



Does Article 21c CRD (added by CRD VI) require changes to the LMA loan documentation or mandate letters?

The LMA has concluded that it will not be making changes to its loan documentation or mandate letters in response to Article 21c. Please refer to the LMA's publication, "Article 21c of CRD VI: Practical guidance on cross-border corporate lending" for more detail and background on the impact of Article 21c on cross-border corporate lending.

This reflects the view that the existing Designated Entity (**DE**) clause may provide a workable mechanism to support Article 21c compliance. The DE clause can already be used to address similar restrictions that currently apply to non-EU lenders engaging in cross-border lending to corporate borrowers in several EU jurisdictions (or that may apply to foreign lenders when engaging in cross-border lending to corporate borrowers in some non-EU jurisdictions). In particular, the DE clause allows a non EU lender – where an EU borrower accedes to a loan facility or subsequently draws under that facility – to nominate an EU affiliate to participate in relevant utilisations in place of the original non EU lender, without requiring a transfer or prior allocation of commitments.

However, there are some important considerations when using the DE clause to support Article 21c compliance:

- **Capital considerations:** the use of the DE clause may result in duplication of commitments (and associated capital requirements) between the non EU lender and its EU affiliate.
- **Timing uncertainty:** It is expected that the DE clause is deployed when the loan document is signed or before an EU borrower accedes to a loan facility (on the basis that Article 21c is triggered when the agreement to lend is entered into with the EU borrower and not only when a utilisation is made – although this could depend on national transposition of Article 21c and may vary across EU Member States). Article 21c compliance may also need to be addressed in mandate or commitment letters if they contain obligations to lend to EU borrowers.
- **National Implementation:** The suitability of the DE clause may not be uniform across EU Member States and should be assessed against the relevant implementing legislation to ensure it operates as intended in the jurisdiction of all relevant EU borrowers.
- **Other approaches:** The DE clause is only one possible approach to addressing Article 21c compliance. Others include: (i) separate tranches for EU and non-EU borrowers; (ii) reliance on the Facility Office provisions by non-EU lenders with an EU branch (if in the same EU Member State as the EU branch); and (iii) changes to the borrower accession mechanics to manage the accession of EU borrowers.

The LMA has also decided not to amend its mandate or commitment letters to address the reverse solicitation exemption under Article 21c. The current view is that the regulatory effectiveness of standardised "reverse solicitation" clauses is uncertain and may be challenged by regulators. Approaches to reverse solicitation may differ across EU Member States, reducing the value of a uniform approach. In addition, such language could introduce separate risks, including potential agency and liability exposure (for example, borrower liability for arranger actions or the potential recharacterisation of duties owed by the arranger to the borrower) and may blur the capacity in which arrangers act across different functions.

The DE clause was originally developed to address restrictions on cross-border lender arising in the context of the UK's departure from the EU. However, as already noted, the flexibility it offers has always had wider utility. A minor change to the introductory notes to the DE clause will be made to reflect this.

Whilst every care has been taken in its preparation, no representation or warranty is given by the LMA as to the accuracy or completeness of the contents of this Q&A or the extent to which any documentary measure discussed above is effective to address any applicable legal or regulatory requirement. Most importantly, this Q&A is not designed to provide legal or other advice on any matter whatsoever.