**20 May 2022

Mairead McGuinness

Commissioner for Financial Services, Financial Stability and Capital Markets Union

European Commission

Rue de la Loi / Westraat 200,

1049 Brussels,

Belgium

Dear Commissioner McGuinness,

**Proposed amendments to the Capital Requirements Directive ("CRD6") contained in the 2021 Banking Package**

The Loan Market Association[[1]](#footnote-1) ("**LMA**") is concerned that the legislative proposal contained in the 2021 Banking Package to amend CRD6 would have a very negative effect on the EU loan markets. These markets are wholesale markets, in which large banks lend substantial sums to largely corporate borrowers, and as a result the regulatory approach taken to date around the world has been facilitative. This has produced a large, global market whose simplicity and interconnectivity has enabled the raising of enormous amounts of capital to fund economic and social development. The placing of regulatory obstacles to this market (the size of which in the EU was €732.17 billion[[2]](#footnote-2) in 2021), as envisaged in CRD6, could do significant harm to the markets, to lenders and to borrowers. This is why such measures are not in place in the UK, Switzerland, the US and many other jurisdictions. By contrast, we are unable to see any benefit either to customers, to lenders or to the EU as a whole deriving from these proposals.

The CRD6 legislative proposal would add a new Article 21c to the Capital Requirements Directive ([CRD)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0036) prohibiting third-country undertakings from carrying on any of the activities listed in Annex I CRD in a Member State (otherwise than on a reverse solicitation basis) without establishing a branch in that Member State. Member States will be required to establish an authorisation regime for such branches under a new Title VI CRD. There are a number of problems with the drafting of the relevant articles, which do not appear to us to have been thought through – Appendix 1 to this letter identifies some of the detailed considerations which the drafting raises. However, the body of the letter addresses the policy behind the proposal.

The structure of this requirement appears to confuse the purpose of Annex I to the CRD with the purpose of Annex I to the Markets in Financial Instruments Directive (“**MiFID**”). Annex I of MiFID sets out a list of the activities which member states *must* regulate. Annex I to CRD (apart from item 1) lists activities which member states *may* regulate. The position as regards regulation of these activities varies from state to state. In particular, some member states regulate non-consumer lending, but others do not. Appendix 2 to this letter sets out an illustrative map of the actual authorisation status across some major EU jurisdictions. However, it should be noted that even in jurisdictions where Annex I activities are regulated, there is very often a local licencing or exemptive power which the member state uses to exempt some or all of the participants in that market in that jurisdiction from regulatory requirements. Countries such as the UK, which do not regulate non-consumer lending at all, are the exception rather than the rule. However in many countries there are exemptions and exclusions designed to ensure that banks established in other jurisdictions can lend to local businesses.

By imposing requirements on all non-EU firms in respect of all of the activities listed in Annex I to the CRD, the proposal is in effect imposing a regulatory requirement on non-EU firms in respect of activities which are not regulated within the EU, and pre-empting local regulatory decisions and local exemptive reliefs in member states. The logic of this approach is unclear.

Problems for loan syndication

A further issue arises with respect to the nature of the primary loan market. The process of syndication is roughly as follows. The borrower will usually ask potential lenders to bid to arrange the loan, with the mandate being awarded to the party/ies offering the most competitive terms (the "**Mandated lead Arranger(s)**", or "**MLA**"). They will be paid an arrangement fee, out of which all other fees are paid to lenders who will join the syndicate. Some finance – notably acquisition finance - is formally underwritten, whereas other syndicates are put together on a best efforts basis. It is then for the MLA to syndicate the facility to other banks. Typical structures vary according to the financial strength of the borrower – thus very highly rated borrowers may build a "club" of banks with whom they deal as required, whereas lower rated borrowers may require significant assistance from a MLA to secure financing.

It is almost impossible to fit this architecture into the framework set out in the proposed CRD6 draft. In particular, where a bank which is mandated as MLA contacts other banks, is that contact capable of being regarded as being at the exclusive initiative of the borrower? If not, does this mean that only banks who have a branch in the home territory of the borrower may be members of a syndicate lending to that borrower? Further, since the initiation of the arrangement with the MLA is likely to have arisen as part of an auction process, does the fact that the MLA has bid in that auction mean that his appointment is not the result of an "exclusive initiative" of the borrower?

More significantly, it should be asked what part of the existing process is regarded by the authorities as dangerous, uncertain or otherwise requiring regulation. As regards the loan market, it is almost impossible to identify what the problem is which this regulation is intended to address.

Problems for the loan market

These difficulties become more acute when we turn to the secondary markets. The existence of the secondary market in loan assets is an important part of the loan finance ecosystem, and is generally credited as being an important contributor to its stability and robustness.

In general, the regulation of the secondary market in loans is done through a prism of primary market regulation. In particular, a purchaser of a loan in the secondary market is treated as if they have become a lender to the initial borrower. Thus, for example, in judgment No. 12777/2019 published on 22 March 2019 (the "**IBLOR Judgment**"), the Fifth Criminal Section of Italy's Supreme Court of Cassation held that in some cases the acquisition by a foreign bank of a loan made by an Italian bank to an Italian borrower could be a breach of Italian law by the foreign bank, since the acquisition of the loan interest by it constituted lending to an Italian borrower in Italy. If this judgement accurately reflects EU law, then non-EU investors would be unable to acquire loans to EU borrowers in the secondary market unless they satisfied the local criteria for lending to that particular borrower. We believe this would strongly disincentivise investment in loans to EU borrowers; a development which would necessarily increase the cost of funding to those borrowers.

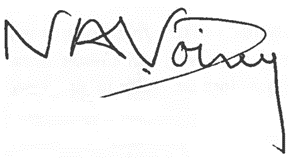
Problems for borrowers

The proposal also creates significant difficulties for borrowers as regards group financing. Very few of the borrowers who are active in the loan markets will operate exclusively in a single jurisdiction, and the bulk of the global loan markets involves borrowers who are groups with operations in multiple jurisdictions. Loan facilities for global corporates frequently provide that any member of a group may draw down on a facility arranged at group level. How would this provision be applied to the EU subsidiary of a US group who had arranged a loan facility at group level under which a number of group members, including the EU entity, could draw down? Even more importantly, because the proposal does not have any of the normal exemptions, an EU subsidiary which raised finance from its own parent outside the EU would potentially place that parent in breach of this requirement.

Conclusion

We believe that the wholesale loan markets would be significantly adversely affected, and as a result EU corporate borrowers damaged, by these proposals. We would therefore suggest that non-consumer lending should be exempted from their operation. We would welcome the opportunity to meet with you to discuss our concerns and to assist you in any way we can. If we can be of any further assistance, please do not hesitate to contact the undersigned by email at [nicholas.voisey@lma.eu.com](mailto:nicholas.voisey@lma.eu.com) or by telephone on 020 7006 5364.

Yours sincerely,



Nicholas Voisey  
**Managing Director**

**Appendix I**

1. New Article 47(1)(a) CRD refers to the list of activities in Annex I CRD as if this were a list of activities that require authorisation in the EU. However, EU law does not require Member States to impose authorisation requirements on all the activities listed in Annex I. Annex I CRD merely provides a list of activities that an EU credit institution authorised in one Member State can carry on in other Member States without additional authorisation, where the activity is already covered by the institution's authorisation in its home Member State. This is particularly unfortunate because Annex 1 does not sufficiently describe the parameters of an authorisation requirement. Such a requirement should, at a minimum;
   * contain or refer to definitions of the listed activities that would adequately delimit the scope of the authorisation requirement under new Article 21c(1) or new Article 48c(1);
   * describe all the conditions that would need to be met for an authorisation requirement to apply (e.g., that the undertaking carries on the activity as a business) or
   * address the exemptions from authorisation that would be available to EU undertakings carrying on like activities where the activities are subject to authorisation in the EU (e.g., under Article 9 CRD, MiFID, the Consumer Credit Directive, the Mortgage Credit Directive, the Payment Services Directive or the Electronic Money Directive) or that would otherwise be necessary to avoid adverse consequences. For example, third-country corporates may wish to approach banks to borrow repayable funds or to trade on own account in securities or derivatives
2. As a result, it is not clear whether large corporates or other entities that would otherwise be able to rely on those exemptions would be subject to the new authorisation requirements under new Article 47(1)(b) if they seek to engage in cross-border business with EU banks
3. New Article 48c(1) CRD states that Member States shall require that third country undertakings establish a branch in their territory before commencing the activities referred to in new Article 47(1). There is no derogation for reverse solicitation corresponding to that set out in new Article 21c(2) and (3).

1. New Article 48c(3)(d) CRD. Article 47(3) MiFIR provides that third-country firms that are established in a country whose legal and supervisory framework has been recognised as equivalent and that have established a branch in a Member State authorised in accordance with Article 39 MiFID can provide the services and activities covered under the authorisation to eligible counterparties and professional clients in other Member States without the establishment of new branches. New Article 48c(3)(d) conflicts with this existing provision in so far as it would prohibit branches of third-country firms from jurisdictions treated as equivalent which are authorised under new Title VI CRD from conducting cross-border business covered by MiFID in other Member States.
2. Title II, Chapter IV MiFID. Where a third-country credit institution establishes a branch in a Member State which is subject to authorisation under new Title VI CRD, that branch may also be subject to authorisation under Title II, Chapter IV MiFID where the credit institution is a third-country firm as defined in MiFID and the Member State has exercised the option provided for in Article 39 MiFID. CRD6 does not establish how the two sets of authorisation requirements should interact with each other in such a case.

1. The third sub-paragraph of Article 3(1) CRD6 would not allow a third-country undertaking to continue its activities after the end of the specified 12-month conformance period where it has previously applied for authorisation of a branch but the competent authority has not yet determined that application.
2. The fourth sub-paragraph of Article 3(1) CRD6 would require branches of third-country undertakings to comply with the new reporting requirements immediately after the end of the transposition period specified in the first sub-paragraph. This may be practically difficult where the branch has not previously required authorisation in the Member State or where the Member State in question only adopts the relevant implementing legislation towards the end of the transposition period.

**Appendix II**

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| **#** | **Further detail** | **Belgium** | **Finland** | **France** | **Germany** | **Ireland** | **Italy** | **Luxembourg** | **Regulatedrway** | **Netherlands** | **Spain** | **Sweden** |
|  | Deposit taking, account bank | Regulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Regulated | Regulated | Regulated | Regulated | Regulated | Regulated | Regulated |
|  | Standalone commercial lending | Unregulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Unregulated | Regulated | Regulated | Regulated | Unregulated | Regulated | Regulated |
|  | Financial leasing - commercial clients | Regulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Unregulated | Regulated | Regulated | Regulated | Unregulated | Regulated | Regulated |
|  | Factoring | Unregulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Unregulated | Regulated | Regulated | Regulated | Unregulated | Regulated | Regulated |
|  | Guarantees and commitments | Unregulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Provided Regulatedt contract of surety (i.e. insurance) | Regulated | Regulated | Regulated | Unregulated | Regulated | Regulated |
|  | Payment Services | Regulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Regulated | Regulated | Regulated | Regulated | Regulated | Regulated | Regulated |
|  | Issuing other means of payment (eg travellers cheques, bankers drafts) - other than payment services | Regulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Regulated | Permissable per se, but depending on precise features | Regulated | Regulated | Unregulated | Regulated | Regulated |
|  | Consumer credit lending | Regulated | Regulated | Regulated | Discretionary waiver available but only in respect of professional clients | Regulated | Regulated | Regulated | Regulated | If obtains a cross border licence/waiver | Regulated | Regulated |

1. The LMA is the trade body for the European, Middle Eastern and African ("**EMEA**") syndicated loan markets. Its aim is to encourage liquidity both in the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice which are widely used and adopted. Membership of the LMA currently stands at approximately 750organisations across66 jurisdictions and consists of commercial and investment banks, institutional and other non-bank investors, borrowers, law firms, ratings agencies and services providers. Its membership also consists of regulatory and governmental bodies, including the European Commission. [↑](#footnote-ref-1)
2. Principally including the following countries: Germany, €180.82 billion; France, €157.82 billion; the Netherlands, €85.72 billion; Spain, €66.58; and Italy, €62.41 billion. [↑](#footnote-ref-2)