definition of banking activities and services; and (iii) the criteria for excluding entities established in third countries from being deemed as shadow banking entities.

These draft RTS are aligned with the [Guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395\(2\) of the Regulation](#).

Entities that carry out banking activities or services that have been authorised and are supervised in line with the regulatory framework consisting of any of the legal acts referred to in Annex I of these draft RTS (or are part of a group supervised on this basis) must not be

considered as shadow banking entities. The same treatment must apply to the entities that are exempted or excluded from the application of some of those legal acts, notably the Regulation, Directive 2013/36/EU, Regulation (EU) No 648/2012 or Directive 2009/138/EC. All other entities that provide banking activities and services must be considered as shadow banking entities, with specific rules applying to certain collective investment undertakings.

For entities established in a third country, the draft RTS differentiate between institutions and other entities. Institutions must not be identified as shadow banking entities if they are authorised and supervised by a supervisory authority that applies banking regulation and supervision based on at least the Basel Core Principles for effective banking supervision; other entities must not be identified as shadow banking entities if they are subject to a regulatory regime recognised as equivalent to the one applied in the EU for such entities in line with the equivalence provisions of the relevant EU legal act.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012¹, and in particular Article 394(4), fourth subparagraph, thereof,

Whereas:

- (1) Shadow banking can lead to increased risks for financial stability. Authorisation and supervision in accordance with Union law mitigates that risk. It is, therefore, appropriate to lay down that entities that are subject to such authorisation and supervision are not to be considered shadow banking entities. For that purpose, it is necessary to specify that Union law.
- (2) During the recent Covid-19 crisis, money market funds faced severe liquidity issues. This highlighted that risks associated with money market funds, particularly in stressed market conditions, are not fully mitigated by the existing prudential requirements in the Union and hence, can lead to an increased risk for financial stability. For that reason, exposures to money market funds should be regarded as exposures to shadow banking entities.
- (3) Alternative investment funds employing leverage on a substantial basis entail additional risks that are not deemed to be adequately mitigated from a prudential perspective by the requirements imposed to their asset managers under Directive 2011/61/EU of the European Parliament and of the Council². It is therefore necessary to ensure that institutions regard alternative investment funds as shadow banking entities where those undertakings employ leverage on a substantial basis, originate loans in the ordinary course of their business, or purchase third-party lending exposures for their own account.
- (4) Institutions should not consider as shadow banking entities financial institutions that are treated as institutions for the calculation of risk-weighted assets under the standardised approach set out in Article 119(5) of Regulation (EU) No 575/2013, as

¹ OJ L 176 27.6.2013, p. 1.

² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

those financial institutions are authorised and supervised by the competent authorities and subject to prudential requirements comparable, in terms of robustness, to those applied to institutions.

- (5) Due to their public or semi-public nature or their cooperative status, certain entities are explicitly excluded from the scope of Directive 2013/36/EU of the European Parliament and of the Council³, Regulation (EU) No 648/2012 of the European Parliament and of the Council⁴ and Regulation (EU) No 575/2013. For that reason, institutions should not regard those entities as shadow banking entities.
- (6) Article 4 of Directive 2009/138/EC of the European Parliament and of the Council⁵ excludes certain insurance and re-insurance undertakings from the scope of that Directive, due to their size. Since those undertakings are small, they do not pose significant risk to financial stability. For that reason, institutions should not regard those undertakings as shadow banking entities.
- (7) Credit intermediation activities of entities that are part of a non-financial group, carried out on behalf of other entities within that non-financial group, are limited in scope. For that reason, they do not pose significant risk to financial stability and should therefore neither be identified as shadow banking entities.
- (8) Entities that are included in the supervision on a consolidated basis of institutions that are subject to the prudential requirements laid down in Regulation (EU) No 575/2013 should not be identified as shadow banking entities, as risks of those entities are captured at consolidated level.
- (9) The Basel Core Principles for effective banking supervision represent internationally agreed principles and a sound foundation for the regulation, supervision, governance, and risk management of a country's banking sector. A third country institution that has been authorised and is supervised by a supervisory authority that applies those Basel Core Principles should therefore not pose a significant risk to financial stability and should not be identified as a shadow banking entity.
- (10) For the same reason, subsidiaries of a parent undertaking that is authorised and supervised in accordance with the Basel Core Principles and that are included in the prudential consolidation and supervision on a consolidated basis of that parent undertaking should not be considered as shadow banking entities.
- (11) Points 1, 2, 3, 6, 7, 8 and 10 of Annex I to Directive 2013/36/EU lists certain services and activities as banking services and activities. However, there are other services and activities carried out by certain entities that are very similar to those banking services and activities, where they involve maturity transformation, liquidity transformation, leverage, or credit risk transfer. Those services and activities should, for that reason, be regarded as banking services and activities for the identification of shadow banking entities.

³ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁴ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

⁵ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (12) This Regulation is based on the draft regulatory technical standards submitted to the Commission by European Banking Authority.
- (13) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁶,

HAS ADOPTED THIS REGULATION:

Article 1

Criteria for identifying shadow banking entities

1. Institutions shall identify as a shadow banking entity:
- (a) any entity that offers banking services or performs banking activities as set out in Article 2 and is not authorised and supervised in accordance with any of the Union acts listed in the Annex to this Regulation;
 - (b) any undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC of the European Parliament and of the Council⁷ where those undertakings are authorised as money market funds as referred to in Article 4 of Regulation (EU) 2017/1131 of the European Parliament and of the Council⁸;
 - (c) any alternative investment fund as defined in Article 4(1), point (a), of Directive 2011/61/EU, where any of the following applies:
 - (i) the alternative investment fund is authorised as a money market fund as referred to in Article 4 of Regulation (EU) 2017/1131;
 - (ii) the alternative investment fund employs leverage on a substantial basis as set out in Article 111(1) of Commission Delegated Regulation (EU) No 231/2013⁹;
 - (iii) the alternative investment fund is not prohibited from originating loans in the ordinary course of its business or from purchasing third-party lending exposures for its own account on the basis of its rules or instruments of incorporation.
2. By way of derogation from paragraph 1, institutions shall not identify the following entities as shadow banking entities:

⁶ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (OJ L 302, 17.11.2009, p. 32).

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

⁹ Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

- (a) financial institutions the exposures of which are treated in accordance with Article 119(5) of Regulation (EU) No 575/2013;
- (b) any entity that is excluded from the scope of any of the following:
 - (i) Directive 2013/36/EU;
 - (ii) Regulation (EU) No 648/2012;
 - (iii) Directive 2009/138/EC;
 - (iv) Regulation (EU) No 575/2013;
- (c) any entity that is exempted from the application of any of the following:
 - (i) Directive 2013/36/EU;
 - (ii) Regulation (EU) No 648/2012;
 - (iii) Directive 2009/138/EC;
 - (iv) Regulation (EU) No 575/2013;
- (d) any entity that is part of a non-financial group whose principal activity is to carry out credit intermediation activities for its parent undertaking or its subsidiaries or other subsidiaries of its parent undertaking;
- (e) any entity that is included in the supervision of an institution on a consolidated basis;
- (f) any entity established in a third-country that meets any of the following criteria:
 - (i) the entity has been authorised and is supervised by a third-country supervisory authority in accordance with the Basel Core Principles for effective banking supervision;
 - (ii) the third country's regulatory regime, in accordance with which the entity has been authorised and is supervised, has been recognised as equivalent to the one applied in the Union for such entities in accordance with the equivalence provisions of the applicable Union legal act referred to in the Annex;
 - (iii) the entity is included in the supervision on a consolidated basis of an institution that has been authorised and is supervised by a third-country supervisory authority that applies banking regulation and supervision based on the Basel Core Principles for effective banking supervision.

Article 2

Banking services and activities

1. For the purposes of Article 1, the following shall constitute banking services and activities:
 - (a) the activities referred to in points 1, 2, 3, 6, 7, 8 and 10 of Annex I to Directive 2013/36/EU;
 - (b) any other service or activity involving maturity transformation, liquidity transformation, leverage or credit risk transfer.

2. By way of derogation from paragraph 1, activities and services consisting of clearing as defined in Article 2, point (3), of Regulation (EU) No 648/2012 shall not constitute banking services and activities.

Article 3
Entry into force

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

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

Done at Brussels, 6.9.2023

For the Commission
The President
Ursula VON DER LEYEN