

CIRCOLARE TECNICA 07/20

Milano, 29 settembre 2020

OGGETTO: La definizione di default EBA nel factoring - Linee interpretative e opzioni applicative

Al fine di supportare gli Associati nelle riflessioni ed attività sul tema della nuova definizione di default EBA, con la presente circolare Assifact mette a disposizione degli Associati l'allegato documento che riassume il lavoro svolto dall'Associazione, in collaborazione con l'apposito gruppo di lavoro e le commissioni tecniche.

Gli orientamenti espressi nel documento sono stati oggetto di una apposita consultazione con tutti gli Associati e potranno essere considerati da ciascuna Società nel rispetto delle proprie specificità e degli indirizzi del proprio gruppo di appartenenza.

Cordiali saluti

 Il Segretario Generale
 Alessandro Carretta

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La definizione di default EBA nel factoring

Linee interpretative e opzioni applicative

Organo associativo

GdI Nuova definizione di default EBA

Consiglio

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La definizione di default EBA nel factoring

Linee interpretative e opzioni applicative

Premessa

L'Associazione ha da tempo avviato una serie di approfondimenti volti ad interpretare gli Orientamenti EBA sull'applicazione della definizione di default ai sensi dell'articolo 178 del regolamento (UE) n. 575/2013 ("Orientamenti"), attraverso appositi gruppi di lavoro.

Tali Orientamenti, unitamente alla riforma delle soglie di materialità di cui all'art. 178 del CRR, modificano sensibilmente le modalità di determinazione del cd. scaduto deteriorato (da oltre 90 giorni), introducendo nuove modalità di calcolo della soglia, livelli più restrittivi e principi di valutazione delle posizioni mirati ad anticipare il momento del riconoscimento di un default da parte di un debitore.

L'interpretazione dei punti più controversi e l'applicazione dei nuovi metodi alla peculiare attività del factor sono complesse e generano numerose criticità. Assifact, sia direttamente che per il tramite dell'EUF (European Federation for the Factoring and Commercial Finance Industry), ha più volte rimarcato la necessità di chiarire alcuni passaggi della nuova disciplina e adottare approcci coerenti con il rischio e le specificità del credito commerciale, particolarmente penalizzato nel nuovo framework normativo.

In questo contesto di forte novità e generale incertezza, con la presente nota Assifact fornisce agli Associati le proprie interpretazioni e i risultati degli approfondimenti svolti su alcuni temi chiave per il factoring nell'ambito delle proprie Commissioni Tecniche e dei Gruppi di lavoro (ed in particolare il Gruppo di lavoro "Nuova definizione di default"), cui si fa riferimento in questo documento in generale come "Associazione".

Tutte le soluzioni riportate in questo documento sono ritenute coerenti con l'impianto normativo della nuova definizione di default; esse sono state comunque sottoposte all'attenzione delle Autorità e nello specifico della Banca d'Italia e, in alcuni casi, dell'EBA (tramite EUF), dalle quali alla data di stesura della relazione si attende un riscontro sulle impostazioni proposte.

Nel documento si adotta un approccio "Frequently Asked Question".

Sommario

Premessa.....	2
È possibile considerare una fattura scaduta a partire dalla data di presunto incasso?.....	4
Quando inizia il conteggio nel caso di crediti acquistati già scaduti?.....	5
Nel caso di enti pubblici, l'iter di liquidazione della fattura configura un rischio di diluizione?.....	6
La comunicazione al debitore della aspettativa di incasso convenuta con il cedente ha rilevanza ai fini della DoD?	8
È possibile che il debitore sia da considerarsi fra le esposizioni scadute deteriorate anche in assenza di esposizioni scadute da 90 giorni?	10
Come si applica il trattamento specifico per la Pubblica Amministrazione delineato dai paragrafi 25 e 26 degli Orientamenti EBA?.....	15
Come si applica la situazione tecnica di arretrato specifica per il factoring?	17
Allegati	18

È possibile considerare una fattura scaduta a partire dalla data di presunto incasso?

Nel resoconto della consultazione pubblica svolta in merito agli Orientamenti, l'EBA ha precisato quanto segue¹:

In accordance with general principles the calculation of days past due should always refer to the dates of contractual obligations. In the case of a purchased receivable the date of contractual obligation is the due date of the receivable. However, the specific case of undisclosed factoring has been clarified in paragraph 32 of the Guidelines. In this case, as the debtors do not have an obligation to pay directly to the institution, the contractual obligations of the seller are taken into account for the purpose of counting of days past due.

Pertanto, la data di riferimento per il calcolo dei giorni di arretrato, per un credito la cui cessione è notificata al debitore, è riferita alla data in cui il credito diviene esigibile.

Nei propri orientamenti di vigilanza, la Banca d'Italia ha spiegato che²:

Il par. 28 delle LG EBA chiarisce che il conteggio dei giorni di arretrato per un credito commerciale acquistato e iscritto nel bilancio del factor inizia quando il credito diventa esigibile. In linea generale, l'esigibilità del credito è indipendente dalla data di acquisto o dalla data di presunto incasso indicata nel contratto di cessione. Il conteggio deve quindi decorrere dal giorno successivo alla data di scadenza della fattura.

In linea generale, l'Autorità di vigilanza ritiene che il credito commerciale divenga esigibile, ai fini della definizione di default, trascorsa la scadenza prevista dal contratto per il pagamento e pertanto non sia possibile il riferimento alla data di presunto incasso, neppure se concordata con il cliente.

Allo stesso tempo, tuttavia, l'Associazione ritiene sostenibile, nell'ambito di questo principio generale, il riconoscimento delle casistiche particolari in cui l'esigibilità del credito commerciale non è correlata alla scadenza della fattura e risulta condizionata da diverse fattispecie, fra loro non omogenee, quali a titolo esemplificativo e non esaustivo:

- gli eventi di cui ai paragrafi 17-18-19 degli Orientamenti,
- gli eventi di diluizione del credito,
- la situazione in cui l'aspettativa del factor in merito alla data di incasso è stata comunicata al debitore ceduto.

Nel caso di factoring "undisclosed" (not notification) si ritiene esauriente quanto precisato da EBA nel paragrafo 32 degli Orientamenti:

Nel caso specifico di accordi di factoring non comunicati, qualora i debitori non siano informati in merito alla cessione dei crediti commerciali, ma i crediti commerciali acquistati siano iscritti nel bilancio del factor, il conteggio dei giorni di arretrato dovrebbe decorrere a partire dal momento convenuto con il cliente in cui i pagamenti effettuati dai debitori dovrebbero essere trasferiti dal cliente al factor

e confermato nel resoconto: *as the debtors do not have an obligation to pay directly to the institution, the contractual obligations of the seller are taken into account for the purpose of counting of days past due*, che chiarisce la rilevanza della data convenuta con il cliente per questo tipo di operazioni.

¹ Cfr. Allegato 1

² Cfr. Allegato 2

Quando inizia il conteggio nel caso di crediti acquistati già scaduti?

Nei propri orientamenti di vigilanza, la Banca d'Italia ha spiegato che:

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In linea pratica, tuttavia, con riferimento al tema dei crediti commerciali il cui acquisto è successivo alla data di scadenza nominale del credito, l'Associazione sottolinea che il conteggio dei giorni di scaduto è attivato dal superamento della soglia, la quale tiene conto delle esposizioni iscritte nel bilancio dell'istituzione e certamente non può essere ricostruita retroattivamente per i giorni precedenti all'acquisto del credito. Sembra pertanto doversi comunque intendere che, per un credito acquistato già scaduto, l'avvio del conteggio debba in ogni caso riferirsi al superamento della soglia di materialità, a cui il nuovo credito acquistato non può che contribuire solo a seguito dell'iscrizione nel bilancio del factor.

Nel caso di enti pubblici, l'iter di liquidazione della fattura configura un rischio di diluizione?

Gli art. 269 e segg. del RD 827/1924 e gli par. 182 e segg. del d.lgs. 267/2000 definiscono (rispettivamente per le spese dello Stato e degli enti locali) il cosiddetto "processo della spesa" articolato in quattro fasi:

- i) Impegno
- ii) Liquidazione
- iii) Ordinazione
- iv) Pagamento

In particolare, la fase di liquidazione appare come la più critica dal punto di vista della determinazione della certezza, liquidità ed esigibilità del credito. Essa è la fase in cui viene determinato l'esatto ammontare del diritto di credito, a seguito del riscontro operato sulla regolarità della fornitura o della prestazione e sulla rispondenza della stessa ai requisiti quantitativi e qualitativi, ai termini ed alle condizioni pattuite. Al completamento di tali verifiche è emesso un atto di liquidazione, che rappresenta condizione necessaria per l'ordinazione e il pagamento.

L'importanza dell'espletamento della fase di liquidazione è tale che ove il relativo atto non sia emesso, l'ente pubblico non può nemmeno rilasciare la certificazione che il credito è certo, liquido ed esigibile (tanto che l'assenza di tale atto è la prima e più frequente causa di rifiuto della istanza di certificazione del credito proposta dal fornitore).

In virtù dell'importanza data a tale fase nell'ordinamento italiano, l'ente pubblico non può riconoscere il diritto di credito del fornitore fintanto che non ha terminato le verifiche imposte dalla Legge.

In tale contesto, si ricorda altresì che anche in caso di avvio del processo monitorio, con l'emissione di un decreto ingiuntivo, anche trascorsi i 40 giorni necessari prima della sua trasformazione in titolo esecutivo (in assenza di opposizione) alla Pubblica Amministrazione è concesso un ulteriore termine di 120 giorni per completare le relative procedure³, durante i quali al creditore è in ogni caso inibito procedere ad esecuzione forzata e alla notifica del precetto.

Pertanto, il creditore che intenda adottare un comportamento attivo, nel caso di un ente pubblico che presenta un ritardo persistente nel pagamento di un debito di fornitura, ha di fronte a sé unicamente le seguenti strade:

- i) Presentare istanza di certificazione, che in caso di procedura di liquidazione incompleta sarà comunque rifiutata;
- ii) Avviare un procedimento monitorio, il quale prevede comunque un termine di 120 giorni per gli enti pubblici (che si sommano ai giorni necessari per l'ottenimento del decreto ingiuntivo e per l'eventuale opposizione del debitore), prima dei quali è inibito il recupero forzoso del credito. In caso di opposizione al decreto ingiuntivo, si instaura un procedimento ordinario.

Appare pertanto evidente come nel caso di un incompleto processo di liquidazione l'ordinamento italiano configuri di fatto una "sospensione" dei caratteri di certezza, liquidità ed esigibilità del credito, nonché la conseguente impossibilità, per il creditore, di ottenere il soddisfacimento forzoso delle proprie ragioni di credito fino al completamento di tali processi.

Si ritiene pertanto che sussistano gli elementi per considerare il tardivo completamento della procedura di liquidazione come un potenziale rischio di diluizione del credito invece che come rischio di credito: infatti, fino al completamento dei relativi controlli e all'emissione dell'atto di liquidazione del relativo credito, l'ente non solo non può procedere al pagamento, ma nemmeno può riconoscere in alcun modo l'esistenza del diritto di credito del fornitore né il relativo ammontare. Ciò si deduce dall'impossibilità di procedere alla certificazione del credito in questa particolare circostanza così come dalla previsione, anche in presenza di un titolo esecutivo e di un decreto ingiuntivo non opposto, di un ulteriore

³ Cfr. ddl 669/1996 art 14: "Le amministrazioni dello Stato, gli enti pubblici non economici e l'ente Agenzia delle entrate - Riscossione completano le procedure per l'esecuzione dei provvedimenti giurisdizionali e dei lodi arbitrali aventi efficacia esecutiva e comportanti l'obbligo di pagamento di somme di danaro entro il termine di centoventi giorni dalla notificazione del titolo esecutivo. Prima di tale termine il creditore non può procedere ad esecuzione forzata né alla notifica di atto di precetto".

termine di 120 giorni per il completamento delle procedure durante il quale al creditore procedente sono comunque inibite azioni esecutive sul patrimonio dell'ente.

Si aggiunga che, nella quasi totalità dei casi, gli enti pubblici debitori – ivi incluse le autorità di vigilanza italiane – rappresentano ai factor la necessità di dovere effettuare, in momenti molto successivi al trasferimento dei crediti in favore degli stessi, verifiche sui singoli documenti di credito al fine di accertare, sia a livello amministrativo, sia contabile, lo stato degli eventuali ordini di pagamento.

L'assunzione di trovarsi di fronte ad un rischio di diluizione anziché ad un rischio di default è altresì rafforzata dall'assetto istituzionale e dalle modalità di finanziamento degli enti pubblici, in particolare Regioni, Comuni, Province ed enti del settore sanitario, per i quali è normativamente esclusa l'insolvenza e, seppure a fronte di una nominale autonomia economico-patrimoniale, sono previste procedure di gestione delle situazioni di temporanea difficoltà dell'ente che, in ogni caso, escludono la possibilità del mancato pagamento al creditore di quanto dovuto, riducendo il rischio di default dell'ente.

La data di ultimazione del processo di liquidazione deve intendersi come la data di effettiva esigibilità del credito. Il conteggio dei giorni di arretrato per le relative fatture è sospeso sino all'emanazione dell'atto di liquidazione della fattura e la fattura va considerata come non scaduta.

Alla luce del fatto che è possibile recuperare gli atti che vengono prodotti mentre non è possibile recuperare ciò che non viene prodotto, va da sé che in assenza di una evidenza che il processo di liquidazione è stato completato, si deve presumere che esso sia ancora in corso. Ciò premesso, le società di factoring dovranno adoperarsi per recuperare, nei limiti del possibile, le evidenze dell'avvenuta emissione di detto atto di liquidazione.

A supporto della propria attività il factor potrà verificare, ove possibile, lo stato dell'iter tramite piattaforma per la certificazione dei crediti commerciali (PCC). È infatti previsto un apposito campo dove l'ente indica se la fattura è "liquidato", "sospesa" (in attesa di liquidazione) o "non liquidabile" quindi è immediatamente riconoscibile l'avvenuta liquidazione della fattura.

La comunicazione al debitore della aspettativa di incasso convenuta con il cedente ha rilevanza ai fini della DoD?

L'Associazione ha valutato un'opzione applicativa consistente nel dare una contestuale informativa al debitore ceduto circa la data di atteso incasso del credito al fine di dare rilevanza alla scadenza contrattuale.

In generale, l'Associazione ritiene comunque chiarito che la scadenza effettiva del credito - anche ai fini delle valutazioni di cui alla normativa di natura prudenziale applicabile ai soli enti creditizi - non va in alcun modo collegata alla decorrenza degli interessi ex d.lgs. 231/02, i quali sono la conseguenza di un comportamento ritenuto iniquo del debitore nei confronti del fornitore (il ritardo di pagamento) e di una previsione normativa generale finalizzata a disincentivare i ritardi dei pagamenti nelle transazioni commerciali.

Il rapporto di factoring è bilaterale e non si hanno rapporti con il debitore ceduto, ad eccezione dei c.d. debitori contrattualizzati: con questi si concorda una dilazione, onerosa o non onerosa, che ovviamente rileva in ogni caso ai fini della scadenza dell'esposizione, ma che sottende un momento negoziale con il debitore.

Si è, quindi, in tale ambito, affrontata la percorribilità di una strada che conduca alla risoluzione delle problematiche poste dalla nuova definizione di default ricorrendo alla comunicazione al debitore ceduto della data di scadenza convenzionale pattuita con il cedente.

A prescindere dai non irrilevanti oneri operativi che discendono da una impostazione del genere, particolare attenzione deve essere prestata al tenore della comunicazione che si inoltrerà, al fine di non pregiudicare i diritti dei cessionari e, e, al tempo stesso, considerando il rischio che detta comunicazione possa diventare un "incentivo" da parte del debitore ceduto a ritardare ulteriormente i propri pagamenti.

Al fine di cui sopra si è valutato di predisporre la comunicazione in termini di "aspettativa" del cessionario all'incasso del credito ad una certa data: in tal caso occorre delineare il concetto di aspettativa, per cui si rinvia alle successive riflessioni.

L'aspettativa indica una situazione di attesa in ordine ad un determinato effetto; più precisamente si identifica con quelle situazioni in cui la norma qualifica una situazione di fatto, al fine di garantire tutela al soggetto, che confida di conseguire in futuro un particolare risultato.

Al fine della presenza di una particolare situazione giuridica occorre che l'ordinamento accordi tutela e/o una conseguenza alla mancata soddisfazione dell'interesse del soggetto, in mancanza rileverà solo quale mero fatto.

Un esempio di aspettativa ricorre nel caso di negozio condizionato in cui pur nella pendenza della condizione il soggetto riceve tutela dall'ordinamento, non si è in presenza, pertanto, di un mero fatto.

Nell'aspettativa devono ricorrere due elementi:

- il fatto che funge da elemento che perfeziona la fattispecie deve essere solo futuro, non è necessario che sia anche incerto;
- è indispensabile che il verificarsi dell'evento non dipenda dalla volontà dei soggetti tra cui si è instaurato il rapporto giuridico.

In tale contesto, l'ordinamento riconosce da un lato una tutela cautelare e conservativa in capo al soggetto che "detiene" l'aspettativa e, dall'altro lato, nel caso in cui l'altro soggetto ha alterato il decorso naturale degli eventi così da impedire il completamento della fattispecie, questa viene considerata perfetta e ne conseguono i suoi effetti tipici.

Anche se l'aspettativa, per parte della dottrina, non è tale da essere ricondotta nel concetto di diritto soggettivo, la stessa riceve comunque tutela ai sensi dell'ordinamento in costanza degli elementi sopra riportati.

Parte della dottrina definisce tale situazione quale "aspettativa legittima", che è tutelata dal diritto e consiste in uno stato preliminare del diritto soggettivo caratterizzato dalla presenza di un fatto necessario ma non ancora sufficiente perché possa sorgere un vero e proprio diritto (ad es. perché non si è ancora verificata la condizione prevista in contratto).

Contrapposta a questa vi è l'“aspettativa di fatto” costituita da uno stato psicologico meramente soggettivo che non si fonda su alcuna norma giuridica e che pertanto non riceve protezione dall'ordinamento.

Riportando tale costruzione di diritto nella cessione del credito e, in particolare, con riferimento ai crediti a scadere:

- la situazione di attesa o di fatto del cessionario di conseguire l'incasso o perché il credito è futuro o perché non sono ancora verificate tutte le condizioni poste dal contratto o dalla legge per l'adempimento;
- l'evento futuro, costituito dal sorgere del credito (nel caso di credito futuro), o dalla scadenza del termine per l'adempimento (se credito esistente);
- l'evento futuro e incerto, rappresentato dai presupposti affinché il credito futuro diventi esistente e dal giorno del pagamento il cui adempimento, comunque, non dipende dalle parti del contratto (cedente e cessionario) bensì da un terzo soggetto, il debitore ceduto;
- la tutela da parte dell'ordinamento in capo al cessionario che consegue alla scadenza del termine in assenza di adempimento da parte del debitore.

Si può concludere, pertanto, che il cessionario, pur essendo titolare del credito, è altresì titolare della aspettativa a conseguire l'incasso ad una certa data.

Riassumendo:

- il cessionario del credito è titolare di una aspettativa legittima all'incasso ad una certa data, attesa la garanzia del “nomen verum” del credito e le altre garanzie contrattualmente previste;
- il cessionario è legittimato, pertanto, a comunicare tale aspettativa di incasso al debitore ceduto.

In relazione al tenore della comunicazione si ritiene opportuno richiamare la tripartizione delineata dalla dottrina di:

- credito concesso: da cui l'insorgere di una dilazione contrattuale;
- credito subito: il ritardato pagamento;
- credito occulto: in cui si riscontrano tempi tecnici dovuti a fattori tecnici, ivi inclusi gli usi del mercato di riferimento.

Esclusa la percorribilità, per quanto sopra esposto, del “credito concesso”, rimarrebbe quella del “credito occulto”, ai sensi del quale il tenore della dichiarazione deve essere tale da non comportare, neppure implicitamente, una forma di autorizzazione e/o benestare alla dilazione con salvaguardia, altresì, del diritto agli interessi di mora.

Così operando e proprio per effetto di aver ribadito il diritto a tali interessi, si ritiene che la dichiarazione possa non integrare i presupposti di una dilazione con procrastinazione del termine di adempimento e qualora ciò avvenisse il debitore sarebbe edotto a priori dell'onere del pagamento degli interessi di mora escludendosi, pertanto, il dubbio di incentivare a ipotesi di comportamenti iniqui da parte del debitore ceduto volti a incrementare la prassi di cattivi pagatori.

Pertanto, ai fini della determinazione della data di avvio del conteggio dei giorni di scaduto, oltre all'ovvia casistica della concessione di una dilazione contrattuale e alla previsione di flessibilità contrattuali per il pagamento concesse d'intesa con il cedente, parrebbe ammissibile dare rilevanza al momento – individuato nell'accordo tra cedente e factor – in cui quest'ultimo ha legittima aspettativa di incassare il proprio credito, se comunicato al debitore ceduto.

È possibile che il debitore sia da considerarsi fra le esposizioni scadute deteriorate anche in assenza di esposizioni scadute da 90 giorni?

La nuova disciplina in materia di individuazione dei crediti deteriorati è fondata sull'art. 178 del CRR, il quale a sua volta è l'esito di un processo di evoluzione della materia, nel corso degli anni, che trova la sua origine nelle previsioni dell'Accordo Basilea II, e nel tentativo della normativa di assicurare una tempestiva individuazione delle esposizioni a rischio di insolvenza.

Tale processo ha portato nel tempo ad un framework normativo complesso, che si è distaccato dalla previsione originaria rendendo non più immediata e univoca la comprensione dei principi dietro alle previsioni che governano la classificazione a "default" di una esposizione.

In primo luogo, giova quindi ricostruire alcuni dei passaggi principali di tale evoluzione normativa:

- BCBS, Basel II: International Convergence of Capital Measurement and Capital Standards: a Revised Framework (<https://www.bis.org/publ/bcbs107.htm>)
- Direttiva 2006/48/CE del Parlamento europeo e del Consiglio, del 14 giugno 2006, relativa all'accesso all'attività degli enti creditizi ed al suo esercizio (<https://eur-lex.europa.eu/legal-content/it/TXT/?uri=CELEX%3A32006L0048>)
- CRR, art. 178 (<https://eur-lex.europa.eu/legal-content/it/TXT/?uri=celex:32013R0575>)
- EBA, Regulatory Technical Standards on materiality threshold of credit obligation past due (<https://eba.europa.eu/regulation-and-policy/credit-risk/regulatory-technical-standards-on-materiality-threshold-of-credit-obligation-past-due>)
- EBA, Final Report, Guidelines on the application of the definition of default under Article 178 of Regulation (EU) No 575/2013 (<https://eba.europa.eu/regulation-and-policy/credit-risk/guidelines-on-the-application-of-the-definition-of-default>)
- BCBS, Prudential treatment of problem assets - definitions of non-performing exposures and forbearance (<https://www.bis.org/bcbs/publ/d403.htm>)
- Regolamento Delegato (UE) 2018/171 della Commissione del 19 ottobre 2017 che integra il regolamento (UE) n. 575/2013 del Parlamento europeo e del Consiglio per quanto riguarda le norme tecniche di regolamentazione relative alla soglia di rilevanza delle obbligazioni creditizie in arretrato (<https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32018R0171>)

L'Accordo di Basilea II, prevedeva che un default occorresse, nell'ambito dei metodi interni, al verificarsi di una delle seguenti condizioni.

452. A default is considered to have occurred with regard to a particular obligor when either or both of the two following events have taken place.

- *The bank considers that the obligor is unlikely to pay its credit obligations to the banking group in full, without recourse by the bank to actions such as realising security (if held).*
- *The obligor is past due more than 90 days on any material credit obligation to the banking group. Overdrafts will be considered as being past due once the customer has breached an advised limit or been advised of a limit smaller than current outstandings*

Nell'ambito dei metodi standardizzati l'accordo di Basilea lascia all'ECAI utilizzata il compito di individuare il default limitandosi a prevedere una ponderazione specifica per il portafoglio di crediti scaduti da oltre 90 giorni:

75. The unsecured portion of any loan (other than a qualifying residential mortgage loan) that is past due for more than 90 days, net of specific provisions (including partial writeoffs), will be risk-weighted as follows:

[...]

91. An ECAI must satisfy each of the following six criteria. [...] Disclosure: An ECAI should disclose the following information: its assessment methodologies, including the definition of default, the time horizon, and the meaning of each rating; the actual default rates experienced in each assessment category; and the transitions of the assessments, e.g. the likelihood of AA ratings becoming A over time.

La definizione di default è quindi sempre stata composta da due elementi costituenti:

- 1) La prospettiva di una insolvenza totale o parziale del debitore (“unlikely to pay”) sulle proprie obbligazioni creditizie
- 2) Un backstop prudenziale che identifica un default in presenza di una obbligazione creditizia rilevante scaduta da oltre 90 giorni, quale “proxy” dell’insolvenza.

La previsione richiamata, per le due componenti del “default”, utilizza le seguenti parole: i) per l’unlikely to pay: “its credit obligations”; ii) per il past due oltre 90 giorni: “any loan” / “any material credit obligation”.

Da un lato, l’insolvenza è uno stato del soggetto e quindi, correttamente, l’improbabilità di rimborsare le esposizioni debitorie è valutata sull’interezza delle sue esposizioni. Dall’altro lato il Comitato di Basilea intendeva evidenziare una situazione di “probabile inadempienza” in presenza di almeno un prestito ovvero una obbligazione creditizia materiale scaduta continuativamente da oltre 90 giorni.

La Direttiva 2006/48/CE non prende una direzione opposta, indicando, per i metodi standardizzati, che (Annex 2, art. 61): “[...]5, the unsecured part of any item that is past due for more than 90 days and which is above a threshold defined by the competent authorities and which reflects a reasonable level of risk shall be assigned a risk weight of: [...]” e per i metodi interni che (Annex VII, art. 44); “A ‘default’ shall be considered to have occurred with regard to a particular obligor when either or both of the two following events has taken place:

(a) the credit institution considers that the obligor is unlikely to pay its credit obligations to the credit institution, the parent undertaking or any of its subsidiaries in full, without recourse by the credit institution to actions such as realising security (if held);

(b) the obligor is past due more than 90 days on any material credit obligation to the credit institution, the parent undertaking or any of its subsidiaries.”

Anche in questo caso il lessico utilizzato punta (addirittura con maggior decisione, utilizzando il termine “item”) sulla continuità dello scaduto per oltre 90 giorni sulla singola esposizione. La definizione di “materialità” e le modalità di calcolo nonché il valore delle soglie di materialità erano lasciate, nel precedente regime, alle singole autorità nazionali di vigilanza (NSA).

L’articolo 178 del CRR, che rappresenta oggi la fonte normativa primaria, segue la stessa linea lessicale dell’Accordo Basilea II e della Direttiva:

Article 178

Default of an obligor

1. A default shall be considered to have occurred with regard to a particular obligor when either or both of the following have taken place:

(a) the institution considers that the obligor is unlikely to pay its credit obligations to the institution, the parent undertaking or any of its subsidiaries in full, without recourse by the institution to actions such as realising security;

(b) the obligor is past due more than 90 days on any material credit obligation to the institution, the parent undertaking or any of its subsidiaries. Competent authorities may replace the 90 days with 180 days for exposures secured by residential or SME commercial real estate in the retail exposure class, as well as exposures to public sector entities). The 180 days shall not apply for the purposes of Article 127.

Con l'emanazione dell'RTS EBA Regulatory Technical Standards on materiality threshold of credit obligation past due e del successivo RD 2018/171, l'Autorità Bancaria Europea, preso atto della diversità delle metodologie previste dalle singole NSA per la determinazione delle esposizioni materiali scadute da oltre 90 giorni, propone una soglia di materialità armonizzata, composta da una componente assoluta e una componente relativa, il cui superamento per oltre 90 giorni comporta la classificazione a default.

Secondo EBA: *"The conditions set out in these RTS in particular require that competent authorities set a materiality threshold that is composed of both an absolute and a relative threshold. The absolute threshold refers to the total amount of the credit obligation past due understood as the sum of all past due amounts related to the credit obligations of the borrower towards the institution, the parent undertaking or any of its subsidiaries. The relative threshold is defined as a percentage of a credit obligation past due in relation to the total on-balance-sheet exposures to the obligor excluding equity exposures. In the case where both of those limits are breached for 90 consecutive days (or 180 days if the competent authority has decided to replace the 90 days with 180 days in accordance with Article 178(1)(b) of the CRR) a default would be considered to have occurred.*

[...]

It is proposed that in the assessment of the materiality of credit obligations past due all past due amounts related to the credit obligations of the borrower towards the institution, the parent undertaking or any of its subsidiaries should be taken into account. In order to mitigate the risk of splitting the credit obligations into smaller portions or of selective repayment of the obligations by the obligor in order to avoid the default being triggered, all amounts past due, irrespective of which credit obligation of the obligor they are related to, should be summed and the sum should be assessed against the materiality threshold. This approach also ensures that the application of the materiality threshold will be to a large extent independent of the payment allocation scheme used by an institution (i.e. LIFO, FIFO or any other approach).

The threshold should be structured as a combination of an absolute and a relative limit. The absolute component should be used as described in the previous paragraph. The relative component is the sum of all past due amounts as a percentage of the total on-balance-sheet exposures to the obligor excluding equity exposures. In the case of retail exposures where the definition of default is applied at the level of the individual facility, the sum of the amounts past due related to a single credit obligation (facility) of the obligor should be taken into account. For the purpose of the relative threshold this sum should be considered as a percentage of the value of on-balance-sheet exposures related to this single credit obligation. The use of on-balance-sheet exposures as the denominator of the relative threshold provides a simple and comparable solution. As only the outstanding exposures, unlike unused credit lines, can in fact become past due, it ensures consistency between the numerator and denominator of the ratio. Furthermore, it prevents the impact of the relative threshold being diminished by the inclusion in the denominator of off-balance-sheet exposures that cannot in practice be drawn by an obligor and do not have credit characteristics.

It is proposed that the obligor should be considered defaulted whenever both of the components of the threshold, i.e. the absolute and the relative limits, are breached for 90 consecutive days (or 180 days if the competent authority has decided to replace the 90 days with 180 days in accordance with Article 178(1)(b) of the CRR). This approach is balanced and proportionate, as it takes into account the exposure value and materiality is assessed in relation to it."

Il Regolamento Delegato riprende la proposta di EBA evidenziando quanto segue (art. 1):

2. [...] *The absolute component shall be expressed as a maximum amount for the sum of all amounts past due owed by an obligor to the institution, the parent undertaking of that institution or any of its subsidiaries ('credit obligation past due').*
[...] *The relative component shall be expressed as a percentage reflecting the amount of the credit obligation past due in relation to the total amount of all on-balance sheet exposures to that obligor of the institution, the parent undertaking of that institution or any of its subsidiaries, excluding equity exposures.*

[...]

5. *When setting the materiality threshold in accordance with this Article, the competent authority shall assume that the obligor is defaulted when both the limit expressed as the absolute component of the materiality threshold and the limit*

expressed as the relative component of that threshold are exceeded either for 90 consecutive days or for 180 consecutive days, [...].

La Banca Centrale Europea ha fornito una propria interpretazione nel feedback statement della consultazione svolta in occasione dell'impostazione delle soglie di materialità per le banche vigilate dal SSM⁴:

B.7 Application of the past due criterion – Article 3(3) One respondent suggested that the past due criterion should trigger the default of an obligor where the obligor has past due exposures exceeding the materiality threshold for 90 consecutive days and, at the same time, one of its exposures, considered alone, is more than 90 days past due.

The ECB Regulation reflects the threshold structure and the mechanism for counting the number of days past due that are demanded by the RTS. These may, in some cases, lead to a default being identified despite no individual exposure being more than 90 days past due. For instance, this could happen where an obligor repays some material past due exposures, but the number of days past due keeps increasing – instead of being reset – because there are other material exposures that are just a few days past due. In that case, a default will be triggered when the counter reaches 90 days, in line with Article 3(3) of the ECB Regulation, but on that day the remaining material exposures could be less than 90 days past due.

L'Associazione ritiene che, al fine di allinearsi correttamente alla disciplina di Basilea e al dettato del CRR, sia comunque necessario il requisito della continuità dello scaduto su una singola obbligazione creditizia.

L'approccio alla nuova definizione di default, nell'interpretazione fornita da ECB, parrebbe infatti tarato principalmente sul concetto di "overdraft" (sconfini), mutuandone il meccanismo di calcolo anche per altre tipologie di operazioni che però presentano impostazioni contrattuali basati su scadenze e/o piani di rimborso.

Tale impostazione non appare condivisibile: un conteggio dei giorni di scaduto che prescindendo dall'esistenza di almeno una obbligazione di pagamento continuativamente inadempita per 90 giorni finirebbe per penalizzare oltremodo le esposizioni a scadenza rispetto ad altre forme tecniche (es. scoperti di conto), alimentando significativamente i "falsi positivi" individuati dalla metodologia di calcolo dei giorni di scaduto e identificando come insolventi, in presenza di ritardi anche contenuti, numerosi soggetti che non presentano in realtà alcun sintomo dell'insolvenza.

A titolo di esempio, si evidenzia che in assenza del suddetto requisito sulla singola obbligazione creditizia, il default per "past due oltre 90 giorni" potrebbe occorrere:

- nel caso di scoperto di conto, dopo 90 giorni di superamento del limite concesso;
- nel caso di una esposizione di tipo rateale a scadenze mensili, con un mero ritardo di pagamento 31 giorni nel pagamento della rata su tre rate consequenziali;
- nel caso di crediti commerciali acquistati, con ritardi di pagamento anche irrilevanti, ma sovrapposti, sulle fatture cedute.

È evidente come in tale ipotesi si generi una disparità fra le diverse operatività: nel primo caso occorrono 90 giorni di ritardo consecutivi su una singola obbligazione creditizia, nel secondo basterebbero 31 giorni (se ripetuti su diverse scadenze). Pur condividendo che 90 giorni di sconfini su una esposizione siano un segnale inequivocabile di difficoltà nel rimborsare le proprie esposizioni, non si può condividere che lo stesso valga nel caso di scaduti contenuti, sebbene ripetuti e sovrapposti fra loro. A maggior ragione nei contesti in cui i ritardi di pagamento risultano connessi, come nel caso dei crediti commerciali acquistati, a situazioni ed eventi tipiche delle relazioni di fornitura e che sono tipicamente giustificati da ragioni mercantili: sebbene ritardi di pagamento anche contenuti nelle transazioni commerciali non siano auspicabili, certamente essi non possono essere rappresentativi di una insolvenza del debitore, soprattutto quando si risolvono in maniera regolare con i relativi pagamenti.

Il metodo introdotto con l'RTS EBA, nell'interpretazione fornita da ECB, genererebbe un processo di isteresi dello scaduto in cui il meccanismo di calcolo non terrebbe conto degli importi pagati e trascinerebbe lo scaduto fintantoché il soggetto presentasse importi scaduti, indipendentemente dalla continuità dello scaduto delle singole obbligazioni di pagamento.

⁴ Cfr. Allegato 3.

Per tale ragione, al fine di garantire equilibrio fra le diverse forme tecniche ed evitare una eccessiva penalizzazione di quelle basate su piani di pagamento rispetto a revoca, l'Associazione ritiene necessario riprendere nell'applicazione delle nuove soglie il concetto di "continuità" dello scaduto sulla singola obbligazione creditizia, prevedendo che il conteggio dei giorni di scaduto e di superamento della soglia sia rimodulato, in occasione di ciascun pagamento, sull'obbligazione creditizia più vecchia fra quelle scadute ancora in essere.

Questa interpretazione:

- 1) non genera ritardi nell'identificazione di un default, in quanto sarebbe comunque assicurato il rispetto delle previsioni di Basilea e del CRR che richiedono la continuità dello scaduto su "any material credit obligation";
- 2) elimina ogni disparità fra i soggetti che utilizzano le diverse forme tecniche, in quanto il conteggio dei giorni di scaduto sull'obbligazione scaduta partirebbe, in ogni momento, dalla scadenza più vecchia fra quelle in essere ovvero dal momento del superamento del limite accordato, indipendentemente dalla forma tecnica e dal metodo di allocazione dei pagamenti, evitando così che il sovrapporsi di ritardi minimi su scadenze ripetute equivalga, dal punto di vista della definizione di default, ad un ritardo di 90 giorni su una singola scadenza;
- 3) evita il generarsi di un elevato numero di falsi positivi, con impatti potenzialmente molto significativi sulle stime di PD (sovrastimata) e LGD (sottostimata) nell'ambito dei modelli interni di rating.

Come si applica il trattamento specifico per la Pubblica Amministrazione delineato dai paragrafi 25 e 26 degli Orientamenti EBA?

EBA ha introdotto nei propri Orientamenti un trattamento specifico per i crediti commerciali acquistati verso la Pubblica Amministrazione nei paragrafi 25 e 26:

25. Gli enti possono applicare un trattamento specifico per le esposizioni verso le amministrazioni centrali, le autorità locali e gli organismi del settore pubblico, se sono soddisfatte tutte le seguenti condizioni:

- (a) il contratto riguarda la fornitura di beni o servizi, ove le procedure amministrative richiedano determinati controlli connessi all'esecuzione del contratto prima che il pagamento possa essere effettuato: ciò si applica in particolare per le esposizioni di factoring o altri accordi analoghi, ma non a strumenti finanziari quali i titoli obbligazionari;*
- (b) tranne il ritardo nel pagamento, non sussistono altre indicazioni dell'improbabile adempimento come specificato ai sensi dell'articolo 178, paragrafo 1, lettera a), e paragrafo 3, del regolamento (UE) n. 575/2013 e dai presenti orientamenti, e la situazione finanziaria del debitore è sana e non esistono ragionevoli preoccupazioni che l'obbligazione potrebbe non essere pagata per intero, compresi, se del caso, gli eventuali interessi di mora;*
- (c) l'obbligazione è in arretrato da non più di 180 giorni.*

26. Gli enti che decidono di applicare il trattamento specifico di cui al paragrafo 25 dovrebbero applicare tutte le condizioni seguenti:

- (a) le esposizioni non dovrebbero essere incluse nel calcolo della soglia di rilevanza per le altre esposizioni verso il debitore;*
- (b) non dovrebbero essere considerate come in stato di default ai sensi dell'articolo 178 del regolamento (UE) n. 575/2013;*
- (c) dovrebbero essere chiaramente documentate come esposizioni soggette al trattamento specifico.*

Sul punto dell'incompletezza dell'iter della spesa previsto per gli enti pubblici, l'Associazione ritiene in generale che il ritardo di pagamento dovuto a tale situazione configuri un rischio di diluizione del credito e non un rischio di credito⁵. Gli Orientamenti prevedono comunque la facoltà di adottare il suddetto trattamento specifico per gli enti pubblici che consente, in tale situazione e a certe condizioni, di non includere le esposizioni scadute da meno di 180 giorni, al numeratore, nel calcolo della soglia di rilevanza per le altre esposizioni verso il debitore.

Sul punto, la BCE ha ritenuto di esprimere la propria posizione nei termini che seguono: *It should be noted that the specific treatment set out in the EBA Guidelines has to be applied after the calculation of the materiality threshold. It can be applied to exposures that have been materially past due for 90 consecutive days, but only where all conditions specified in Paragraph 25 of the EBA Guidelines are met. If the credit obligation past due is immaterial under the ECB Regulation or it has been material for less than 90 days, the specific treatment is not relevant. Where exposures have been materially past due for 90 consecutive days in accordance with the ECB Regulation and all conditions specified in Paragraph 25 of the EBA Guidelines are met, the specific treatment may be applied. This means that, in accordance with Paragraph 26 of the EBA Guidelines, those exposures are not treated as having defaulted within the meaning of Article 178 of the CRR and, from the time of the application of that specific treatment, those exposures have to be excluded from the calculation of the materiality threshold for all other exposures of the obligor. Importantly, the exposures that are subject to that specific treatment need to be clearly documented. It goes without saying that if, after the application of that specific treatment, the materiality threshold is still exceeded on account of other exposures past due which are not covered by Paragraphs 25 and 26 of the EBA Guidelines, the obligor in question, and all of its exposures, are immediately regarded as having defaulted, since the obligor has still been materially past due for more than 90 consecutive days.*

L'impostazione formulata dalla BCE appare concettualmente macchinosa, tecnicamente complessa da applicare ed in ultima analisi sostanzialmente inefficace per gli stessi scopi del trattamento specifico nei confronti della PA. Essa non sembra neppure conforme agli Orientamenti EBA, in quanto l'art. 26 esplicita chiaramente come ai sensi del trattamento specifico "le esposizioni non dovrebbero essere incluse nel calcolo della soglia di rilevanza per le altre esposizioni verso il debitore".

⁵ Si veda la FAQ "Nel caso di enti pubblici, l'iter di liquidazione della fattura configura un rischio di diluizione?" nel presente documento.

L'Associazione ritiene pertanto che il trattamento specifico delineato negli artt. 25 e 26 degli Orientamenti consenta di escludere dal calcolo della soglia i crediti commerciali dotati dei requisiti di cui all'art. 25, senza richiedere il conteggio preventivo dei giorni di superamento della soglia ante applicazione del trattamento. L'effetto sostanziale di tale meccanismo è che il debitore ceduto PA avrà una soglia positiva esclusivamente in presenza di fatture scadute da oltre 180 giorni (nell'ipotesi in cui le fatture scadute da meno di 180 giorni rispettino i requisiti previsti) e da lì inizierà il conteggio dei giorni di scaduto.

Come si applica la situazione tecnica di arretrato specifica per il factoring?

Gli Orientamenti EBA introducono una stringente definizione di situazione tecnica di arretrato, nell'ambito della quale è delineato un trattamento specifico per il factoring:

23. Si dovrebbe considerare verificata una situazione tecnica di arretrato esclusivamente in uno dei seguenti casi:

- (a) nel caso in cui un ente stabilisca che lo stato di default si è verificato quale risultato di errore a livello di dati o di sistema dell'ente, compresi errori manuali nelle procedure standardizzate, con esclusione di decisioni errate sul credito;*
- (b) nel caso in cui un ente stabilisca che il default si è verificato in conseguenza della mancata, inesatta o tardiva esecuzione dell'operazione di pagamento disposta dal debitore, o qualora sia comprovato che il pagamento non ha avuto esito positivo a causa del mancato funzionamento del sistema di pagamento;*
- (c) quando a causa della natura dell'operazione intercorra un lasso di tempo tra la ricezione del pagamento da parte di un ente e l'attribuzione di tale pagamento al conto interessato, per cui il pagamento è stato effettuato entro i 90 giorni e l'accredito sul conto del cliente ha avuto luogo dopo 90 giorni di arretrato;*
- (d) nel caso specifico di accordi di factoring e di conseguente registrazione dei crediti commerciali acquistati nel bilancio dell'ente con superamento della soglia di rilevanza indicata dall'autorità competente, in conformità all'articolo 178, paragrafo 2, lettera d), del regolamento (UE) n. 575/2013, ma senza che i crediti commerciali del debitore siano scaduti da oltre 30 giorni.*

Considerando anche la necessità di contribuire le singole esposizioni del debitore ceduto (rappresentate dalle fatture) nell'ambito di una posizione complessiva a livello di gruppo, l'Associazione ritiene di poter sostenere come corretta l'impostazione secondo cui le fatture scadute da meno di 30 giorni debbano essere escluse dal calcolo della soglia di materialità ai sensi dell'art. 23.d) degli Orientamenti.

Allegati

1. EBA – GL on the definition of default - Summary of responses to the consultation and the EBA’s analysis
2. Banca d’Italia - Applicazione della definizione di default ai sensi dell’articolo 178 del Regolamento (UE) n. 575/2013 e adeguamento delle definizioni di esposizioni creditizie deteriorate – Nota del 14 agosto 2020
3. BCE - Responses to the public consultation on the draft ECB Regulation on the materiality threshold for credit obligations past due
4. EUF – Letter to EBA Re. Definition of default and materiality threshold: application to factoring and impact of the COVID-19



Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Relations with IFRS 9	<p>Many respondents suggested that the Guidelines should be as consistent as possible with IFRS 9. Specific issues related to IFRS 9 that were mentioned by the respondents include in particular the following:</p> <p>a. the IFRS 9 standard uses the term '90 days and more past due' (90+) while the Consultation Paper and Article 178(1)(b) of the CRR refer to 'more than 90 days past due' (91+);</p> <p>b. given that the wording 'significant perceived decline in credit quality' as an indication of unlikelihood to pay might be misleading and wrongly equated with Stage 2 of IFRS 9, the Guidelines should clarify that classification in Stage 2 should not be considered an indication of default.</p>	<p>The EBA recognises the benefits of aligning the frameworks. However, some differences may remain where they stem from different objectives of prudential and accounting regulations or from the specific wording of primary regulations.</p> <p>a. The Guidelines have to be consistent with the wording of the CRR. It is considered a minor difference as for accounting purposes it is applied only at the reporting dates whereas for prudential purposes defaults are recognised on a daily basis. In IFRS 9, 90 days past due is a rebuttable presumption so it should be possible to use 91 days if justified by alignment with prudential practices.</p> <p>b. According to the text of the Guidelines it is clear that exposures in Stage 2 should not be automatically classified as defaulted. However, it is possible that some exposures in Stage 2 will be defaulted if there are other indications of unlikelihood to pay.</p>	No change
Implementation	<p>Many respondents suggested that the Guidelines should be as consistent as possible with IFRS 9 not only in terms of the content but also in terms of the time of implementation. However, several respondents requested that the implementation of the definition of default should only be required after implementing IFRS 9</p>	<p>The changes have to be implemented at the latest by the end of 2020, hence sufficient time is granted after the date of implementation of IFRS 9. However, institutions may implement the changes in a shorter timeframe. Therefore, if it is deemed appropriate, institutions may align the timeline for implementation</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>as it would be too burdensome to adapt both aspects simultaneously.</p> <p>In terms of implementation several respondents suggested that the new requirements should apply only prospectively and not retrospectively. Retrospective adjustment is not always possible and performing the adjustment may lead to data quality issues and to a high degree of inhomogeneity of data.</p> <p>It was also noted that the implementation will be conducted simultaneously with the broader review of IRB methodologies and hence sufficient time for implementation is necessary. A few respondents requested that a comprehensive balancing of benefits and costs should be performed of both the changes in the definition of default and the whole IRB review.</p> <p>Consistency with the amendments proposed by the BCBS is considered important to avoid a duplicated burden related to the implementation of these amendments.</p> <p>It was also proposed that the implementation of regulatory changes should not lead to penalties such as additional margin of conservatism (MoC).</p>	<p>of the Guidelines with the implementation of IFRS 9.</p> <p>The EBA's expectations with regard to the implementation of the changes, including the reference to possible retrospective adjustments in the data, have been expressed in the EBA's opinion on the implementation of the regulatory review of the IRB Approach published in February 2016. The adjustment of historical data in order to reflect the new definition of default in the estimates of risk parameters is considered a superior approach, where such an adjustment is considered possible and not unduly burdensome by competent authorities, but will not be required in all cases. The EBA's opinion reflects a holistic approach to implementation that includes not only the changes in the definition of default but also all other changes related to the regulatory review of the IRB Approach.</p> <p>A common understanding of the definition of default is considered crucial for the comparability of capital requirements under the IRB Approach.</p> <p>The necessity to apply MoC in cases where the data are less satisfactory or not representative of the current portfolio and processes stems from the requirements of the CRR and therefore cannot be overruled by the Guidelines.</p>	
Materiality of model changes	A few respondents suggested that in the case of implementation of the regulatory changes the approach to the assessment of the materiality of model changes should be simplified and should provide more flexibility to	The aspects of the materiality of the changes and related approval processes are regulated by Regulation (EU) No 529/2014 and therefore the	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	facilitate re-approval processes, especially in the SSM context.	treatment cannot be changed by the Guidelines.	
Level of application	A few respondents indicated that, for banks spread over a large geographical area, it is quite resource-intensive to implement some of the proposals since some information is not collected on that local level or the relevant information is not submitted to central systems. It was proposed that the group-wide default determination should consider only exposures of core subsidiaries that are involved in lending business in the narrow sense or those included in the regulatory scope of consolidation.	<p>The application of the default of an obligor on a group-wide basis is required by Article 178(1) of the CRR. The CRR also specifies the relevant level of consolidation.</p> <p>In order to address operational aspects of the application of the definition of default at a group-wide level paragraphs 81 and 82 specify situations where simplified processes may be applied.</p>	No change
National discretions	Some respondents requested clarification on the application of the national discretions related to the definition of default. In particular clarification was requested regarding potential removal of national discretion to use 180 days instead of 90 days past due for certain exposures.	National discretions granted by the CRR to the competent authorities cannot be overruled by the Guidelines. Hence, competent authorities may decide that the application of 180 days past due is appropriate for the exposures specified in Article 178(1)(b) of the CRR.	No change
Daily identification of defaults	Daily determination of past due amounts was perceived by many respondents as overly burdensome and would significantly increase the complexity of the implementation, especially with regard to exposures such as mortgages, factoring or other retail exposures, as currently monthly checking is common in retail business. It was also mentioned that some institutions determine the default on a daily basis but the information is sent to the central database in batch form at the end of the month.	It has been clarified in the Guidelines that the timely identification of default is perceived from the perspective of the objective that up-to-date information has to be used in all relevant processes. Therefore, up-to-date information about the default of an obligor has to be available whenever it is used in any of the institution's processes. The modified text is included in paragraph 21 of the Guidelines.	Par. 21



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Flexibility	<p>Several respondents stated that a sufficient degree of flexibility is needed regarding the institutions' application of the unlikelihood to pay criterion and the definition of default in general. Complete standardisation of the definition of default across all EU institutions is perceived as not desirable.</p> <p>However, other respondents suggested that the Guidelines should provide clear, consistent and appropriate definitions of terms such as 'material', 'significant' or 'large' to allow a distinct identification of obligations across institutions.</p>	<p>The Guidelines set minimum standards and a common understanding of the main concepts related to the definition of default. However, institutions may recognise default earlier on the basis of expert judgement whenever they consider that the obligation will not be paid in full by the obligor without recourse to actions such as realising security.</p> <p>The clarification of terms such as 'material', 'significant' or 'large' has been proposed wherever it was considered that harmonisation is appropriate. Otherwise it is left to the expert judgement of the institutions.</p>	No change
Payment allocation	<p>Some respondents noted that the proposed Guidelines ignore the existence of different practices in the treatment of missed payments, i.e. how incoming cash flows after a default situation should be treated in relation to the previous instalments that are in arrears. A FIFO (first in first out) approach or a LIFO (last in first out) approach will influence a return to non-defaulted status. The harmonisation of a procedure for these cases is considered very important and should be included in the EBA's final Guidelines.</p> <p>Some respondents suggested that the application of a FIFO approach should be required while others preferred a LIFO approach.</p>	<p>It was decided not to prescribe any specific method for the allocation of payments. These aspects are often regulated by national laws as well as specific contracts with the clients. Apart from FIFO or LIFO there are also many different approaches that may be based, for instance, on specific credit products or on the interest rates related to different credit facilities of an obligor.</p> <p>The variability in the identification of default resulting from payment allocation schemes was addressed by adopting the approach for the application of the materiality threshold for past due exposures that will give similar results regardless of the chosen approach to the allocation of payments. Therefore, it is not deemed necessary to regulate this aspect in the Guidelines.</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Materiality threshold	<p>Many respondents submitted comments relating to the materiality threshold for past due exposures. The issues that were mentioned included in particular the following:</p> <ul style="list-style-type: none"> a. a suggestion that the compensation of past due amounts with unused general credit lines of the same debtor should be allowed; b. concerns regarding the potential lack of a relative component of the materiality threshold for retail exposures; c. proposals to increase the levels of the materiality threshold; d. concerns regarding factoring operations in the case of applying the threshold as proposed in the QIS exercise; e. a proposal to allow the computation of materiality threshold for 90 days past due at individual institution level as a first step (in the case of breach, dissemination and group-wide assessment would follow); f. a request to include examples on the calculation of the materiality threshold in the Guidelines. 	<p>The issues relating to the materiality threshold were addressed in the RTS on materiality threshold for past due exposures rather than in the Guidelines. The following considerations were taken into account when developing the final RTS:</p> <ul style="list-style-type: none"> a. Compensation with unused credit lines should not be allowed, in order not to water down the effect of the materiality threshold. b. Both absolute and relative threshold components are considered for both retail and non-retail clients. c. Maximum levels of the thresholds were calibrated based on the results of the QIS and taking into account the industry's feedback provided in the consultation process. d. The concerns related to factoring were addressed in the Guidelines by modifying the specification of a technical past due situation in paragraph 23(b). e. Application of the definition of default at the obligor level, including institution, parent undertaking and any of its subsidiaries, is a CRR requirement. Possible situations where a simplified approach may be applied are already described in paragraphs 81 and 82 of the Guidelines. f. As the materiality threshold is regulated by the RTS rather than the Guidelines it is not considered appropriate to include such examples in the Guidelines. 	Par. 23(d)



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Non-accrued status	It was mentioned by some respondents that the accounting rules for non-accrued status are not specific enough, that it is not an IFRS concept, and even that the requirements in that regard should be deleted from the Guidelines or limited to entities where this information is available based on local GAAPs.	This indication of unlikeliness to pay is specified in Article 178(3)(a) of the CRR and hence cannot be overruled by the Guidelines. However, where non-accrued status is not applicable because of the specific accounting framework that is used this indication will not occur.	No change
Bankruptcy	<p>One respondent suggested that the bankruptcy definition should refer to the list annexed to the Insolvency Regulation (EU) 2015/848, and to similar processes for financial institutions under e.g. the BRRD.</p> <p>It was also suggested that the Guidelines should consider that bankruptcy orders often allow the debtor to retain primary residence and exclude mortgage payments from the action (such mortgage exposures should not be considered defaulted automatically).</p>	<p>It was clarified in paragraph 57 of the Guidelines that all arrangements listed in Annex A to Regulation (EU) 2015/848 should be treated as bankruptcy in the sense of Article 178 of the CRR.</p> <p>Default in general is a characteristic of an obligor rather than an exposure. Hence, although bankruptcy procedures may exclude some types of exposures default of the obligor should be recognised. Recognition of default does not necessarily lead to immediately starting liquidation procedures.</p>	Par. 57
Unlikeliness to pay	<p>A few respondents regarded the criterion of unlikeliness to pay 'significant (expected) increase of leverage' as counterintuitive if the counterparty has improved its credit quality.</p> <p>In the opinion of other respondents the relevant unlikeliness to pay triggers according to paragraph 47 should exclude circumstances related to the obligor's financial distress or high vulnerability and should be limited to default/financial covenants.</p>	<p>Paragraphs 59 and 60 provide examples of possible additional indications of unlikeliness to pay. Institutions may decide not to adopt them or to adopt them in a modified version when deemed appropriate. In accordance with paragraph 58 the additional indications of unlikeliness to pay may be adopted on a case-by-case basis.</p> <p>Regarding the covenants, also other than financial covenants could in some situations indicate financial problems on the part of an obligor. This should be analysed by the institutions depending on which types</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		of covenants are used in specific types of contracts.	
Non-credit risk triggers	<p>Several respondents made the general comment that the credit quality-related triggers should be the key drivers behind default recognition, otherwise issues may arise related to data instability as well as with regard to use test requirements if the non-credit-related regulatory default treatment is not reflected in credit decisions.</p> <p>A few respondents mentioned specifically credit frauds, which are perceived as operational rather than credit risk.</p>	<p>It is clear that the definition of default should be driven by credit quality-related triggers. However, where other triggers, such as credit frauds, lead to material delays in payment or unlikelihood to pay, this should also be recognised as default in accordance with Article 178 of the CRR. Otherwise capital requirements could be underestimated.</p>	No change
External data	<p>It was requested by one of the respondents that it should be clarified that the assessment of differences between definition of default used internally and in external data and their impact on the default rate should not be construed as an indication that the definition of default used in the external data has to be equivalent.</p>	<p>It is required by Article 178(4) of the CRR that if external data reflect different definitions of default appropriate adjustments should be made to achieve broad equivalence. All differences between the internal and external definitions should be analysed and, where possible, adjusted. In any case, where the default definitions in internal and external data are not fully equivalent the data should be considered less satisfactory and this should be reflected in an appropriate margin of conservatism in accordance with Article 179(1)(f) of the CRR.</p>	No change
Promotional loans	<p>It was requested by a few respondents that the specificities of promotional loans provided by development banks should be taken into account by adding them to the list of exceptions in paragraph 28 of the Consultation Paper and in the provisions on probation periods.</p>	<p>It was considered appropriate that the general principles specified in the Guidelines, unless stated otherwise, should apply to all types of loans, including promotional loans provided by development banks.</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
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Responses to questions in Consultation Paper EBA/CP/2015/15

Question 1. Do you agree with the proposed definition of technical defaults? Do you believe that other situations should be included in this definition? If yes, please provide detailed proposals on how to address further possible situations.

Expert judgement	<p>Many respondents requested that some flexibility should be maintained in the identification of technical defaults and that institutions should be allowed to use expert judgement in that regard. It was argued that otherwise the definition of default might not be in line with the use test and it would be less risk-sensitive for specific cases. For some respondents a strict definition of technical defaults would mean a major change from the current practice for non-retail activities, where no definition is given and where expert judgement is used to determine whether a past due status relates to a technical default or not. Such a strict definition could affect some customers that are not in financial difficulties but because of an inadequate definition of default may struggle to secure refinancing.</p>	<p>In order to ensure consistent and comparable recognition of default across EU institutions it is considered important to avoid excessive subjectivity in the recognition of technical defaults.</p>	Par. 23
	<p>It was argued that the role of expert judgement could be limited and constrained by internal policies that are agreed upon with supervisors and supported by appropriate disclosures. It was also suggested that minimum guidelines could be established with examples of exceptions that take into account a common-sense approach and the ability to use expert judgement to determine non-credit-related events as is the case for the guidelines on sale of credit obligations.</p> <p>A few respondents admitted that the proposed approach</p>	<p>In accordance with Article 178 of the CRR any situation that leads to material delay in payment or unlikelihood to pay should be considered default. In many cases it is difficult to clearly specify the reasons for the delay in payment, as they may be a combination of financial situation and external circumstances. Therefore, all cases of material delay in payment or where the institution considers it unlikely that the obligor will pay its credit obligations in full, regardless of the reasons, should be classified as defaults.</p> <p>As so-called 'technical defaults' are not real defaults, i.e. in reality there is no material delay in payment or unlikelihood to pay, it is proposed in the final Guidelines that it is more appropriate to call certain events 'technical past due situation'. It follows that these situations should not be considered to lead to the recognition of default.</p> <p>Those suggestions of the respondents that were in line with the above considerations were included in paragraph 23 of the final Guidelines.</p>	



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	may be acceptable for application to the retail business, where a more mechanical approach is more appropriate.		
Disputes	<p>Many respondents argued that in the case of disputes over credit obligations the past due exposures should not be treated as defaulted. Such disputes are often resolved over long periods (even several years), which would mean that the borrower would remain in default throughout this period.</p> <p>Many respondents gave the example of commercial litigation with a client in the case of the leasing business where the quality of the product/service rendered is disputed, the service is no longer provided, or there is an equipment failure. In practice, litigation is generally avoided as the goal is to achieve an amicable solution with the lessee as customer. But finding a solution which is acceptable to both the lessee and the leasing company is often protracted.</p> <p>A similar situation can occur in factoring businesses where in a commercial relation between the factor's client (assignor) and its debtor there could be a dispute over a supply due to which the debtor decides not to pay the invoices. In this case, the disputed invoices or receivables should be excluded from the calculation of the default because the delay of the payment is not due to deterioration of the debtor's creditworthiness but to commercial/legal reasons.</p> <p>Other examples of disputes given by the respondents include commercial disputes over a standby letter of credit, call of suretyship where the suretyship contests</p>	<p>Although disputes are not included in the definition of a technical past due situation the argumentation of the respondents was taken into account and specific treatment of disputes has been specified in paragraph 19 of the Guidelines. However, in order to ensure consistent application of the definition of default and to avoid excessively broad application of the specific treatment, the possibility of suspending the counting of days past due was limited to those disputes that were introduced to a court or another formal procedure performed by a dedicated external body that results in a binding ruling (such as arbitration).</p> <p>In addition to that, the specific situation of leasing where the dispute may arise between the obligor and the provider of the leasing object rather than directly with the institution was addressed in point (b) of paragraph 19.</p> <p>With regard to purchased receivables, including those resulting from factoring arrangements, similar situations, i.e. disputes between the obligor and the supplier of goods, are addressed through the recognition of dilution risk as specified in the CRR and in paragraphs 29 and 30 of the Guidelines, that is, distinct from default risk.</p>	<p>Par. 19</p> <p>Par. 29-30</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	the legitimacy of the call, which entails a past due situation, and disputes regarding the amount or the nature of collaterals in the case of margin calls.		
Public sector	<p>Several respondents indicated that in the case of public sector entities the delay in payment often results from the lengthy administrative procedures rather than from financial difficulties. A few respondents suggested that for sovereign counterparties default may be assessed at the political level. In addition to that an example was given of a merger of government entities where existing loans need to be transferred to the merged entity and technical delays in payment may occur due to that reason.</p> <p>The treatment of public sector entities was also mentioned in the context of factoring. Some respondents suggested inserting a specific provision that a default on trade debts of PSE debtors can be detected only when a crisis procedure has been activated on the single public entity or, at least, one of the following reliefs: (i) the introduction of a waiver that would allow the institution to suspend the counting of past due days if the debtor (being a public administration) makes a payment on at least one of its past due exposures, or (ii) to allow starting the counting of the days past due for receivables to public entities from the date when the payment is actually expected, according to the factor's experience or to reliable information pooled among institutions where available, rather than from the due date of the invoice. One respondent requested clarification of whether an intention to pay would be sufficient to reset the number</p>	<p>The systematic delays in payments by certain types of obligors are not desirable and wherever possible these obligors should be encouraged by the institutions to pay their obligations in a timely manner. In case of the necessity to carry out certain administrative procedures before extending the payment this should be envisaged in the payment schedule so that the delays can be avoided.</p> <p>However, in order to avoid unintended consequences for the financial and public sector in general the concerns of the respondents were addressed by specifying a specific treatment of exposures to central governments, local authorities and public sector entities in paragraphs 25 and 26 of the Guidelines. It has to be underlined that this specific treatment can only be applied where there is no concern regarding unlikelihood to pay. The specified criteria should be applied in a rigorous manner and the application of the specific treatment should be clearly documented to allow subsequent monitoring and analysis of these cases.</p> <p>It is clear that for the purpose of calculation of days past due only factually provided payments can be taken into account and the intention of payment is not sufficient in that regard.</p>	Par. 25-26



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	of days past due for these obligors.		
Errors	<p>It was suggested by several respondents that errors should be treated as technical defaults not only when they happen within the institution but also when they occur on the customer side. Complex customer groups are given as an example where multiple accounts and facilities may lead to potential system and administrative errors. Moreover, it was also requested that the closure or disruption of a payment system should be treated as a technical situation.</p> <p>One respondent indicated that recognition of a situation where the counterparty may be unable to make the payment at the time required for reasons other than financial difficulties would be consistent with industry documentation such as ISDA Master Agreements dealing with administrative/operational errors.</p>	<p>Delays in payments resulting from errors in the data or IT systems of the counterparty should not be considered technical past due situations, as it is the obligation of the debtor to provide the payment to the institution in a timely manner. It would be difficult for an institution to verify whether an error has actually occurred at the counterparty and such a possibility, if granted, could be misused. The obligors should not be encouraged to pay their obligations only on the last day before the recognition of default; rather, they should provide the payments in accordance with contractual obligations.</p> <p>However, it has been clarified that the failure of the payment system between the bank and the counterparty could be considered a source of technical defaults alongside errors on the part of banks; however, in that situation the obligor has to provide evidence that it attempted to make a payment but that it was unsuccessful due to the failure of the payment system.</p>	Par. 23(b)
Allocation of payments	<p>It was indicated by a few respondents that, in factoring, payments might be made by debtors to a factor for certain ceded invoices and not yet registered on the right account due to difficulties in the payment reconciliation process. This should not lead to recognition of default. Other respondents mentioned that invoices may be due but not correctly and promptly dispatched to the debtor</p>	<p>It has already been specified in the Consultation Paper that in the case of a time lag between the receipt of a payment by an institution and the allocation of that payment to the relevant account this transitional period may be considered a technical past due situation, and this provision remains in the final Guidelines in paragraph 23(c).</p>	Par. 31-32



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	by the seller.	The treatment of payments to the seller instead of the institution and the treatment of payments in the case of undisclosed factoring have been further specified in paragraphs 31 and 32.	
External events	Several respondents indicated that some external events could lead to technical defaults. The examples of such events include environmental disasters, measures imposed by law (e.g. obligations due to capital controls imposed on the Greek banking system last year), riots, strikes, wars, etc. In the case of trade finance or the funding of energy and commodities, these external events could be related to logistical issues and reasons that lead to delivery delays, such as the goods being blocked at customs, prohibitions on entering or leaving ports, strikes, etc. Other respondents noted that some positions may be reported as expired due to bureaucratic delays of various types (for example, time needed to formalise resolutions, availability of notaries, time required for the registration of mortgages). In more general terms such situations were mentioned where past due amounts are attributable to operational risk, or 'blended events' (i.e. where there are several risk types at play) and where a decision needs to be taken as to whether it is appropriate or not to take such an event into account for credit risk requirement purposes.	External events that are not related to the obligor, such as environmental disasters, measures imposed by law, riots, strikes, wars or logistical issues, should not be considered technical defaults (or technical past due situations as specified in the Guidelines). All individuals and entities operate in an environment of uncertainty where they are affected by external events. This uncertainty is a part of the risk that has to be taken into account by the institutions when estimating credit risk and calculating capital requirements. Capital requirements should in particular be sufficient to absorb losses stemming from external events that affect both clients and institutions. Therefore, these situations, including events related to country risk, cannot be treated as technical past due situations and have to be included in the estimation of risk parameters.	No change
Factoring	A few situations were indicated by the respondents in the context of factoring that could lead to technical defaults. These situations include: a. extension of payment terms granted to the debtor but	The following considerations were taken into account in relation to the comments submitted by the respondents: a. As a general rule the calculation of days past due	Par. 31-32



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>not yet registered on the factor's system;</p> <p>b. discounts, deductions, netting or other credit invoices issued by the seller but not promptly communicated to the factor or not directly linked to the invoices;</p> <p>c. wrong payments by the debtor to the supplier;</p> <p>d. delay in the transfer of information about the collected receivables by the seller in non-notification factoring agreements or when the client acts as agent for the collection;</p> <p>e. delay in the registration of the collected amounts in non-notification factoring agreements or when the client acts as agent for the collection;</p> <p>f. payments by the buyer without indication of the paid invoices.</p>	<p>should always be based on the most up-to-date schedule of payments.</p> <p>b. These events are related to dilution risk and should be recognised when calculating capital requirements for dilution risk.</p> <p>c-e. The treatment of payments to the seller instead of the institution and the treatment of payments in the case of undisclosed factoring have been specified in paragraphs 31 and 32.</p> <p>f. This situation will most probably result in a time lag between the receipt of the payment and its allocation to the relevant account, which is already addressed in paragraph 23(c) of the Guidelines.</p>	
Leasing	<p>In the case of leasing it was mentioned that procedural aspects are quite frequently to be found in vehicle leasing to corporate lessees with a large number of leases (fleet leasing), especially if the lease payments are due on different dates. There is typically a lag between invoicing and settlement of the invoice. Default may be triggered even if none of the open invoices is past due more than 90 days.</p>	<p>It is the obligation of the institution to issue the invoices in a timely manner to allow the obligor to make the payments in accordance with the payment schedule. Where there is a time lag between the receipt and the allocation of the payment this situation is addressed by paragraph 23(c).</p>	No change
Syndicated financing	<p>One respondent mentioned an example where there is a delay in passing payments between the syndicate members involved or if the institution restructures the loans without default (crisis-related restructuring). This can arise, for example, if the internal limit has already</p>	<p>In the case of changes in the terms and conditions of a loan, including in particular increase of the limit, where this is due to financial difficulties of the obligor, such changes should be considered distressed restructuring and should be treated accordingly in the</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	been increased, but the agreement in the lender consortium cannot be achieved within 90 days.	recognition of default. The definition and treatment of distressed restructuring has been specified in paragraphs 49 to 55 of the Guidelines.	
Long-term loans	With regard to asset financing long-term loans it was mentioned that amendments, waivers or consents are possible due to, for example, a lack of customer responsiveness, a maintenance check of products or a reality check of the financing according to new market conditions. It was deemed necessary to use expert assessment in such cases.	Wherever changes of terms and conditions result from financial difficulties of the obligor this should be considered distressed restructuring and treated accordingly in the recognition of default. In any case institutions should perform an analysis of the potential unlikelihood to pay of the obligor and classify an obligor as defaulted where concerns in that regard exist.	No change
Mergers and acquisitions	A few respondents requested clarification that should a defaulted client of a bank be bought by another client of the bank (client B) that is not in default, the exposures of client B should not be considered defaulted if there is no decrease in the credit quality of client B (due to the acquisition).	In accordance with the comments received it has been clarified in paragraph 20 of the Guidelines that if the obligor changes then the counting of days past due starts for the new obligor from the beginning. If, however, the obligor (legal entity) does not change then there is no reason to apply a different treatment and in particular there is no merit in considering such cases technical past due situations.	Par. 20
No additions to technical defaults	A few respondents agreed with the proposal and did not see a need for additional types of technical defaults.	The list of technical past due situations is strictly limited to those situations where no material delay in payments and no concern about unlikelihood to pay exist.	No change
Application of technical defaults	A few respondents requested additional clarification on the application of the definition of technical defaults: in particular they asked for clarification that the technical defaults that do not lead to actual default do not need to	The technical past due situation should not be considered default and therefore the criteria for a return to non-defaulted status do not apply. Any identified errors should be corrected as soon as	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	be registered in a central risk database, and registration in the local database for audit trails would suffice. Moreover, it should be clarified that in the case of technical defaults it is possible to automatically restore positions to non-defaulted status without having to trigger an individual restoration process including individual documentation. This option should be applicable for restructuring and all other retail exposures.	possible. It has also been clarified in paragraph 24 of the Guidelines that technical past due situations, where identified, should be removed from the reference data set of defaulted exposures for the purpose of estimation of risk parameters.	
Relation to LGD	It was requested by a few respondents that if the EBA's definition of default (defined, among other ways, by new and stricter rules on technical default) remains unchanged, floors on the minimum level of LGD have to be reduced or completely removed.	The aspect of LGD floors is not covered by the scope of these Guidelines.	No change
Question 2. Do you consider the requirements on the treatment of factoring arrangements as appropriate and sufficiently clear? If not, please provide proposals for additional clarifications?			
Requests for clarification	Several respondents requested clarification with regard to factoring with and without full transfer of risks and benefits, especially in situations where local accounting standards are used. Also, clarification was requested in general terms of what is the relation between the paragraphs in the Guidelines that refer to factoring and other parts of the Guidelines, in particular in Chapter 4 of the Guidelines. Furthermore, some respondents wondered whether the same requirements as for factoring would apply also to other economically similar financial products regardless of the terminology.	It was clarified in paragraphs 27 and 28 of the Guidelines that the differentiation between the types of factoring arrangements is based on whether the receivables are actually purchased by the institutions and recognised in the institution's balance sheet or not. As in accordance with the CRR the risk weights are applied to all assets on the institution's balance sheet, the same rule applies independently from the applicable accounting standards. Furthermore, it has to be noted that where the scope of application is not specifically mentioned all other	Par. 27-32



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		parts of the Guidelines apply equally to all types of exposures including those that result from factoring arrangements. However, paragraphs 27 to 32 of the Guidelines define specific rules that apply specifically to factoring and/or purchased receivables, where purchased receivables may stem from factoring arrangements or another type of transaction.	
	Clarification was requested of whether the approach proposed for factoring is valid for institutions adopting the Standardised Approach and those adopting the IRB Approach, taking into account in particular the derogations for purchased receivables as allowed by the CRR under the IRB Approach.	Unless it is specifically mentioned the Guidelines apply equally to institutions that use the IRB and the Standardised Approach.	No change
	Some respondents asked for clarification of the treatment of situations where the debtor has not been informed about the cession and the debtor continues making the payments to the seller instead of the factor. Some suggest that this situation should be considered a technical default.	Clarification on the treatment of payments made directly to the seller has been provided in paragraphs 31 and 32 of the Guidelines. Differentiation has been introduced depending on whether the debtor has been adequately informed about the cession. In any case, however, this situation should not be treated as technical default (technical past due situation).	Par. 31-32
	One respondent asked for clarification of whether factoring without full transfer of risks and benefits should be treated similarly to an overdraft (i.e. taking into account the advised limit) or whether the agreed percentage of advances should be taken into account.	The treatment of factoring that does not lead to the recognition of purchased receivables in the balance sheet of the institution has been specified in paragraph 27. Although there are some similarities to overdrafts, as explained in the section on background and rationale, the treatment specified in paragraph 27 is specific to this type of factoring.	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Expert judgement	Several respondents disagreed with automatic recognition of default in the case of factoring. Some suggested determination of default on a case-by-case basis if factoring arrangements have sufficient material impact to cause the obligor to default on its other obligations. It was mentioned in particular that judgemental assessment should be allowed if the same counterparty is both a client and a debtor to another client.	The backstop, i.e. the latest possible moment for the recognition of default, has to be specified in an objective manner in order to ensure sufficient comparability across institutions. In the CRR such a backstop has been defined in Article 178(1)(b) as a days past due criterion. However, until that moment institutions may recognise default on the basis of unlikelihood to pay considerations, which leaves room for judgemental assessment of the financial situation of the obligor.	No change
Dilution risk	In the case of factoring with full transfer of risks and benefits many respondents suggested that the calculation of the threshold should not take into account events which are strictly related to the commercial relationship between the debtor and the client (e.g. disputes, discounts, deductions, netting, credit note issued by the seller). The suggestions on how to address these events include a rebuttable presumption on the automatic classification of days past due, suspension of days past due counting and exclusion of the relevant invoices in the calculation of the threshold. However, the respondents admit that these occurrences should trigger an analysis of the debtor's situation in order to assess possible indications of unlikelihood to pay.	Dilution risk, as specified in the CRR, applies to portfolios of purchased receivables regardless of whether they stem from factoring arrangements or any other transactions. The treatment of events related to dilution risk has been further clarified in paragraphs 29 and 30 of the Guidelines. It is also stressed that a significant number of events related to dilution risk may indicate potential unlikelihood to pay and in this situation an appropriate assessment has to be performed.	Par. 29-30
Reference date for DPD	One respondent suggested that, in the case of factoring with full transfer of risks and benefits, in order to classify a single receivable as past due, the reference date should not be the maturity date of the receivable but the maturity date contracted with the assignor or the DSO	In accordance with general principles the calculation of days past due should always refer to the dates of contractual obligations. In the case of a purchased receivable the date of contractual obligation is the due date of the receivable. However, the specific case of	Par. 32



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	(days of sales outstanding) plus any increase, which is the date used for determining the sale price of the assigned receivables.	undisclosed factoring has been clarified in paragraph 32 of the Guidelines. In this case, as the debtors do not have an obligation to pay directly to the institution, the contractual obligations of the seller are taken into account for the purpose of counting of days past due.	
	In the case of factoring without full transfer of risks and benefits a few respondents requested adding a provision that when the factor and the client agree a due date for the credit granted to the client, the counting of past due days shall commence from such date, regardless of the account that is in debt.	The general requirement that the counting of days past due should always refer to the most up-to-date contractual obligations applies also to factoring arrangements. However, it also has to be noted that where the contractual obligations are changed due to financial difficulties of the obligor this should be considered a distressed restructuring and in this case relevant provisions of the Guidelines on the treatment of distressed restructuring will also apply.	No change
Question 3. Do you agree with the approach proposed for the treatment of specific credit risk adjustments (SCRA)?			
	Most of the respondents agreed with the proposed rules for the treatment of specific credit risk adjustments (SCRA) and appreciated the alignment of these rules with the accounting standards. However, some respondents requested additional clarification on the treatment of exposures classified as Stage 2 under IFRS 9 to make sure that these exposures do not have to be treated as defaulted. It was considered that a decrease in book value, even due to a decrease in credit quality, should not necessarily be judged as default, especially in the case of exposures measured at fair value.	It has been specified that only exposures that are classified as credit-impaired under IFRS 9 have to be treated as defaulted, with certain exceptions as specified in paragraph 39 of the Guidelines. Exposures classified as Stage 2 under IFRS 9 are not credit-impaired and therefore they are in general not treated as defaulted. However, these exposures may be classified as defaulted if they are materially past due or any other indications of unlikelihood to pay exist.	Par. 39



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Several respondents indicated that some assets classified as Stage 3 should not be treated as defaulted. The examples included in particular assets purchased or originated at a significant credit-related discount and hence classified as credit-impaired. Some respondents were concerned that assets that are credit-impaired at origination would have to remain defaulted until maturity.	The treatment of assets purchased or originated at a significant credit-related discount has been specified in paragraph 62 of the Guidelines. Such assets should be assessed for potential unlikelihood to pay, which is the basis for the decision regarding whether these assets should be treated as defaulted or not. As a result there is no automatism in classification of assets purchased or originated at a discount as defaulted. A similar assessment is performed for the purpose of classification of exposures as credit-impaired for accounting purposes. Once the exposures are classified as defaulted the general criteria for a return to non-defaulted status apply as specified in Chapter 7 of the Guidelines.	Par. 62
	Some respondents were concerned about the differences between the accounting rules and the provisions specified for a return to non-defaulted status.	The accounting standards specify how to construct a balance sheet for the institution that reflects a situation at a certain point in time, whereas the prudential requirements have to be met on an ongoing basis, and therefore the exact date of reclassification is necessary. Moreover, the definition of default used for prudential purposes may also be used for accounting purposes, including the criteria for reclassification.	No change
	A few respondents suggested that a threshold should be applied to the recognition of default based on specific credit risk adjustments.	According to Article 178(3)(b) of the CRR whenever the institution recognises a specific credit adjustment resulting from a significant perceived decline in credit quality subsequent to the institution taking on the exposure this should be considered an indication of unlikelihood to pay. Therefore, the Guidelines specify	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		which SCRA should be considered to result from a significant decline in the credit quality of the exposure and there is no need for specifying a threshold.	
	There was a formal remark from one respondent that the term 'Stage 3' should not be used, as it is not formally defined in IFRS 9.	The comment has been incorporated and the Guidelines refer to exposures that are 'credit-impaired'.	Par. 39
	One respondent indicated potential inconsistency between the RTS on the general and specific credit risk adjustments and the proposed rules. According to this respondent these RTS prescribe that for the purpose of Article 178 of the CRR only SCRA directly for individual exposures should be used and SCRA for a portfolio should be excluded even if it is mapped onto the individual exposures, whereas in the draft Guidelines it is proposed that collectively assessed SCRA is also an indication of unlikelihood to pay.	It has been specified in the Guidelines that SCRA based on losses resulting from current or past events should be considered an indication of unlikelihood to pay. Although the level of provisions may be assessed individually or collectively (in particular for exposures that are not individually significant) the classification of exposures as those where the event of loss has already occurred is done on an individual basis. Therefore, the SCRA is specified directly for individual exposures. In contrast to this, as specified in paragraph 37 of the Guidelines, where the loss has occurred but the institution is not yet aware of which individual exposure has suffered these losses this should not be considered an indication of unlikelihood to pay of a specific obligor.	No change
Question 4. Do you consider the proposed treatment of the sale of credit obligations appropriate for the purpose of identification of default?			
Level of the threshold	While a few respondents agreed with the proposed treatment of the sale of credit obligations many respondents suggested increasing the proposed threshold for the loss on the sale of credit obligations. One respondent indicated that the threshold should be	The price for a credit obligation reflects in general the expectation of the future cash flows on the exposure. Where the price is significantly lower than the outstanding amount this indicates unlikelihood to pay with regard to this obligation. Where, however, the	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	significantly increased to avoid situations where exposures with a PD that is material but significantly below 100% is classified as defaulted. This respondent also argued that as LGD and in particular the existing collateral affects the sale price the loss in general should not be the basis for the recognition of default.	discount results from other than credit-quality-related reasons this situation is addressed in paragraph 42 of the Guidelines.	
Application of the threshold	Several respondents requested that objective criteria to determine losses due to credit risk should be specified, as many factors other than credit-related can substantially influence the price and therefore these should be excluded.	The treatment of non-credit-risk-related factors that influence the price for credit obligations has been specified in paragraph 42 of the Guidelines. Where the economic loss related to the sale of credit obligations is considered not credit-related the sale should not be considered an indication of default.	No change
	A few respondents suggested that the exposure in the formula for the threshold should be discounted to reflect the timing of the payments.	Introduction of discounting in the formula would lead to excessive complexity. It was considered that the formula should be rather simple. It takes into account the outstanding amount at the moment of the sale and does not include any future interest. These future interests reflect the value of the payments in time for the investor and hence the price for well-performing obligations should cover at least the current outstanding amount (i.e. mostly the value of the principal).	No change
	Several respondents noted that the portfolio subject to the sale is often heterogeneous and may in particular include performing and non-performing exposures. Some respondents suggested that exposures should be grouped into homogeneous pools in terms of credit quality and that not all exposures should be defaulted as a result of	It is specified in paragraph 48 of the Guidelines that the treatment of individual credit obligations within this portfolio should be determined in accordance with how the price for the portfolio was set. Where the price for the portfolio is set only at the portfolio level it is assumed that the exposures included in this	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	the sale.	portfolio are sufficiently homogeneous and can be treated similarly in terms of the identification of default. Where, however, both performing and non-performing exposures are subject to the sale it is likely that the price will differ for different parts of the sold portfolio. In this case the threshold will apply separately to each part of the portfolio that was separately priced.	
Requests for clarification	Several respondents indicated that the default trigger based on the sale of credit obligations should be considered an auxiliary indicator as exposures are typically defaulted before sale.	The sale of credit obligations as a default trigger is relevant for exposures that are not yet defaulted at the moment of the sale. In the case exposures defaulted before their sale, such sale will not define the moment of default but will determine the level of loss related to the previously defaulted exposure. In the case of institutions that use the advanced IRB Approach this information should be adequately recorded and stored for the purpose of LGD estimation process.	No change
	Several respondents requested clarification of whether securitised exposures qualify as sold exposures.	It has been clarified in paragraph 41 that transactions of traditional securitisation should be considered sale of credit obligations where they lead to significant risk transfer.	Par. 41
	One respondent asked for clarification of the treatment of the exposures to a client that remain on the book when some of the exposures to this client have been sold by the institution, and in particular of whether the pulling effect could be applied in this case.	The treatment of partial sale of credit obligations of an obligor is described in paragraph 47 of the Guidelines. The pulling effect is not an obligatory indication of default but institutions may use it where it is considered appropriate. Therefore, in the case of retail exposures where default definition is applied at the	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		facility level, institutions should decide themselves whether they will use the pulling effect and, if so, whether it will include the value of sold credit obligations.	
Implementation	Some respondents expressed concerns about the application of the threshold retrospectively. They argued that the behaviour of sellers would have been different had the proposed rules been in force at the time of sale. In addition it was mentioned that reporting and documentation subsequent to a sale might be technically challenging if no exposures to the client exist any more.	Treatment of the sale of credit obligations at a material credit-related economic loss as an indication of default is already required by Article 178(3)(c) of the CRR and hence the obligation to store this information for the purpose of estimation of risk parameters under the IRB Approach existed before the application of these Guidelines. Where the historical information is considered not representative of the current conditions this should be treated appropriately in the estimation of risk parameters. More guidance in this regard will be provided in the EBA Guidelines on the estimation of risk parameters.	No change
Other comments	One respondent proposed determining default in case of the sale of credit obligations by assessing whether there would have been an individual impairment adjustment on the exposure without the sale transaction, instead of the application of the threshold.	In order to achieve greater comparability of capital requirements across institutions the rules regarding the recognition of default should be as far as possible objective and independent of the applicable accounting framework. The approach proposed by the respondent would lead to excessive subjectivity of the assessment and would also depend on the locally applicable expectations with regard to the impairment adjustments.	No change
Question 5. Do you agree that expected cash flows before and after distressed restructuring should be discounted with the customer's original effective interest rate or would you prefer to use the effective interest rate applicable at the moment before signing the restructuring arrangement? Do you consider the specification of the interest rate used for discounting of cash flows sufficiently clear?			



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Level of the threshold	<p>Many respondents suggested that the proposed threshold should be increased; some suggested up to 5% or even up to 10%. A few respondents were of the opinion that the threshold should be removed and that instead the relevant measure for recognition of default should be set at a level when the new cash flow (NPV) would no longer be adequate to cover the value at origination of the obligation, regardless of the decline in NPV.</p> <p>One respondent suggested that similar thresholds should be used for all comparisons (e.g. distressed restructuring, discount in case of sale of obligations).</p>	<p>Distressed restructuring should lead to recognition of default whenever it leads to diminished financial obligation caused by material forgiveness, or postponement, of principal, interest or, where relevant fees. As the term distressed restructuring already implies that an obligor is facing substantial financial difficulties, the main purpose of the specified threshold is to avoid the recognition of default due to some technicalities related to the calculation of NPV, rather than to reflect the materiality of the loss. The other thresholds apply to different values and have a different economic rationale; therefore, there is no justification for using the same level of threshold.</p>	No change
Interest rate	<p>The majority of respondents supported the use of the original effective interest rate while a few respondents were in favour of using the current (before signing the restructuring contract) effective interest rate.</p>	<p>The majority view of the respondents was taken into account and, as proposed in the Consultation Paper, the original effective interest rate was specified as the appropriate discounting factor for the purpose of NPV calculation.</p>	No change
	<p>Many respondents asked for clarification on the treatment of variable rate contracts (here it was suggested that the variable component should be used at the current level together with the spread that was negotiated originally in the contract). In addition it was suggested that a certain approximation should be allowed in line with IFRS. In addition some respondents asked for clarification of the rule for those institutions that do not use IFRS and suggested that these banks should be allowed to use a different interest rate for the purpose of discounting cash flows. Furthermore, clarification was</p>	<p>It has been specified that NPV should be calculated with the use of the original effective interest rate as a discounting factor in order to align the rule with accounting practices. Therefore, any approximation of such rate or treatment of variable rates that is used for accounting purposes should also be used in the calculation of NPV for the purpose of default identification.</p> <p>It has to be stressed that the calculation of diminished financial obligation is relevant only to distressed</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>requested of which interest rate should be used in the case of purchased or originated credit-impaired financial assets.</p> <p>Finally, it was argued by a respondent that the classification to defaulted status of the distressed restructuring should not be based on the 'impairment test' for accounting purposes, as the objective of this test is only to evaluate when an impairment has been produced as a consequence of modification of a contract and not to determine whether the exposure is defaulted.</p>	restructuring, i.e. the restructuring that results from financial difficulties of the obligor. In this situation, whenever the financial obligation has diminished as a result of material forgiveness, or postponement, of principal, interest or, where relevant fees, default should be recognised.	
Application of the threshold	Several respondents asked for clarification of whether the formula for the loss calculation includes cash flows from recoveries.	The formula for NPV both before and after the restructuring arrangements is based only on the contractual schedules of payments and not on the cash flows that are actually expected, where they are different.	No change
	Some respondents requested further alignment with IFRS 9, according to which banks shall assess significant increase in credit risk but forbearance measures that diminish the cash flows of the contract do not necessarily automatically result in a credit-impaired status (defaulted status) under IFRS 9.	The Guidelines only provide further clarification on the application of Article 178 of the CRR and cannot contradict it. According to Article 178(3)(d) of the CRR distressed restructuring that is likely to result in a diminished financial obligation caused by material forgiveness, or postponement, of principal, interest or, where relevant fees should be considered an indication of unlikelihood to pay.	No change
	Some respondents indicated cases where the threshold might not work properly. These include a situation where the interest reset date has been passed in the case of defaulted exposures and the exposures are therefore subject to daily interest rates (as in these cases the	The Guidelines were specified with the intention of not introducing excessive complexity. The proposed approach to the assessment of diminished financial obligations should be sufficiently universal to be applied to any type of exposure. This calculation is	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	proposed present value test would always lead to a default) and where a lower interest rate after a distressed restructuring might be due to lower risk if the restructuring brought in additional collateral or an increase in seniority.	only relevant to exposures that are not yet defaulted before the restructuring arrangements. In order to be able to compare the financial obligations, the NPV before and after restructuring should be calculated with the use of the same discounting factor. The potential additional collateral may contribute to a more effective recovery processes in the case of default but in general does not change the fact of whether default has occurred or not.	
	One respondent proposed that the calculation of loss that results from the comparison of the NPVs of the cash flows before and after restructuring should account for available collateral. Transactions with solid collaterals or relating to exposures past due where the customer has increased the level of collaterals or paid the underlying interest should not be classified as distressed restructuring.	The existence of collateral may contribute to a more effective recovery process in the case of default but it cannot be used to avoid the identification of default.	No change
Other comments	A few respondents argued that paragraph 43 of the draft Guidelines, which requires that all forborne non-performing exposures should be classified as defaulted and subject to distressed restructuring, should be deleted. This is seen as contradictory to the statement included in the accompanying documents that the alignment of the definition of default with the non-performing exposures should be non-obligatory.	The accompanying documents include the analysis of various options considered in the process of the specification of the Guidelines but the final policy choices are reflected in the legal text of the Guidelines. While it was proposed that the pulling effect used for the purpose of supervisory reporting should not be treated as an obligatory indication of unlikelihood to pay in the identification of default, it was considered important to specify that all forborne non-performing exposures should be classified as defaulted.	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Several respondents indicated that it should be made clear that the concept of distressed restructuring should not apply if a revision of the conditions is allowed by the contract or by specific laws or where the conditions are changed based on commercial renegotiations.	The definition of distressed restructuring has been aligned with the definition of forbearance used for the purpose of supervisory reporting. As forbearance refers only to such changes of terms and conditions resulting from financial difficulties of the obligor, only such situations should be treated as potential indications of unlikelihood to pay in accordance with Article 178(3)(d) of the CRR.	No change
	A concern was expressed by some respondents that the proposed rules may lead to an increase in non-performing loans, as currently in the case of the first forbearance measure 'under probation' a default only occurs after the 30 days past due criterion or after the implementation of the second forbearance measure. These respondents suggested that the current methodology should be maintained.	<p>The Guidelines do not change the rules for supervisory reporting. Rather, some of the rules that apply in supervisory reporting were transposed into default identification processes in order to achieve greater alignment. In particular it has been specified that all forborne non-performing exposures should be classified as defaulted. This rule will not increase the number of non-performing loans but, depending on the currently applicable practices, may lead to the recognition of more defaults.</p> <p>However, where the currently applied practices in the recognition of default are less strict than those specified in the Guidelines and the exposures defaulted in accordance with the Guidelines were not previously classified as non-performing, an increase in non-performing loans may result from the rule that all defaulted exposures should be reported as non-performing.</p>	No change
	One respondent saw the proposal for calculation of NPV as overly burdensome.	As the calculation of NPV should be applied for the purpose of the identification of default, it only applies	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		to those exposures that are subject to distressed restructuring and have not been recognised as defaulted yet. As the calculation is based only on actual contractual obligations with an interest rate that is already used for accounting purposes, it should not be overly burdensome.	
Q6. Do you agree that the purchase or origination of a financial asset at a material discount should be treated as an indication of unlikelihood to pay?			
	<p>The majority of respondents were of the opinion that the purchase or origination of a financial asset at a material discount should not be treated as an indication of unlikelihood to pay or that it should only be treated as such if this material discount is due to credit quality issues. It was argued that, otherwise, performing clients would need to be classified as in default. However, some respondents supported this event being an indication of unlikelihood to pay or suggested that it should be an auxiliary indicator.</p> <p>Some respondents suggested that the treatment of the purchase or origination of a financial asset at a material discount should be aligned with the treatment of the sale of credit obligations. It was, however, also noted that the treatment would not be appropriate for the purchase of a portfolio where the discount should not necessarily lead to default on all assets but maybe just some of them. Hence the treatment should entail individual assessment of the creditworthiness of the obligor and should not rely solely on rating agency downgrades.</p>	<p>The treatment of the purchase or origination of a financial asset at a material discount has been specified in paragraph 62 of the Guidelines. This approach will ensure greater comparability across institutions and will provide alignment with the accounting standards. It has been specified that the asset should be considered defaulted only in the case of unlikelihood to pay considerations. A similar assessment is performed for accounting purposes in order to decide whether the asset should be considered impaired. This approach will ensure that the classification of exposures as defaulted will be based on the assessment of the credit quality of the exposures.</p> <p>Although there is a clear relation between the purchase and the sale of a portfolio, especially in the case of intragroup transactions, where the assessment of the credit quality of the obligors should be consistent, full alignment of the treatment was not considered appropriate. In the case of the sale of credit obligations the price received by the institution determines the final economic loss related to this</p>	Par. 62



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		exposure. In the case of the purchase of an asset the price does not indicate the final outcome but is rather a starting point for the assessment.	
	Some respondents requested clarification on the criteria for a return to non-defaulted status in the case of exposures defaulted at the moment of purchase or origination.	As the classification to defaulted status will be based on the assessment of the unlikelihood to pay of the credit obligation, the same criteria for a return to non-defaulted status will apply as in the case of any other indication of unlikelihood to pay.	No change
Question 7. What probation periods before the return from default to non-defaulted status would you consider appropriate for different exposure classes and for distressed restructuring and all other indications of default?			
Fixed minimum probation periods	<p>The majority of respondents did not agree with fixed probation periods, and the arguments include, among others, possible inconsistency with Article 178(5) of the CRR, lack of alignment with IFRS 9 and consequences for internal management practices. The respondents in general prefer more flexibility in setting probation periods and in some situations it should be possible to shorten the probation period. It is also argued that institutions should be able to choose those tried and trusted periods from their individual internal risk management.</p> <p>A few respondents suggested that the probation period should not apply if default is triggered on the basis of the days past due criterion.</p> <p>However, several respondents agreed with the proposal for the probation period and expressed support for rationalising and aligning the conditions for reclassification to a non-defaulted status.</p>	<p>The specification of the probation period is based on the assumption that where default has been recognised the assessment of unlikelihood to pay should be more cautious. The application of the probation period should prevent frequent reclassifications of exposures where unlikelihood to pay may still exist.</p> <p>The same consideration applies to those cases where default is triggered on the basis of the days past due criterion, as, before reclassification, institutions should make sure that the improvement of the financial situation of the obligor is permanent and that the reclassification is not a result of a one-off payment.</p> <p>It also has to be stressed that the Guidelines specify only minimum lengths for probation periods and, where appropriate, institutions may apply longer periods. In particular, the length of the probation</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		period may be different for different types of exposures.	
Length of the probation period	Several respondents argued that the 3-month probation period is too long for both large corporate exposures and retail consumers, in particular when applied together with the strict definition of technical default. Other respondents suggested that the length should be different for different types of products, customers or triggers of default. However, some respondents envisaged that applying changed probation periods to historical defaults would be challenging in the recalibration of IRB models, especially if different probation periods are applied to different types of default events. One respondent proposed that in order to address short-term instruments the probation period could be set in terms of a percentage of the remaining period.	<p>It is considered that the 3-month probation period is the shortest period during which a meaningful assessment of the improvement of the credit quality of the exposures can be performed. This is also consistent with the results of the QIS, which indicate that where probation periods are used they have a length of at least 3 months and in many cases much longer probation periods are used.</p> <p>Regarding the differentiation of the length of such periods it was decided that institutions should be allowed to decide whether such differentiation is appropriate in a specific situation. Therefore, institutions may apply different probation periods for different types of exposures but each of those probation periods has to be at least 3 months.</p>	No change
Alignment	Many respondents mentioned the importance of aligning regulatory proposals with the treatment of non-performing loans in supervisory reporting and with IFRS 9. In particular, concerns were expressed in the context of exposures classified as Stage 2 under IFRS 9.	<p>The application of probation periods does not affect the alignment with supervisory reporting. As all defaulted exposures have to be reported as non-performing the exposures will remain non-performing until the end of the probation period and until the reclassification to non-defaulted status or the termination of the exposure. As a result the classification of exposures as non-performing will remain consistent with their classification as defaulted.</p> <p>With regard to IFRS 9 it is in general recommended</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		that for accounting purposes the same definition of default should be used as for prudential purposes. This includes in particular the criteria for the reclassification of exposures. It has to be noted that in the case of IFRS 9 this alignment will refer to exposures classified as Stage 3, whereas exposures in Stage 2 are not considered defaulted unless other indications of unlikelihood to pay are observed.	
Alternative solution	One respondent presented an alternative proposal that instead of probation periods a maximum relative amount of multiple defaults could be introduced.	This proposal could potentially achieve similar objectives to those of the probation periods but it was not included in the Guidelines as it is not in line with the current practices of the institutions and it could be difficult to implement for institutions that use the Standardised Approach.	No change
Material payment	A few respondents suggested that in the case of distressed restructuring the requirement should be aligned with the reporting framework and the obligor should either make a material payment or otherwise demonstrate the ability to comply with the post-forbearance conditions.	As all defaulted exposures have to be reported as non-performing the alignment with the reporting framework has not been compromised. Institutions should be particularly cautious when reclassifying exposures that were subject to distressed restructuring and it is important that material payment be made before reclassification. Only this way can the obligor truly demonstrate both the ability and the willingness to repay the obligation in accordance with the post-restructuring conditions.	No change
Grace period	Several respondents requested clarification of which repayment suspensions shall be considered a 'grace period' in accordance with paragraph 59 of the Consultation Paper. The postponement of a due	A 'grace period' as referred to in paragraph 72 of the Guidelines should be understood as a period during which no or only interest payments are required. However, institutions should also assess unlikelihood	Par. 53



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	instalment and/or due interest and/or a due fee towards the end of the credit period should not be considered an extension of the 'grace period' towards the end of the credit period. Should such postponement be considered a 'grace period' this would indicate that the 1-year minimum period starts at the end of the credit period.	to pay in the context of the specific repayment schedule. In accordance with paragraph 52 of the Guidelines an irregular repayment schedule where significantly lower payments are envisaged at the beginning of the repayment schedule, a large lump sum payment is envisaged at the end of the repayment schedule or a significant grace period is envisaged at the beginning of the repayment schedule may indicate unlikelihood to pay.	
Partial losses	Clarification was requested of how to treat exposures with incurred partial losses.	No additional conditions were added in the Guidelines as it is considered that it is possible to return to non-defaulted status even in a case where partial losses have been incurred on a specific exposure. This is, in particular, possible in the case of distressed restructuring where the loss could have been incurred at the moment of the restructuring. Such loss should not prevent a return to non-defaulted status where all conditions specified in that regard in the Guidelines are met. However, where the advanced IRB Approach is used these losses should be taken into account in the estimation of LGD.	No change
Question 8: Do you agree with the proposed approach as regards the level of application of the definition of default for retail exposures?			
	The large majority of respondents supported the proposed approach, especially with regard to alignment of the level of application of the definition of default with internal risk management practices. In addition, clarification was requested of paragraph 74 of the Consultation Paper, which requires keeping the number	The rules proposed for the level of application of the definition of default for retail exposures remained as specified in the Consultation Paper. It was not possible to provide more clarity on the possible level of overlap of obligors between portfolios subject to facility and obligor-level definitions of default and in particular it	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	of clients under different levels of application of the definition of default to a strict minimum.	was not considered appropriate to specify a certain threshold in that regard. The extent of overlap should be assessed individually for each situation; however, the wording 'strict minimum' suggests that the extent of acceptable overlap should be limited to very few individual cases.	
Question 9: Do you consider that where the obligor is defaulted on a significant part of its exposures this indicates the unlikelihood to pay of the remaining credit obligations of this obligor?			
	The majority of respondents agreed that the pulling effect can be included as an additional, but not automatic, indication of unlikelihood to pay. Several respondents questioned the proposals for a possible automatic contagion rule based on additional indications of unlikelihood to pay in the case of default definition at the facility level. On the other hand, a few respondents suggested that the pulling effect should be mandatory and aligned with supervisory reporting requirement or that the threshold is too low.	Taking into account the concerns expressed by the respondents it was specified that the pulling effect could be taken into consideration as an additional indication of unlikelihood to pay but that this should not be an obligatory criterion for default.	No change
Question 10. Do you agree with the approach proposed for the application of materiality threshold to joint credit obligations?			
Contagion rules	Many respondents expressed general agreement with the proposed requirements. However, there was also a general opinion that automatic consideration of all individual obligors participating in a joint credit obligation as defaulted is too strict, especially in the case of many individual obligors. Several respondents suggested that a case-by-case assessment should be applied.	Taking into consideration the concerns expressed by the respondents, specific situations have been defined in paragraph 97 of the Guidelines where the default of a joint credit obligation does not have to lead to default of individual exposures to these obligors.	Par. 97



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Competition	Several respondents mentioned that competition issues may arise between Member States due to differences in materiality thresholds.	The concept of the materiality threshold and the way it applies have been harmonised through the RTS on the materiality threshold for past due exposures and these Guidelines. The right of the competent authorities to specify the exact level of the threshold has been granted by Article 178(2)(d) of the CRR and the differences between the Member States should reflect in particular different market and economic conditions in these countries.	No change
Operational burden	<p>Some respondents mentioned the operational burden in identification of those obligors that are within the scope of application of the joint default treatment, and also in terms of applying the treatment on a group-wide basis and criteria for the return to non-defaulted status.</p> <p>A few respondents argued that the identification of full joint liability of retail obligors (e.g. a married couple) on an ongoing basis is overly burdensome. Other respondents opined that consideration of contagion across retail and corporate exposures may not be possible and contradicts commonly applied management approaches. One respondent suggested that the alternative solution mentioned in the Consultation Paper (aggregating of individual and joint credit obligations) should be available for portfolios, for which the general approach is too costly or burdensome.</p>	As the implementation of some of the provisions included in the Guidelines may be challenging for some institutions, a long implementation period has been envisaged. As the relations between clients provide relevant information for the assessment of risk it is considered important that the institutions collect such information. However, where the full implementation of these requirements is overly burdensome and the effect of non-compliance is material, institutions may agree with their competent authorities appropriate action plans or demonstrate that the effect of non-compliance is immaterial on the basis of Article 146 of the CRR.	No change
Default counting	One respondent requested clarification of how default on a joint credit obligation should be counted in the default time series.	A joint obligor should be counted as a separate obligor. Therefore, default on a joint credit obligation should be counted separately from default of	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		individual obligors.	
Question 11. Do you agree with the requirements on internal governance for banks that use the IRB Approach?			
	A large majority of the respondents agreed with the proposal. It was stressed by several respondents that it is important that the requirements be aligned with BCBS Guidelines on credit risk management processes. A few respondents mentioned possible difficulties with regard to the use test requirement, especially in the context of a large number of upcoming changes in the area of the IRB Approach.	The requirements on internal governance are based directly on the requirements for IRB institutions included in the CRR but they do not contradict BCBS guidelines. A long implementation period has been specified in order to account for the fact that during this period not only the changes in the definition of default will have to be implemented but in the case of institutions that use the IRB Approach also other changes related to the review of the IRB Approach.	No change

APPLICAZIONE DELLA DEFINIZIONE DI DEFAULT AI SENSI DELL'ARTICOLO 178 DEL REGOLAMENTO (UE) n. 575/2013 E ADEGUAMENTO DELLE DEFINIZIONI DI ESPOSIZIONI CREDITIZIE DETERIORATE

Con la presente nota si forniscono orientamenti sull'applicazione del Regolamento Delegato (UE) n. 171/2018 sulla soglia di rilevanza delle obbligazioni creditizie in arretrato ai sensi dell'art. 178, par. 2, lettera d) CRR (RD), che rappresentano la posizione della Banca d'Italia su come va applicata la disciplina del RD. Inoltre, sono forniti chiarimenti sulle disposizioni attuative degli Orientamenti dell'EBA sull'applicazione della definizione di default (LG EBA). Gli orientamenti e i chiarimenti potranno essere rivisti anche in relazione a eventuali future indicazioni delle autorità europee.

Ambito di applicazione

1. *Qual è l'ambito di applicazione della nuova definizione di default in relazione ai portafogli contabili previsti dall'IFRS 9?*

La definizione di default si applica alle esposizioni creditizie classificate a fini prudenziali nel portafoglio bancario – per le quali l'esposizione ponderata per il rischio è calcolata conformemente alla Parte Tre, Titolo 2 (Requisiti patrimoniali per il rischio di credito) del CRR. L'ambito di applicazione della nuova definizione di default prescinde dall'articolazione dei portafogli contabili.

2. *Nell'ambito del factoring, nel caso dell'acquisto pro-soluto di un credito commerciale scaduto è possibile far decorrere il conteggio dei giorni di arretrato dalla data di acquisto o dalla data di presunto incasso?*

Il par. 28 delle LG EBA chiarisce che il conteggio dei giorni di arretrato per un credito commerciale acquistato e iscritto nel bilancio del *factor* inizia quando il credito diventa esigibile. In linea generale, l'esigibilità del credito è indipendente dalla data di acquisto o dalla data di presunto incasso indicata nel contratto di cessione. Il conteggio deve quindi decorrere dal giorno successivo alla data di scadenza della fattura.

3. *Le moratorie ex-lege (es., L. 24 luglio 2018 n. 89) rientrano tra le fattispecie disciplinate dal par. 18 delle LG EBA?*

Si conferma che le moratorie *ex-lege* rientrano tra le fattispecie regolate dal par. 18, in quanto cause sospensive del rimborso di un'obbligazione.

Calcolo delle soglie e quantificazione dell'obbligazione creditizia in arretrato

4. *Il calcolo delle soglie di rilevanza deve essere effettuato solo a livello consolidato per poi farne discendere gli effetti anche sulla classificazione delle controparti a livello individuale?*

Si conferma che la rilevanza di un'esposizione creditizia in arretrato ai fini della classificazione di un debitore a *default* deve sempre essere valutata facendo riferimento all'esposizione complessiva del gruppo bancario verso uno stesso debitore, secondo quanto previsto dal RD. La classificazione di un debitore in *default* così determinata si riflette sulla classificazione a livello individuale.

5. *Le esposizioni connesse con l'erogazione di servizi di tesoreria (i.e. anticipazioni e delegazioni di pagamento) devono essere incluse nel computo delle esposizioni da considerare ai fini del calcolo delle soglie di rilevanza?*

Ai fini del calcolo della soglia di rilevanza occorre considerare tutte le esposizioni creditizie rilevate in bilancio. Ne consegue che anche le esposizioni relative alle anticipazioni di tesoreria o delegazioni di pagamento rilevate in bilancio rientrano nel calcolo delle soglie.

6. *Con riferimento ai crediti per leasing, nella quantificazione dell'obbligazione creditizia in arretrato devono essere considerate solo le rate previste dal piano di ammortamento o anche eventuali oneri di natura non finanziaria (es. spese condominiali, bolli, multe) connessi al contratto di leasing?*

Le esposizioni nei confronti del locatario a fronte di spese connesse con l'immobile oggetto di leasing finanziario, se non ricomprese nel credito per leasing e classificate in bilancio nella voce "altre attività", ai sensi della Circolare n. 262 "Il bilancio bancario: schemi e regole di compilazione", non rientrano nell'ambito di applicazione della definizione di *default*.

Ritorno a uno stato di non default

7. *Nel valutare il ritorno a uno stato di non default per un'esposizione oggetto di concessioni deteriorata, il cure period di "almeno un anno" previsto par. 72 delle LG EBA include i tre mesi richiesti dal par. 71 per la generalità delle esposizioni?*

Le condizioni per la riclassificazione a uno stato di non *default* definite dai parr. 71 e 72 devono intendersi come alternative. Infatti, il par. 71 esclude espressamente dal suo ambito di applicazione le situazioni di cui al par. 72.

Il par. 54 chiarisce poi che tutte le esposizioni oggetto di concessioni deteriorate devono essere classificate come oggetto di ristrutturazione onerosa. Ne consegue che queste ultime rientrino nell'ambito di applicazione del solo par. 72 e richiedano, quindi, un *cure period* di almeno un anno per ritornare a uno stato di non *default*.

8. *Un limitato ritardo nei pagamenti durante il cure period compromette il ritorno a uno stato di non default?*

La valutazione del comportamento del debitore di cui al paragrafo 71 lettere b) – d) delle LG EBA è rimessa alla autonoma valutazione dei responsabili aziendali e va ispirata ai principi di sana e prudente gestione. Essa deve seguire linee di indirizzo formalmente definite. In tale ambito, la sola individuazione a priori di un criterio oggettivo, quale un numero fisso di giorni di ritardo, non costituirebbe indicazione sufficiente per disattivare la classificazione a *default* di una singola esposizione o di un debitore.

Obbligazioni creditizie congiunte

9. *Le LG EBA prevedono (par. 97) che il default su un'obbligazione creditizia congiunta implichi il default di eventuali altre esposizioni congiunte verso i medesimi debitori e delle singole esposizioni verso gli stessi, salvo che l'obbligazione congiunta i) costituisca parte irrilevante delle obbligazioni totali di un debitore o ii) che il ritardo risulti da una controversia tra i singoli obbligati. In sede di prima classificazione a default, l'esposizione contagiata deve essere classificata nella classe del debitore contagiante o sempre come "inadempienza probabile"? Cosa si intende per "parte irrilevante"?*

Si evidenzia preliminarmente che l'esposizione creditizia congiunta va considerata come esposizione verso una "controparte" a sé stante. Se sono presenti più esposizioni congiunte verso i medesimi debitori occorre considerare l'ammontare complessivo di tutte queste esposizioni congiunte ai fini del calcolo della soglia di materialità ⁽¹⁾. Nel caso in cui dal calcolo risulti che sussiste uno scaduto rilevante da oltre 90 giorni, tutte le esposizioni congiunte vanno considerate in uno stato di *default*. Nell'ambito della disciplina segnaletica non armonizzata è rimessa poi all'autonomia dei responsabili aziendali la valutazione sulla sussistenza delle condizioni per una classificazione delle esposizioni congiunte in *default* fra le "inadempienze probabili", le "sofferenze" o gli "scaduti e/o sconfinanti".

Occorre inoltre verificare, nel caso in cui l'esposizione/i congiunta/e classificata/e versa/versano in uno stato di *default*, se vi sono altre esposizioni verso i medesimi debitori individualmente considerati e determinare se queste sono state "contagate" sulla base di un criterio di rilevanza. La verifica del contagio va effettuata considerando tutte le esposizioni verso lo specifico debitore, incluse le esposizioni congiunte.

Relativamente alla nozione di rilevanza di un'obbligazione creditizia congiunta, deve ritenersi che un'obbligazione congiunta sia "irrilevante" rispetto alle obbligazioni totali del debitore se la sua inclusione nell'importo della complessiva obbligazione creditizia in arretrato (numeratore della soglia) e nell'importo complessivo di tutte le esposizioni verso i singoli debitori coinvolti (denominatore della soglia) non è determinante per il superamento della soglia di rilevanza ⁽²⁾. Nell'ambito della disciplina segnaletica non armonizzata la classificazione, in caso di contagio, dovrà essere allineata a quella dell'esposizione/i creditizia congiunta/e.

¹ A titolo esemplificativo, si consideri l'esistenza di due finanziamenti ("Alpha" e "Beta") nei confronti di tre clienti al dettaglio ("A", "B" e "C"), ugualmente responsabili del rimborso di ciascuna obbligazione creditizia (i.e. clienti congiunti). L'importo dell'obbligazione creditizia nei confronti del debitore congiunto "ABC" è pari a mille euro per il finanziamento "Alpha" e 2 mila euro per il finanziamento "Beta". Trattandosi di esposizioni creditizie nei confronti della clientela al dettaglio, nel caso in cui il creditore applichi la definizione di *default* a livello di singolo debitore, l'importo complessivo di tutte le esposizioni verso il debitore "ABC" ai fini del calcolo della soglia di rilevanza è pari a 3 mila euro (i.e. mille per il finanziamento "Alpha" e 2 mila euro per il finanziamento "Beta").

² A titolo esemplificativo, sviluppando ulteriormente l'esempio riportato nella nota precedente, si consideri l'esistenza di un finanziamento nei confronti del cliente al dettaglio "C". Si ipotizzi che l'importo dell'obbligazione creditizia nei confronti del debitore "C" sia pari a 500 mila euro e che l'esposizione sia *performing*. Nell'ipotesi in cui l'esposizione complessiva verso il debitore congiunto "ABC" sia scaduta e classificata in stato di *default*, la complessiva obbligazione congiunta nei confronti del debitore "ABC" (importo pari a 3 mila euro) risulta "irrilevante" rispetto alle obbligazioni creditizie complessive del debitore "C" (importo dell'obbligazione creditizia ai fini del calcolo della soglia di rilevanza pari a 503 mila euro) dal momento che l'inclusione delle obbligazioni congiunte nell'importo della complessiva obbligazione creditizia in arretrato e nell'importo complessivo di tutte le esposizioni verso il debitore "C" non determina il superamento della soglia di rilevanza relativa dell'1 per cento. Pertanto il debitore "C" non dovrà essere classificato in stato di *default*.

Resta salva la necessità di valutare, nel caso di mancato superamento della soglia di rilevanza, se il *default* sull'obbligazione congiunta sia comunque indicazione dell'esistenza dei presupposti per la classificazione a inadempienza probabile delle altre obbligazioni creditizie verso ciascun singolo debitore rientrante nell'esposizione congiunta.

Applicazione alle operazioni di cessione del quinto

10. *Nell'ambito delle operazioni di cessione del quinto dello stipendio o della pensione (CQSP) è possibile far decorrere il conteggio dei giorni di arretrato dallo scadere della cd. "franchigia legale"⁽³⁾ e di eventuali ulteriori "franchigie contrattuali" pattuite tra l'Amministrazione Terza Ceduta (ATC) o altro soggetto interposto e l'ente finanziatore?*

Si conferma che il momento a partire dal quale le rate di un'operazione CQSP vanno rimborsate decorre dallo scadere dei termini previsti dalla legge per il versamento delle rate dall'ATC (o dal soggetto terzo interposto) all'ente finanziatore ("franchigia legale"). Differimenti ulteriori della data di inizio del conteggio sono ammissibili solo in presenza di specifiche previsioni contrattuali.

Sino a quando i termini di "franchigia legale" e "contrattuale" non sono scaduti, l'intermediario finanziatore segnala l'importo della rata non versata come non scaduta in capo all'ATC o al soggetto terzo interposto.

11. *Nella Comunicazione del 17 marzo 2017 la Banca d'Italia ha rinviato ai D.P.R. 180 e 895 del 1950 un quesito sulla corretta quantificazione della durata della franchigia legale. È corretto affermare che la durata della franchigia legale possa essere compresa tra 30 e 60 giorni, a seconda del giorno in cui si è verificata la liquidazione?*

Nel caso specifico di dipendenti della Pubblica Amministrazione, in osservanza di quanto specificato dai D.P.R. 180 e 895 del 1950, il periodo di franchigia legale può avere una durata differente a seconda del giorno in cui si è verificata la liquidazione dello stipendio oggetto del contratto di CQS e non può comunque protrarsi oltre l'ultimo giorno del mese successivo a quello cui si riferiscono le quote trattenute.

12. *È possibile applicare la "franchigia legale" in maniera differenziata in funzione della natura della controparte, al fine di tener conto dei tempi tecnici di cui ciascuna categoria di ATC necessita per cominciare a retrocedere gli importi all'ente creditore?*

La durata della cd. "franchigia legale" va determinata nel rispetto di quanto stabilito dalla legge.

13. *Nell'ipotesi di cessioni pro-soluto di operazioni di cessione del quinto da un intermediario all'altro, è possibile prevedere un'integrazione della franchigia legale per tenere conto dei tempi tecnici necessari a una corretta disamina del portafoglio da parte dell'intermediario cessionario?*

Si rinvia alla risposta fornita al quesito n. 12.

³ Si intende qui per "franchigia legale" il periodo di tempo che intercorre tra il momento in cui la rata è trattenuta dall'ATC e il termine di legge (di cui ai D.P.R. n. 180 e 895 del 1950) entro cui l'ATC deve versarla all'istituto cessionario.



14. *Con riferimento alle operazioni di CQSP, è possibile prevedere ulteriori “franchigie tecniche” in considerazione del tempo necessario a imputare alle singole posizioni gli incassi ricevuti dalle ATC, nonché per l’analisi di quote residuali rimaste insolute a fronte di regolari pagamenti riferiti alla medesima esposizione? Errori relativi alla quadratura dei tracciati del Ministero dell’Economia e delle Finanze (MEF), che gestisce le trattenute ed il versamento agli intermediari per conto delle Pubbliche Amministrazioni, rientrano nelle fattispecie di scaduto tecnico?*

Non è possibile considerare franchigie diverse da quelle di natura legale e/o contrattuale. “Errori relativi alla quadratura dei tracciati del Ministero dell’Economia e delle Finanze (MEF)” danno luogo a “scaduti tecnici” qualora rientrino nei casi di cui ai punti (a) e (c) del par. 23 delle LG EBA.

15. *Le ATC indicano a quale rata attribuire i pagamenti che retrocedono agli intermediari e non è concessa all’intermediario la facoltà di assegnare il versamento a una specifica rata. È possibile estendere alle operazioni di CQSP la possibilità di associare l’ultima quota retrocessa alla rata più lontana?*

No, perché il debitore ha la facoltà di stabilire l’imputazione di un adempimento (cfr. art. 1193 Codice Civile). L’imputazione può essere determinata dal creditore solo in via successiva e residuale (cfr. art. 1195 CC).

16. *Nell’identificazione dei default, è possibile derogare al criterio basato sui giorni di arretrato e fare invece riferimento al numero di rate scadute?*

Non è possibile derogare ai criteri di identificazione dei *default* basati sul conteggio dei giorni di arretrato. Inoltre, si osserva che il conteggio inizia solo dopo il superamento delle soglie di rilevanza e non automaticamente dal 1° giorno di scaduto.

17. *È consentita la compensazione di posizioni scadute esistenti su alcune linee di credito con i margini disponibili esistenti su altre linee di credito concesse al medesimo debitore/cedente?*

La nuova disciplina sul default non consente la compensazione di posizioni scadute esistenti su alcune linee di credito con i margini disponibili esistenti su altre linee di credito.

18. *Come deve essere calcolata la componente relativa della soglia di rilevanza per le operazioni di CQSP? Ai fini della verifica della rilevanza, occorre considerare la posizione globale verso l’ATC (o il soggetto terzo interposto) o le posizioni individuali dei singoli clienti percettori di reddito da quella amministrazione?*

Si precisa che i criteri per il calcolo della soglia relativa di rilevanza sono specificati dal RD, articolo 1, punto 2, 3° paragrafo.

Con riferimento alle operazioni di CQSP, il calcolo della soglia di rilevanza è determinata dal rapporto tra l’ammontare complessivo classificato scaduto (ammontare impagato dopo i termini delle franchigie legali/contrattuali più eventuali altre esposizioni *past-due*) verso l’ATC o il soggetto terzo interposto e l’importo complessivo delle esposizioni creditizie per cassa verso l’ATC o il soggetto terzo interposto.

Il calcolo della soglia di materialità non si applica in capo all’ATC o al soggetto terzo interposto nei casi in cui l’intermediario abbia accertato, sulla base delle informazioni in suo

possesso o comunque acquisite nell'ambito del rapporto con i soggetti terzi interposti o con le ATC, che l'inadempimento è imputabile al dipendente/pensionato, l'ATC o l'ente interposto abbia esercitato azione di regresso e il dipendente/pensionato abbia accettato formalmente di pagare le rate scadute. In quest'ultimo caso la soglia verrà calcolata sul singolo cliente percettore di reddito considerando tutte le esposizioni che fanno capo allo stesso.

19. *Si chiede di chiarire le modalità di applicazione della nuova disciplina sul default nel caso in cui si verifichi un sinistro coperto dall'assicurazione obbligatoria che assiste i contratti di CQSP, prima e dopo la denuncia del sinistro.*

È utile in primo luogo ricordare che ai fini di bilancio e delle segnalazioni di vigilanza rimane valido quanto precisato con la [Comunicazione del 17 marzo 2017](#): i) nel caso di decesso del debitore l'esposizione derivante da CSQP deve essere imputata in capo all'assicurazione al verificarsi dell'evento; ii) nel caso di sinistri diversi dal decesso (es, perdita del lavoro) l'esposizione deve essere imputata in capo al dipendente/pensionato dalla data di denuncia da parte dell'ente finanziatore fino alla conferma formale da parte della compagnia assicurativa e in capo a quest'ultima dal momento della conferma; iii) nel caso in cui il debito sia rimborsato dall'ATC tramite il versamento del TFR maturato dal dipendente, l'intermediario finanziatore segnala un credito verso l'ATC per l'intero ammontare del TFR ancora da ricevere. Si chiarisce ulteriormente che le rate già trattenute dall'ATC ed eventualmente classificate come scadute rimangono in capo all'ATC o soggetto interposto.

Ne consegue che le rate classificate scadute dovranno essere imputate ai soggetti verso i quali l'ente finanziatore rileva il credito nell'attivo dello stato patrimoniale e rientreranno nel calcolo della soglia di materialità degli stessi soggetti, seguendo i criteri specificati dal RD, articolo 1, punto 2.

20. *Al verificarsi di un sinistro (es, morte o perdita del lavoro del debitore) coperto dalla polizza che obbligatoriamente accompagna le operazioni di CQSP, è possibile sospendere il calcolo dei giorni di arretrato, assimilando l'istruzione della pratica di rimborso da parte della compagnia assicurativa a una controversia tra debitore ed ente (LG EBA, par. 19)?*

Con riferimento alla possibilità di sospensione del conteggio dei giorni di scaduto si precisa che il calcolo può essere oggetto di sospensione o differimento esclusivamente nei casi previsti dai paragrafi 17, 18 e 19 delle LG EBA. Ne consegue che, in assenza di una specifica previsione contrattuale, ai sensi di quanto specificato nel paragrafo 17 delle LG EBA, non è possibile sospendere il conteggio per la lavorazione della pratica di rimborso ricorrendo per analogia al paragrafo 19 delle LG EBA.

21. *All'atto della conferma del sinistro da parte della compagnia assicurativa, un'esposizione deteriorata assistita da polizza può essere immediatamente riclassificata in stato di non default prescindendo dai periodi minimi previsti dalle LG EBA (in particolare, par. 71-73)?*

Con la [Comunicazione del 17 marzo 2017](#) è stato precisato che – ai fini delle segnalazioni statistiche di vigilanza e del bilancio – in presenza di sinistro un'esposizione creditizia derivante da CQSP deve essere imputata all'assicurazione garante i) dalla data del decesso del debitore o ii) dalla data in cui la stessa assicurazione conferma il sinistro, per tutte le altre fattispecie. Ne consegue che a far data dall'imputazione all'assicurazione i responsabili aziendali dovranno classificare l'esposizione, fra quelle non deteriorate oppure deteriorate, in

funzione del comportamento e della valutazione della nuova controparte (la compagnia assicurativa).

22. *Si chiede di chiarire se una diminuzione superiore all'1% del valore attuale netto (Net Present Value, NPV) dei flussi di cassa connessi a un'operazione di CSQP debba sempre ritenersi un indicatore di inadempienza probabile.*

La sola riduzione del valore attuale non deve ritenersi automaticamente indicatore di inadempienza probabile. Occorre valutare le ragioni della variazione intervenuta. L'art. 178, comma 3, lettera d) CRR precisa che una ristrutturazione onerosa si configuri quale indicazione di inadempienza probabile, quindi di *default*, laddove risulti “una ridotta obbligazione finanziaria dovuta a una remissione sostanziale del debito o al differimento dei pagamenti del capitale, degli interessi o, se del caso, delle commissioni”. Il par. 49 delle LG EBA, mediante rinvio al Regolamento 680/2014, specifica che la concessione nei confronti di un debitore che fronteggia, o è in procinto di fronteggiare, difficoltà finanziaria è preconditione necessaria per la sussistenza di una ristrutturazione onerosa.

23. *Piani di rientro privi di penali, interessi di mora o oneri accessori ma eventualmente comprensivi di spese legali giustificate da atti giudiziari devono essere considerati ristrutturazioni onerose?*

Un piano di rientro come quello descritto è da considerarsi ristrutturazione onerosa qualora costituisca una concessione nei confronti di un debitore che versi in una situazione di difficoltà finanziaria. Si veda pure quanto previsto dal par. 54 delle GL EBA.

Prima applicazione

24. *Sarà possibile avviare il conteggio dei giorni di arretrato ai fini della nuova definizione di default dal primo giorno di applicazione delle nuove regole?*

Dal primo giorno di applicazione delle nuove regole occorrerà verificare se ricorrano le condizioni per la classificazione in default di un'esposizione secondo la nuova definizione.

25. *Il nuovo concetto di cure period dovrà essere applicato solo ai debitori che vengano classificati in default secondo la nuova norma a partire dal 1° gennaio 2021 o occorre applicarlo retroattivamente?*

La riclassificazione in stato di non default secondo le nuove regole riguarderà le posizioni che alla data del 1° gennaio 2021 risulteranno essere in default.



EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Feedback Statement

Responses to the public consultation
on the draft ECB Regulation on the
materiality threshold for credit
obligations past due

BANKENTOEZICHT

November 2018

BANKTILLSYN BANKU UZRAUDZĪBA

BANKŲ PRIEŽIŪRA NADZÓR BANKOWY

VIGILANZA BANCARIA

BANKFELÜGYELET

BANKING SUPERVISION

SUPERVISION BANCAIRE BANČNI NADZOR

MAOIRSEACHT AR BHAINCÉIREACHT NADZOR BANAKA

BANKING SUPERVISION

PANGANDUSJÄRELEVALVE

SUPERVISÃO BANCÁRIA

BANKOVNI DOHLED

BANKENAUF SICHT

БАНКОВ НАДЗОР BANKTILSYN

ΤΡΑΠΕΖΙΚΗ ΕΠΟΠΤΕΙΑ PANKKIVALVONTA

SUPRAVEGHERE BANCARĂ BANKOVÝ DOHLAD

SUPERVIŽJONI BANKARJA

SUPERVISIÓN BANCARIA

BANKING SUPERVISION

SUPERVISÃO BANCÁRIA

BANKENAUF SICHT

Contents

A	Overview and analysis of responses	2
B	Comments on specific provisions of the draft ECB Regulation	4
C	Other comments on the draft ECB Regulation	11
D	Amendments to the draft ECB Regulation	12

This document seeks to provide an overview of the comments that were received during the public consultation on the draft ECB Regulation on the materiality threshold for credit obligations past due, which ran from 3 July to 17 August 2018, and to provide an assessment of those comments. Where applicable, it also explains the amendments that have since been made to the draft Regulation in response to the comments received. However, this document does not prejudge the future interpretation and application of the provisions laid down in the Regulation, since only the Court of Justice of the European Union can provide a legally binding interpretation of the provisions of EU law. Unless otherwise indicated, article numbers referred to in this document relate to the original draft ECB Regulation as submitted for public consultation.

A Overview and analysis of responses

On 3 July 2018, the European Central Bank (ECB) launched a public consultation on a draft ECB Regulation on the materiality threshold for credit obligations past due (hereinafter “the draft ECB Regulation”). Under Article 178(2)(d) of the Capital Requirements Regulation (hereinafter “the CRR”), the ECB, as a competent authority, is required to define the threshold against which the materiality of a credit obligation past due will be assessed for the purposes of identifying defaults by obligors in relation to obligors’ total obligations or at the level of individual credit facilities. When setting that materiality threshold, competent authorities have to take account of the provisions of Commission Delegated Regulation (EU) 2018/171 with regard to regulatory technical standards for the materiality threshold for credit obligations past due (hereinafter “the RTS”)¹.

That public consultation was conducted in accordance with Article 4(3) of Council Regulation (EU) No 1024/2013² conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and sought to collect written feedback and comments on the proposed provisions from industry participants and other interested parties. As part of the consultation process, the ECB gave people the opportunity to participate in a live question and answer session on the draft ECB Regulation, which took the form of a public conference call on 31 July 2018 involving senior representatives of the ECB. The public consultation ended on 17 August 2018.

The ECB has given due consideration to all of the comments that were received during the consultation period. Those comments are available [here](#). A total of nine responses were received, comprising 24 individual comments. However, five of those comments were not related to the draft ECB Regulation and have therefore not been considered in this feedback statement. Those respondents ranged from financial institutions and banking associations to individual citizens, as Table 1 shows.

¹ Commission Delegated Regulation (EU) 2018/171 of 19 October 2017 on supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for the materiality threshold for credit obligations past due (OJ L 32, 6.2.2018, p. 1).

² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

Table 1**Responses to the public consultation on the draft ECB Regulation**

Type of respondent	Number of respondents	Percentage of total
Credit and financial institutions	3	33%
Market and banking associations	5	56%
Public authorities	-	-
Individuals/others	1	11%
Total	9	100%

This feedback statement presents an assessment of the comments received during the public consultation. Although oral feedback received during the conference call is not reflected in Table 1 above, it was taken into account when preparing this statement. It should also be noted that most of the comments that were made during the conference call were repeated in written submissions.

This document sets out and responds to all relevant comments. Comments relating to specific provisions of the draft ECB Regulation are addressed in Section B, whereas other comments on the draft ECB Regulation are addressed in Section C. In order to avoid duplication, comments have been grouped together on the basis of the arguments made and presented as short summaries (in italics) at the start of each section. In each case, details of those comments are then followed by the ECB's assessment of the issue in question. The amendments that have since been made to the draft ECB Regulation on the basis of the comments received are summarised in Section D.

The final text of this ECB Regulation was adopted by the Governing Council of the ECB on 21 November 2018 and was published on the ECB's website, together with this feedback statement, on 26 November 2018. The ECB Regulation will be published in the Official Journal of the European Union on 26 November 2018.

B Comments on specific provisions of the draft ECB Regulation

B.1 Subsidiary undertakings outside the euro area – Article 1

One respondent requested confirmation that EU subsidiary undertakings outside the euro area only needed to comply with the ECB Regulation where local competent authorities had not set a materiality threshold. The same respondent also enquired as to whether Paragraph 83 and subsequent paragraphs of the EBA Guidelines on the application of the definition of default under Article 178 of the CRR (EBA/GL/2016/07) (hereinafter “the EBA Guidelines”) were applicable, given the provisions of the draft ECB Regulation.

One respondent remarked that the past due criterion would be considered differently by subsidiaries of significant institutions and institutions in non-participating Member States where local competent authorities set materiality thresholds that differed from that set by the ECB, which could impede the level playing field across the EU.

Article 1(2) of the RTS states that the materiality threshold to be set by a competent authority for credit obligations past due in its jurisdiction should consist of an absolute component and a relative component. The absolute component should be expressed as a maximum amount for the sum of all amounts past due that are owed by an obligor to an institution, the parent undertaking of that institution or any of its subsidiaries. The relative component, meanwhile, should be expressed as a percentage indicating the amount of credit obligations past due in relation to the total amount of on-balance-sheet exposures to that obligor held by the institution, the parent undertaking of that institution or any of its subsidiaries, excluding equity exposures. The above provisions are reflected in Articles 3(1)(a) and 3(1)(b) of the ECB Regulation, which is applicable exclusively to significant institutions, as stated in Article 1 of the Regulation.

In jurisdictions outside the euro area, a materiality threshold which differs from the one set by the ECB may apply under national law. In this case, an institution in a non-participating Member State, for example, should assess the materiality of a credit obligation past due against a threshold defined by the competent authority of that Member State, which could be different from the materiality threshold set out in the ECB Regulation. This means that the materiality thresholds – and, as a result, the definitions of default – applied by an institution in a non-participating Member State and a significant institution could be different, even if both belong to the same banking group. That scenario is one of the situations addressed by Paragraph 83 of the EBA Guidelines, which the ECB will require full compliance with from 1 January 2021. The EBA Guidelines state that institutions, parent undertakings and subsidiaries should use the same definition of default for all exposures of the same type, but that different definitions of default may be used for different types of exposure (e.g. in the case of specific types of legal entity or presences in

geographical locations that are not achieved via a legal entity). However, this should be justified by the application of significantly different internal risk management practices for those different types of exposure or different legal requirements (such as different materiality thresholds set by competent authorities) in the different jurisdictions. Moreover, according to Paragraph 85 of the EBA Guidelines, where institutions use the internal ratings-based (IRB) approach laid down in Part Three, Title II, Chapter 3 of the CRR, the use of different definitions of default has to be adequately reflected in the estimation of risk parameters in the case of rating systems whose scope of application encompasses different default definitions.

While the ECB acknowledges that the entry into force of the Regulation will not solve all of the discrepancies in the identification of defaults that could potentially occur at jurisdiction level – or even at banking group level – it believes that this legislation will contribute to a level playing field across the Single Supervisory Mechanism (SSM) as regards capital requirements.

B.2 Exchange rate to be used – Article 3(1)

Two respondents enquired about the exchange rate to be used when comparing the total amount past due with the absolute threshold for exposures held in foreign currency.

The absolute component of the materiality threshold established by Article 3(1) of the ECB Regulation is expressed in euro. Consequently, significant institutions will need to convert all of the relevant amounts to euro when applying the materiality threshold.

Since Article 3(3) of the ECB Regulation states that a default is deemed to have occurred when both components of the threshold are exceeded for 90 consecutive days, significant institutions should convert those figures to euro every day, using the exchange rate quoted on that day, in order to count the number of days that the threshold is exceeded.

Furthermore, Paragraph 21 of the EBA Guidelines states that significant institutions should ensure that all information about the number of days past due and defaults is up to date whenever it is used for decision-making, internal risk management, internal or external reporting and the calculation of own funds requirements, and that, where significant institutions calculate the number of days past due less often than daily, the date of default is the date when the days past due criterion is fulfilled for the first time.

In practice, a significant institution that calculates the number of days past due less often than daily could adopt an approach whereby, for each day, amounts past due and exposures to obligors are recorded in foreign currency together with the exchange rate quoted for that day, but the conversion to euro is applied less often than daily. In this situation, although the significant institution would be calculating the number of days past due less often than daily, it would still be able to determine

the precise date on which the days past due criterion was fulfilled for the first time using those daily amounts and daily exchange rates.

Irrespective of the approach used, significant institutions should have documented policies in respect of the counting of the number of days past due and the exchange rates used. These policies should, moreover, be in line with the significant institution's internal risk management and decision-making processes.

B.3 Legal impediments relating to confidentiality – Article 3(1)

One respondent pointed out that legal impediments relating to confidentiality could interfere with the requirement to consolidate defaults across the various legal entities in a supervised group.

In the event of legal impediments relating to confidentiality that could hamper the sharing of client data within an institution, the parent undertaking of that institution or any of its subsidiaries, significant institutions should apply the provisions set out in Paragraph 81 of the EBA Guidelines. Thus, they should inform the ECB of the relevant legal impediments and, if they use the IRB approach, they should estimate the materiality of the inconsistencies in the identification of a defaulting obligor and their possible impact on the estimates of risk parameters.

B.4 Possibility of applying a lower threshold – Article 3(1)

One respondent remarked that, owing to accounting laws or local requirements, banks could have to classify exposures as having defaulted on the basis of a materiality threshold that was lower than the one set out in the draft ECB Regulation. Although Paragraph 34 of the EBA Guidelines allows institutions to apply a lower threshold as an indication that payment is unlikely, the respondent considered that the application of this additional materiality threshold would result in burdensome monitoring of exposures against two thresholds. Consequently, the respondent proposed amending the draft ECB Regulation by including the following sentence in Article 3(1)(b): "By way of exception, lower materiality threshold could be used in order to respect accounting / local standards, when still using a day-past-due trigger".

Article 178(2)(d) of the CRR states that the materiality of a credit obligation past due should be assessed against a threshold defined by the competent authority. Articles 1(1) and 2(1) of the RTS require the competent authority to set, for all institutions in its jurisdiction, a **single** materiality threshold for retail exposures and a **single** materiality threshold for non-retail exposures. Consequently, Article 3 of the ECB Regulation sets a single materiality threshold for retail exposures and a single materiality threshold for non-retail exposures.

Without prejudice to the above, Paragraph 34 of the EBA Guidelines does indeed state that significant institutions may identify defaults on the basis of a lower

threshold if they can demonstrate that this lower threshold is an appropriate indication of the unlikelihood of payment being made and does not lead to (i) an excessive number of defaults that return to non-defaulted status shortly after being regarded as having defaulted or (ii) a decline in capital requirements. In this case, significant institutions should record details of the trigger for the default in their databases as an additional specified indication of the unlikelihood of payment being made. In addition, for significant institutions using the IRB approach, information about the trigger for the default could be relevant for the estimation of the loss given default (LGD), since it should be included in the reference dataset pursuant to Paragraph 109(c) of the EBA Guidelines on PD estimation, LGD estimation and treatment of defaulted assets (EBA/GL/2017/16), which the ECB will require full compliance with from 1 January 2021.

B.5 Adaptation of the absolute component to local jurisdictions – Article 3(1)(a)

One respondent asked whether it was possible to adapt the absolute component to the particularities of each local jurisdiction, given the differences in economic conditions (including price levels) across jurisdictions.

Articles 1(1) and 2(1) of the RTS require the competent authority to set, for all institutions in its jurisdiction, a **single** materiality threshold for retail exposures and a **single** materiality threshold for non-retail exposures. Consequently, the ECB, as a competent authority, only has a mandate to set those two materiality thresholds, which must be applied by all significant institutions within the SSM.

This approach ensures a level playing field across significant institutions within the SSM and consistent use of the materiality threshold, thus helping to reduce the burden of compliance for cross-border groups. As regards exposures booked in subsidiaries of significant institutions located in EU Member States outside the SSM, see paragraph B.1 for details of the possibility of using the materiality threshold set by the competent authority of the other Member State.

B.6 Level of the relative component – Article 3(1)(b)

With regard to the relative component of the materiality threshold, one respondent requested clarification regarding the identification of breaches on the basis of the proposed level.

Two respondents asked that the level of the relative component of the materiality threshold (as stipulated in Article 3(1)(b) of the draft ECB Regulation) be raised, as the proposed level would hamper other positive measures adopted by EU legislators in order to increase and improve the financing of European small and medium-sized enterprises. In particular, one respondent pointed out that in the leasing industry it is common for average monthly instalments/rentals to exceed 1% of contract

exposures and asked that the ECB consider adopting a rate of 2.5% for the relative component.

Article 3(1)(b) of the ECB Regulation states that the relative component of the materiality threshold stands at 1%, and Article 3(3) of the ECB Regulation states that a default is deemed to have occurred when both the absolute and the relative components of the threshold are **exceeded** for 90 consecutive days.

The level of the materiality threshold set out in the ECB Regulation (including the rate of 1% for its relative component) was based on a comprehensive cost-benefit analysis. In the course of that analysis, a variety of different threshold levels were analysed. That cost-benefit analysis showed that the level set out in the ECB Regulation represents a reasonable level of risk within the meaning of Article 3 of the RTS because it does not lead to the recognition of an excessive number of defaults that are due to circumstances other than the financial difficulties of obligors or significant delays in the recognition of defaults.

Given that, under Article 1(2) of the RTS, the ECB can only set the relative component at a level other than the baseline rate of 1% if it considers that this does not reflect a reasonable level of risk, the request to raise the level of the relative component of the materiality threshold cannot be considered.

B.7 **Application of the past due criterion – Article 3(3)**

One respondent suggested that the past due criterion should trigger the default of an obligor where the obligor has past due exposures exceeding the materiality threshold for 90 consecutive days and, at the same time, one of its exposures, considered alone, is more than 90 days past due.

The ECB Regulation reflects the threshold structure and the mechanism for counting the number of days past due that are demanded by the RTS. These may, in some cases, lead to a default being identified despite no individual exposure being more than 90 days past due. For instance, this could happen where an obligor repays some material past due exposures, but the number of days past due keeps increasing – instead of being reset – because there are other material exposures that are just a few days past due. In that case, a default will be triggered when the counter reaches 90 days, in line with Article 3(3) of the ECB Regulation, but on that day the remaining material exposures could be less than 90 days past due.

B.8 **Interaction between Paragraphs 25 and 26 of the EBA Guidelines and the draft ECB Regulation – Article 3(3)**

One respondent requested clarification as to whether the specific treatment of exposures to central government, local authorities and public sector entities that was outlined in Paragraphs 25 and 26 of the EBA Guidelines remained valid in light of the ECB Regulation.

Given that the ECB will require full compliance with the EBA Guidelines from 1 January 2021, the specific treatment of exposures to central government, local authorities and public sector entities that is outlined in Paragraphs 25 and 26 of the EBA Guidelines will remain applicable under the ECB Regulation.

It should be noted that the specific treatment set out in the EBA Guidelines has to be applied **after** the calculation of the materiality threshold. It can be applied to exposures that have been materially past due for 90 consecutive days, but **only** where all conditions specified in Paragraph 25 of the EBA Guidelines are met. If the credit obligation past due is immaterial under the ECB Regulation or it has been material for less than 90 days, the specific treatment is not relevant.

Where exposures have been materially past due for 90 consecutive days in accordance with the ECB Regulation and all conditions specified in Paragraph 25 of the EBA Guidelines are met, the specific treatment may be applied. This means that, in accordance with Paragraph 26 of the EBA Guidelines, those exposures are not treated as having defaulted within the meaning of Article 178 of the CRR and, from the time of the application of that specific treatment, those exposures have to be excluded from the calculation of the materiality threshold for all other exposures of the obligor. Importantly, the exposures that are subject to that specific treatment need to be clearly documented.

It goes without saying that if, after the application of that specific treatment, the materiality threshold is still exceeded on account of other exposures past due which are not covered by Paragraphs 25 and 26 of the EBA Guidelines, the obligor in question, and all of its exposures, are immediately regarded as having defaulted, since the obligor has still been materially past due for more than 90 consecutive days.

B.9 Application of the draft ECB Regulation – Article 4(2)

One respondent emphasised the need for a transition period in cases where the competent authority's current approach was significantly different from that set out in the draft ECB Regulation.

Two respondents requested clarification as to whether the draft ECB Regulation could be applied prior to the application date stipulated in Article 4(2). According to those respondents, the current application date (31 December 2020) did not give significant institutions using an IRB approach enough time to identify defaults in line with the provisions of the draft ECB Regulation and take them into account when making changes to their internal models – changes that, according to the EBA, needed to be finalised by the end of 2020.

The ECB acknowledges significant institutions' efforts to implement the materiality threshold, especially where competent authorities' current requirements differ significantly from those set out in the ECB Regulation.

The ECB agrees that, where significant institutions are using the IRB approach laid down in Part Three, Title II, Chapter 3 of the CRR, it would be beneficial to implement the materiality threshold prior to 31 December 2020 in order to be able to finalise changes to internal models by that date. By way of clarification, that date should therefore be regarded as the last possible date for achieving compliance with the provisions of the ECB Regulation.

In fact, the ECB has sent individual letters to significant institutions using an IRB approach, inviting them to voluntarily adhere to a new supervisory strategy – the Two-Step Approach – set up by the ECB in order to address the EBA roadmap for the review of the IRB approach and, in particular, the implementation of new provisions on the definition of default. Under that supervisory strategy, significant institutions have been invited to start making the necessary preparations and request ECB approval for early implementation of the new provisions on the definition of default, which would allow them to start collecting real default data using the new materiality threshold before 31 December 2020. Those real default data could then, subject to the ECB's approval, be used by those significant institutions to adjust their rating systems prior to 31 December 2020.

With the aim of addressing the respondents' comments regarding the application date, the ECB has decided to amend the Regulation, allowing all credit institutions to determine, by means of a notification letter to the ECB, the date of their application of the ECB Regulation (which must, however, be no later than 31 December 2020). That notification letter should be sent to the ECB by 1 June 2019 at the latest. Those amendments to the ECB Regulation will also allow the implementation of the Two-Step Approach, if credit institutions voluntarily decide to adhere thereto.

C Other comments on the draft ECB Regulation

C.1 Level of harmonisation

Two respondents welcomed the draft ECB Regulation on the basis that it increased the harmonisation of the definition of default across the Member States participating in the SSM and fostered consistent application, transparency and comparability across significant institutions.

The ECB agrees that the application of the new materiality threshold will lead to greater harmonisation of the past due criterion of the definition of default across the Member States participating in the SSM. The ECB Regulation fosters consistent application of the past due criterion, helping to enhance both the transparency of the default recognition process and the comparability of defaulted exposures and risk-weighted asset amounts across significant institutions.

C.2 Operational cost of implementing the proposed materiality threshold

One respondent remarked that the operational cost of implementing the proposed materiality threshold would be very high.

The ECB acknowledges the operational costs that significant institutions will incur in implementing this new materiality threshold, particularly where the current materiality threshold is significantly different from the requirements set out in the ECB Regulation. However, the ECB believes that the adoption of the proposed materiality threshold will help to harmonise the identification of defaults across the EU and will eventually simplify processes for significant institutions (especially for those involved in cross-border activities).

D Amendments to the draft ECB Regulation

Table 2

Amendments to the draft ECB Regulation

Provision in the ECB Regulation	Former provision in the draft ECB Regulation	Headings	Amendment
Recital 9	Recital 9	-	<i>"With regard to the legitimate expectations of supervised credit institutions, the ECB acknowledges the need to allow for transitional periods where its exercise of discretions significantly departs from the approach taken by the national competent authorities prior to the entry into force of this Regulation. In this respect, both credit institutions applying the Standardised Approach and the Internal Ratings Based Approach should have an appropriate transitional period. Therefore, credit institutions must apply the threshold for the assessment of the materiality of a credit obligation past due set by this Regulation not later than 31 December 2020 and must notify the ECB, before 1 June 2019, of the exact date on which they will commence applying such threshold."</i>
Article 1	Article 1	Subject matter and scope	<i>"The ECB hereby exercises the discretion conferred on competent authorities under Article 178(2)(d) of Regulation (EU) No 575/2013 in relation to the threshold for assessing the materiality of credit obligations past due. This Regulation shall apply exclusively with regard to credit institutions classified as significant in accordance with Article 6(4) of Regulation (EU) No 1024/2013 and Part IV and Article 147(1) of Regulation (EU) No 468/2014 (ECB/2014/17) and irrespective of the method used for the calculation of their risk-weighted exposure amounts."</i>
Article 4	Article 4	Date of application of the materiality threshold	<i>"Credit institutions shall apply the threshold for the assessment of the materiality of a credit obligation past due set by this Regulation not later than 31 December 2020. They shall notify the ECB, before 1 June 2019, of the exact date on which they will commence applying such threshold."</i>
Article 5	Article 4	Entry into force	<i>"This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.</i> <i>This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties."</i>

To:

Mr José Manuel CAMPA, Chairperson of the European Banking Authority

Re: Definition of default and materiality threshold: application to factoring and impact of the COVID-19

Dear Mr. Campa,

On behalf of the EU Federation for the factoring and commercial finance industry (hence "EUF"), I would hereby like to take the opportunity to express the concerns of the industry regarding some important issues about the implementation of the EBA Guidelines on definition of default (hence "Guidelines") and the Commission Delegated Regulation (EU) 2018/171 of 19 October 2017 (hence "Delegated Regulation") and the combined impact of them in the light of the COVID-19 pandemic.

Factoring is a flexible form of finance which is secured by means of assignment or purchase of non financial trade receivables. Consequently, the exposure of a Factor to a client is self-liquidating by nature as the reimbursement of the advanced funds is made directly or indirectly through the payments made by the account debtors. As such, the risk on the client (the assignor) is therefore mitigated and subordinated to the risk of dilution and/or default of the assigned debtor/debtors.

Thanks to the nature of the factoring transaction, Factors can control credit risk very successfully (only 0,09% average credit loss allowance in 2018 on a sample of 71 Factors across the EU¹).

Moreover, in non-recourse assignment, the Factor also provides credit risk coverage on the assigned receivables, allowing the client not only to effectively transfer the insolvency risk on the assigned debtor but also to derecognise the receivables from its balance sheet, reducing its net working capital. Thus, in this case, according to the IFRS accounting standards, the exposure on the assigned debtor is embedded in the balance sheet of the Factor for the value of the purchased invoices.

Factoring is widely used by businesses of any size, with a total turnover of €1,91 Trillion representing 11,3% of the EU GDP. Its benefits and importance for the real economy has been recently analysed by the European Commission².

On default risk of the buyer in factoring

The peculiar nature of this kind of exposure encompasses some differences from the exposure rising from traditional finance products such as loans, that can be summarized as follows.

¹ EUF, "Factoring and commercial finance - a new white paper", May 2019 (<https://euf.eu.com/what-is-euf/whitepaper-factoring-and-commercial-finance.html>).

² VVA & AITE, "Study on Supply Chain Finance – Finale Report", commissioned by the European Commission, January 2020 (<https://op.europa.eu/en/publication-detail/-/publication/4b1bcc59-5139-11ea-aece-01aa75ed71a1/language-en>).

Factoring is an agreement between the Factor (the assignee) and its client (the supplier/assignor), while the debtor generally does not enter into any contractual relationship with the Factor.

In traditional lending the repayments are subject to precise expiry dates reported in the loan agreement and the borrower must respect them unconditionally. So it is very clear when the borrower does not stick to a pre-agreed instalment plan or he breaches a covenant which triggers a complete repayment or a re-negotiation (forbearance) of the loan.

This is not the case for the payment of trade receivables, which is subject to specific terms and conditions and it is not immediate to identify a real default because the due date of the payment depends on i) bilateral negotiations between the seller and the buyer ii) industry (sector) standards and iii) local practices

Factors purchase receivables from the supplier (seller) and consequently enter into a trade agreement which has been concluded before the assignment and without any negotiation with the buyer. Generally, there isn't any contractual agreement with the latter.

The due date of an invoice cannot be considered as fully mandatory for the debtor, as in the supply contract normally there are some commercial clauses (terms of delivery, service level, goods compliance, etc.) that limit the possibility to enforce the invoice even if the due date has expired.

As a consequence, payments of payables are always subject to operational procedures as well as procurement and to working capital management policies of the buyer (particularly - but not only - in the P.A. sector), that can cause a certain delay compared to the nominal due date of the obligations. The duration of such delays may vary from Country to Country, from industry to industry or even from business to business and normally it is not linked to financial difficulties of the buyer. Ironically, observing the historical data, it seems that late payments are more customary among large corporate enterprises, with strong balance sheets, high liquidity and good credit ratings, including Public Administration Entities in comparison to SMEs, due to the increasing operational complexity.

Moreover, it requires a certain number of days to register the credit transfer on the Factor's account and correctly allocate the payment on the relevant debtor account. Therefore, even if the buyer pays on the due date, a delay can be registered due to the Factor's technical procedures.

These peculiarities of the payment process regarding factoring could result in the threshold(s) to be exceeded by any debtor, particularly in the P.A. sector, (likely) continuously.

Moreover we have to observe the factors can transfer the risk for the purchased receivables to third parties by way of e.g. credit insurance agreements that, although not generally recognized by the Regulator as a valid CRM tool in their customary forms, are very effective instrument to limit losses in the case the debtor default and also update the information about the financial situation of the debtors modifying the risk coverage

The application to trade receivables of loan-based principles to automatically identify the default of the buyers is misleading and brings, in any case, to unreasonably high levels of default exposures, which are inconsistent with the real financial situation of the debtor.

Although the current framework to identify debtor default provides some minimum flexibility to purchased receivables (namely, a technical past due situation where the debtor does not show receivables due by more than 30 days and the

recognition of dilution situations), the EUF believes it is not sufficient to avoid the unintended consequences of its application on the factoring industry and its clients.

In particular, the new materiality threshold seems to pose some significant issues and needs clarifications on how it should be applied, as specified below.

On the interpretation of the new materiality thresholds

The Delegated Regulation³ provides the general principles for the NSA to set the harmonized materiality threshold (art.1)⁴:

The European Central Bank provided its own interpretation in the feedback statement of the consultation carried out on the occasion of setting the materiality thresholds for the banks supervised by the SSM:

B.7 The ECB Regulation reflects the threshold structure and the mechanism for counting the number of days past due that are demanded by the RTS. These may, in some cases, lead to a default being identified despite no individual exposure being more than 90 days past due. For instance, this could happen where an obligor repays some material past due exposures, but the number of days past due keeps increasing – instead of being reset – because there are other material exposures that are just a few days past due. In that case, a default will be triggered when the counter reaches 90 days, in line with Article 3(3) of the ECB Regulation, but on that day the remaining material exposures could be less than 90 days past due.

The approach proposed by EBA, in the interpretation provided by ECB, appears to be calibrated on the concept of "overdraft", adopting the same calculation mechanism also for other types of operations which instead have contractual settings based on repayment plans.

This approach cannot be shared: as already highlighted during the consultation, a counting of the days past due that prescind from the existence of at least one payment obligation continuously unpaid for 90 days would end up penalizing term and instalment loans compared to other techniques (e.g. overdrafts). This would significantly increase the number of "false positives" identified by the methodology for the counting of days past due and therefore identify as insolvent a huge number of subjects who do not actually present any symptoms of insolvency in presence of any delay (even if short).

³ COMMISSION DELEGATED REGULATION (EU) 2018/171 of 19 October 2017 on supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for the materiality threshold for credit obligations past due.

⁴ 2. [...] The absolute component shall be expressed as a maximum amount for the sum of all amounts past due owed by an obligor to the institution, the parent undertaking of that institution or any of its subsidiaries ('credit obligation past due'). The maximum amount shall not exceed 100 EUR or the equivalent of that amount in the relevant national currency. [...] The relative component shall be expressed as a percentage reflecting the amount of the credit obligation past due in relation to the total amount of all on-balance sheet exposures to that obligor of the institution, the parent undertaking of that institution or any of its subsidiaries, excluding equity exposures. The percentage shall be between 0 % and 2,5 % and shall be set at 1 % whenever that percentage reflects a level of risk that the competent authority considers to be reasonable in accordance with Article 3.

[...]

5. When setting the materiality threshold in accordance with this Article, the competent authority shall assume that the obligor is defaulted when both the limit expressed as the absolute component of the materiality threshold and the limit expressed as the relative component of that threshold are exceeded either for 90 consecutive days or for 180 consecutive days, where all of the exposures included in the calculation of the credit obligation past due are secured by residential or SME commercial real estate and the 90 days have been replaced by 180 days in accordance with Article 178(1)(b) of Regulation (EU) No 575/2013 for those exposures. [...]

The EUF believes that, in order to assure full compliance with the Basel regulations and the CRR, the requirement of the continuity of the days past due on a single credit obligation is still necessary. It should be noted that in the absence of the requirement on the individual credit obligation, the "past due over 90 days" default may occur:

- in the case of overdrafts, after 90 consecutive days of exceeding the allowance;
- in the case of an exposure based on monthly instalments, with a mere payment delay of 31 days in the payment of each instalment on three consecutive months;
- in the case of purchased trade receivables, when the debtor shows payment delays, even if insignificant, but overlapped, on the invoices, as soon as there is an invoice due by more than 30 days.

It is evident that, in this hypothesis, a disparity between the various operations is generated: in the first case, 90 consecutive days of delay are required on a single credit obligation, in the others, 31 days would be enough (if repeated).

While the EUF shares that in principle 90 continuous days of exceeding a limit on an overdraft might be considered as an unequivocal signal of difficulty in repaying one's own exposures, it cannot be shared that the same applies in the case of shorter delays in paying the payables, although repeated and overlapping. Although payment delays in commercial transactions are not desirable, they certainly cannot be immediately representative of the debtor's insolvency, especially when the delay regularly ends up with the payment.

Following the above mentioned interpretation provided by ECB, the new rule would generate a hysteresis process of the past due days in which the method of calculation does not take account of the amounts paid and drags the counting of days past due as long as the subject has overdue amounts, regardless of the continuity of the delay in each single payment obligations. It would also make the provision of the technical past due on trade receivables pursuant to art. 23, d) de facto ineffective.

This interpretation would be tremendously detrimental to the factoring industry and hence to the thousands of SMEs they support as it may bring the unintended result that most debtors will be considered as past due over 90 days. An impact study performed by Assifact⁵ shows that 25% of the businesses that are debtors of receivables purchased without recourse, which represents 33% of the total value of the receivables portfolio of the Italian factoring market would be considered as default following the ECB interpretation. This impact would simply be too high to be acceptable and resoundingly overblown.

For this reason, in order to assure a balanced approach between the different technical forms and avoid an excessive penalization of those based on repayment plans with respect to other lines of credit, it appears strictly necessary to apply the new thresholds considering the concept of "continuity" of the past due days on the single credit obligation, assuring that the counting of the past due days is re-modulated, on the occasion of each payment, on the oldest payment obligation among those unpaid.

This interpretation:

1. does not generate delays in the identification of a default, since it would still ensure the compliance with the provisions of Basel and the CRR (art. 178) that require continuity of the past due days on "any material credit obligation";
2. erases any disparity between subjects who use different financial techniques, since the counting of the days past due on the obligation would start, at any time, from the oldest expired due date or from the moment the exposure exceeds the agreed limit, regardless of the technical form and the method of allocation of

⁵ The Italian Factoring Association.

payments, avoiding that the overlap of repeated minimal delays on consequential payment obligations is considered as equivalent, from the point of view of the definition of default, to a single exposure past due by more 90 days;

3. prevents the generation of a lot of false positive cases, with potentially very significant impacts on estimating the PD (highly overestimated) and the LGD (highly underestimated) and on the outcomes of the internal rating models.

Basically, it can be implemented alternatively:

- a) counting the days past due, in case of exceeding the materiality threshold, starting from the oldest single payment obligation among those still unpaid at the reference date, or
- b) counting 90 consecutive days of exceeding the materiality threshold, if there is at least one single payment obligation (instalment / invoice / overdraft) due more than 90 days

This interpretation would not change the fact that purchased receivables need more flexibility in the approach to identify default, but would help preventing from a “cliff effect” of the application of new DoD on factoring, that would be very detrimental eventually to the financing of the European corporates, especially SMEs⁶.

The EUF, on behalf of their members, asks for confirmation of the above-mentioned interpretation. Please note that this would not apply only on factoring, but also to any other banking exposures based on a reimbursement schedule over time, such as e.g. leasing and mortgages.

Finally, we would like to stress that a more appropriate definition of default for purchased receivables could also be achieved through the possibility to apply under the standardized approach, for purchased receivables to corporates, the definition of default at the level of a particular facility (invoice) as already provided for retail exposures. That would be consistent with a current provision of the CRR (see art. 153.6) and reduces the detrimental effect of the new EBA definition of default.

On the impact of COVID-19

The EUF and its Member Associations share their concern that the business capacity to repay their obligations will be put under pressure by the measure taken and proposed by national governments to limit the diffusion of the COVID-19. Both national governments and EU bodies, including the EBA, are acting with speed and unprecedented strength in order to address and mitigate the adverse systemic economic impact of COVID-19 on the EU banking sector, but definitely the real economy is looking at a long period of stress.

A significantly increased delay in the average payment time of invoices is expected all around Europe, in consequence of such stress. The extent of the economic distress generated by the COVID-19 pandemic is still uncertain.

In this new scenario, which was impossible to foresee, banks and other supervised institutions such as factoring companies, will be called to change their IT systems to apply new and much stricter rules to identify default exposures: the current situation combined with impact of the new materiality thresholds which is expected to be already very high (see above),

⁶ For information, according to the same impact study conducted on Italian factors, under this interpretation the above-mentioned “cliff effect” of the application of new DoD on factoring in terms of new NPLs would be reduced by about 75%.

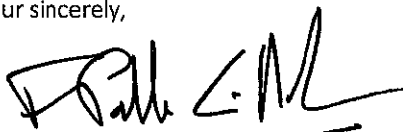
might result in a “perfect storm” for the businesses that exacerbates their difficulties, as the usual and crucial support of factoring could be suddenly affected by the “cliff effect” of the application of the new DoD on their NPL.

The Basel Committee, on March 27th, announced a deferral of Basel III implementation in order to provide additional operational capacity for banks and supervisors to respond to the immediate financial stability priorities resulting from the impact of the coronavirus disease on the global banking system.

In such situation, the European factoring industry urges the EBA to consider the change in the global scenario and, following the example of the Basel Committee, proposing a deferral for at least 12 and up to 24 months of the date of application of the new materiality thresholds and of the Guidelines on the definition of default, in order to assure the resiliency of the European banking system as well as of the factoring industries and their continuous support to the real economy.

The two above-mentioned issues are not related and can be addressed separately, yet they are equally important in order to avoid unnecessary charges and uncertainty on the supervised institutions and, in immediate consequence, on the businesses.

Your sincerely,



Françoise PALLE GUILLABERT
EUF Chair