

Form and content of liquidity support undertakings from overseas entities for intra-group liquidity modifications

Overview

1. The FSA may grant an intra-group liquidity modification to create a non-UK Defined Liquidity Group (DLG) in which an ILAS BIPRU firm or UK DLG can rely for liquidity support on an overseas firm. Such a modification would mandate a liquidity undertaking (the “**Loan Facility Agreement**”) between the ILAS BIPRU firm (“**the borrowing entity**”) (or, if applicable, each member of the UK DLG) and the overseas firm (“**the lending entity**”) which would be a one-way, multi-currency commitment from the lending entity to the borrowing entity. The degree to which the Loan Facility Agreement would contribute to satisfaction of the liquidity standards expected by the FSA of the ILAS BIPRU firm or UK DLG would be limited to the lower of:
 - a) the amount of reliance which the FSA permitted in the intra-group liquidity modification; and
 - b) the difference between the Individual Liquidity Guidance of the ILAS BIPRU firm or UK DLG and the “orderly wind-down buffer” which the FSA would advise to the firm or group of firms.
2. The FSA envisages that the lending entity would normally be the borrowing entity’s overseas parent company. Ordinarily, the FSA would only consider it appropriate to permit liquidity support to be provided by an overseas sister company of the borrowing entity if this lending entity were located in the same jurisdiction as the borrowing and lending entities’ common parent.

Attributes of Loan Facility Agreement

3. The characteristics which we would require the Loan Facility Agreement to possess are prescribed in greater detail as follows:
 - a) The Loan Facility Agreement must be an enforceable contract for a 1-way, unsecured, revolving loan facility from the lending entity to the borrowing entity, callable in all currencies that are significant in the businesses of the

supported ILAS BIPRU firm or members of the UK DLG. The term of the loan would be at the option of the borrowing entity, which could require the term to be of any length up to the maximum specified in the Loan Facility Agreement. This maximum must be at least 90 days.

- b) The Loan Facility Agreement must contain no conditions on the availability of the loan facility to the borrowing entity, or on a drawdown by the borrowing entity, except that the borrowing entity is solvent – meaning that no “insolvency event” has occurred in respect of the borrowing entity. An “insolvency event” occurs when:
 - i) an order (including a bank insolvency order or bank administration order, as defined by s.94 and s.141 of the Banking Act 2009, respectively) is made, or an effective resolution passed, for the liquidation or winding up of the relevant entity; or
 - ii) a receiver, administrator, trustee, bank liquidator, bank administrator, or other similar official shall be appointed in relation to the whole of the relevant entity.
- c) The FSA would normally expect the Loan Facility Agreement to be governed by English, Scottish or Northern Irish law. If a borrowing entity proposed to make a choice of law other than these then, before doing so, it would have to provide a reasoned justification to the FSA as to why it believed this would be appropriate.
- d) The Loan Facility Agreement must contain a jurisdiction clause providing that disputes arising from the Loan Facility Agreement are to fall within the exclusive jurisdiction of the courts of the country of the governing law, save that the borrowing entity may choose the jurisdiction of the courts of England & Wales, Scotland or Northern Ireland, or of the lender’s country of incorporation/head office, if different.
- e) The Loan Facility Agreement must contain a clause specifying an agent of the lending entity for service of process in the jurisdiction governing disputes arising from the contract.

- f) The Loan Facility Agreement must contain an entire agreement clause.
- g) The Loan Facility Agreement must contain no terms that limit the enforceability of the agreement by reference to representations, warranties, conditions precedent or events of default (other than insolvency of the borrower).
- h) The Loan Facility Agreement must contain a clause stipulating that damages arising from any impecuniosity of the borrower due to non-provision of funds under the Loan Facility Agreement are recoverable, but must contain no liquidated damages or limitation clauses (i.e. no pre-estimates of, or limits on, damages recoverable for breach of the agreement).
- i) The Loan Facility Agreement must contain a clause stating that:
 - i) the purpose of the lending facility is to provide a borrowing entity with liquidity in a range of circumstances;
 - ii) the lending facility has been provided both to meet the funding needs of the borrowing entity and in connection with the modification of a regulatory requirement that would otherwise require the borrowing entity to be self-sufficient in terms of liquidity, which has enabled the borrowing and lending entities' group to fund itself on a more efficient basis;
 - iii) the facility may be drawn down by a borrowing entity either on its own initiative or in response to a request or requirement from the FSA; and
 - iv) the circumstances in which the facility may be used include those in which a borrowing entity is unable to access funding from other sources on normal market terms or at all, and that in such circumstances, damages will not be an adequate remedy for the lending entity's failure to lend money to the borrower under the

facility (i.e. for the lending entity's breach of the Loan Facility Agreement).

- j) The Loan Facility Agreement contains a clause stating that all parties to the agreement recognise that the purposes of the agreement include (a) the protection of all consumers, and (b) wider market stability.
- k) The Loan Facility Agreement contains clauses providing that:
 - i) liquidity support must be provided by the lending entity to the borrowing entity as cash in cleared, immediately accessible funds. By reference to the lending entity's time zone, it must be provided by the end of the business day on which the request was made if the borrowing entity makes a request before noon; otherwise it must be provided by noon on the following business day;
 - ii) the loaned funds may be used by the borrowing entity for its general corporate purposes;
 - iii) the following provisions apply in respect of termination:
 - (1) either party may terminate the Loan Facility Agreement upon giving not less than 6 months' notice to the other party;
 - (2) the term of any loan made under the Loan Facility Agreement may not exceed the time remaining until the termination date of the Loan Facility Agreement;
 - (3) when a party gives notice of termination of the Loan Facility Agreement, the borrowing entity's obligation to repay any loan whose term extends beyond the termination date is accelerated so that the loan must be repaid by the termination date;
 - (4) the outstanding borrowings of the borrowing entity under the Loan Facility Agreement must be repaid by the date of termination;

- (5) the Loan Facility Agreement may not be terminated while being relied on for an intra-group liquidity modification.
- l) The Loan Facility Agreement must specify the rate of interest and any other charges to be levied by the lending entity; the rate of interest must be a market rate that would not inhibit use of the loan facility.
 - m) The Loan Facility Agreement must contain a clause warranting that the lending entity has notified its Home State Regulator of the liquidity support arrangement and that the Home State Regulator has not objected, as at the date of coming into force of the modification, to the lending entity entering into the Loan Facility Agreement.
 - n) The Loan Facility Agreement must contain an undertaking from the lending entity to the borrowing entity to notify the borrowing entity of any objection raised to the Loan Facility Agreement at any time by the lending entity's Home State Regulator.

Conditions and requirements

- 4. The FSA will make it a condition of the waiver that the applicant firm has obtained a separate legal opinion (one for each jurisdiction in which a party to the Loan Facility Agreement is located) from reputable third-party counsel with expertise in the relevant field dealing with the following matters:
 - a) Compliance of the Loan Facility Agreement with all the stipulations above.
 - b) Parties' corporate standing;
 - c) Whether the obligations are legal, valid, binding and enforceable (including any relevant conflicts of laws issues and corporate benefit issues);
 - d) Due execution (including whether the agreement was within the capacity and powers of the parties, duly authorised, with all necessary consents and approvals); and
 - e) Whether the provision of the loan facility, and exercise of the rights thereunder, would conflict with any applicable laws or regulations.

5. In order to satisfy the above condition in the waiver, the legal opinions must have found that the Loan Facility Agreement complies with all the stipulations and is enforceable in all relevant jurisdictions and under all relevant systems of law.
6. The FSA will impose a requirement within the waiver (i.e. will amend the Handbook rules) such that the applicant firm must make reasonable efforts to keep under review any legal or regulatory changes that could affect the efficacy of the Loan Facility Agreement, and that it will take all reasonable steps to amend the agreement in the light of any such changes in order to maintain the Loan Facility Agreement's efficacy.