

Form and content of UK DLG liquidity support undertakings for intra-group liquidity modifications

Overview

1. The FCA may grant an intra-group liquidity modification to create a UK Defined Liquidity Group (UK DLG), in which the liquidity of the constituent non-ILAS firms is managed on a group-wide basis. Such a modification would mandate a liquidity undertaking (the "**Loan Facility Agreement**") between the constituent non-ILAS firms which must be a multi-currency, 2-way commitment between those firms having the attributes set out below. The purpose of requiring such an undertaking is to ensure that liquidity can flow completely freely throughout the UK DLG.

Attributes of Loan Facility Agreement

2. The characteristics which the FCA will require the Loan Facility Agreement to possess are prescribed in greater detail as follows:
 - a) The Loan Facility Agreement must be an enforceable contract for a 2-way, unsecured, revolving loan facility, callable in all currencies that are significant in the businesses of the members of the UK DLG. The obligation of each member firm to lend may be limited to its available liquidity resources. "Available liquidity resources" means in this context:
 - i) those of the lending entity's liquidity resources that comprise cleared, immediately accessible funds or those of its assets, rights, facilities or other resources that it, using its best efforts, is capable of converting to cleared, immediately accessible funds such that they may be transferred to and received by the borrowing entity in accordance with paragraph 2(k)(i) below;
 - ii) but excluding:
 - (1) those of its liquidity resources that the lending entity has calculated it is likely will be needed to meet its liabilities to entities other than those in the UK DLG falling due in the 24-hour period following receipt of a request to borrow from the borrowing entity;
 - (2) those of its liquidity resources that the lending entity has already agreed to lend to entities in the UK DLG other than the borrowing entity in the 24-hour period following receipt of a request to borrow from the borrowing entity; and
 - (3) such portion of its liquidity resources which, if lent, would cause the lending entity to become balance sheet insolvent in the sense of section 123(2) of the Insolvency Act 1986

We further would expect that the Loan Facility Agreement:

- (A) not require the lending entity to lend if it reasonably believed that after making the loan, if made in full, it would:
 - (i) be in breach of its capital resources requirement; or

- (ii)** run a significant risk that it would not be able to pay its debts as they fell due;

except to the extent approved in advance by the FCA; and

- (B)** require the lending entity to notify the FCA promptly upon receipt of a request to make such a loan.

- b)** The FCA expects the Loan Facility Agreement to consist of liquidity support undertakings made between all members of the UK DLG, thereby creating a "cat's cradle" configuration of commitments. Where an applicant firm considers that another type of arrangement is more appropriate (given its group structure), the burden lies on the applicant to show that the proposed structure poses no undue risk in comparison with the "cat's cradle" arrangement. In particular, the applicant firm will need to demonstrate how available liquidity could be moved within the proposed UK DLG if, for whatever reason, the primary lending entity (i.e., the "hub") were to be unable to provide funding. In any event, the entirety of the undertaking(s) comprising the Loan Facility Agreement must be contained in a single document.
- c)** The Loan Facility Agreement must contain no conditions on the availability of the loan facility to a borrowing entity, or on a drawdown by a borrowing entity, except that:
 - i)** the borrowing entity continues to be a member of the UK DLG; and
 - ii)** the borrowing entity is solvent – meaning that no "insolvency event" has occurred in respect of the borrowing entity. An "insolvency event" occurs when:
 - (1)** an order (including a bank insolvency order or bank administration order, as defined by s.94 and s.141 of the Banking Act 2009, respectively) is made, or an effective resolution passed, for the liquidation or winding up of the relevant entity; or
 - (2)** a receiver, administrator, trustee, bank liquidator, bank administrator, or other similar official shall be appointed in relation to the whole of the relevant entity.
- d)** The Loan Facility Agreement must be governed by English, Scottish or Northern Irish law.
- e)** The Loan Facility Agreement must contain a jurisdiction clause providing that disputes arising from the agreement are to fall within the exclusive jurisdiction of the courts of the country of the governing law, save that the borrowing entity may choose the jurisdiction of the courts of the lending entity's country of incorporation/head office (if different).
- f)** The Loan Facility Agreement must contain an entire agreement clause.
- g)** The Loan Facility Agreement must contain no terms that limit the enforceability of the agreement by reference to representations, warranties, conditions precedent or events of default (other than insolvency of the borrowing entity).
- h)** The Loan Facility Agreement must contain a clause stipulating that damages arising from any impecuniosity of the borrowing entity due to non-provision of funds under the Loan Facility Agreement are recoverable, but must contain no liquidated damages or limitation clauses (i.e. no pre-estimates of, or limits on, damages recoverable for breach of the agreement).

- i)** The Loan Facility Agreement must contain a clause stating that:
- i)** the purpose of the lending facility is to provide a borrowing entity with liquidity in a range of circumstances;
 - ii)** the lending facility has been provided both to meet the funding needs of the borrowing entity and in connection with the modification of a regulatory requirement that would otherwise require the borrowing entity to be self-sufficient in terms of liquidity, which has enabled the borrowing and lending entities' group to fund itself on a more efficient basis;
 - iii)** the facility may be drawn down by a borrowing entity either on its own initiative or in response to a request or requirement from the FCA; and
 - iv)** the circumstances in which the facility may be used include those in which a borrowing entity is unable to access funding from other sources on normal market terms or at all, and that in such circumstances, damages will not be an adequate remedy for the lending entity's failure to lend money to the borrowing entity under the facility (i.e. for the lending entity's breach of the agreement).
- j)** The Loan Facility Agreement must contain a clause stating that all parties to the agreement recognise that the purposes of the agreement include (a) the protection of consumers, and (b) wider market stability;
- k)** The Loan Facility Agreement must contain clauses providing that:
- i)** liquidity support must be provided by a lending entity to a borrowing entity as cash in cleared, immediately accessible funds within 24 hours of the borrowing entity requesting the loan – it must be provided by the end of the same business day if the borrowing entity makes a request before noon; otherwise it must be provided by noon on the following business day;
 - ii)** the loaned funds may be used by the borrowing entity for its general corporate purposes;
 - iii)** the following provisions apply in respect of a firm ceasing to be a party to the Loan Facility Agreement:
 - (1)** any member of the UK DLG may cease to be a party to the Loan Facility Agreement upon giving not less than 6 months' notice to the other members of the UK DLG; in such circumstances, the contractual relations between the other members of the UK DLG under the Loan Facility Agreement will continue in force unaltered (formally, this may mean that the contract is varied in order to discharge the departing member from its obligations);
 - (2)** when a member of the UK DLG gives notice of its intention to cease to be a party to the Loan Facility Agreement, its obligation to repay any loan whose term extends beyond the date at which it will cease to be a party is accelerated so that the loan must be repaid by the date at which it will cease to be a party to the Loan Facility Agreement;
 - (3)** the outstanding borrowings of a member of the UK DLG under the Loan Facility Agreement must be repaid by the time at which it ceases to be a party to the Loan Facility Agreement;

(4) the Loan Facility Agreement (whether in its original form or as varied) may not be terminated while being relied on for an intra-group liquidity modification to form a UK DLG.

iv) if the intra-group liquidity modification is revoked by the FCA, each member of the UK DLG has the right to be released from its loan-making obligations to other members of the UK DLG under the Loan Facility Agreement. However, its existing repayment obligations would be unaffected.

l) The Loan Facility Agreement must specify the rate of interest and any other charges to be levied by the lending entity; the rate of interest must be a market rate that would not inhibit use of the loan facility.

Conditions and requirements

3. The FCA will make it a condition of the waiver that the applicant firm has obtained a separate legal opinion (one for each jurisdiction in which a party to the Loan Facility Agreement is located) from a reputable third-party counsel with expertise in the relevant field dealing with the following matters:

(a) Compliance of the Loan Facility Agreement with all the stipulations above.

(b) Parties' corporate standing;

(c) Whether the obligations are legal, valid, binding and enforceable (including any relevant conflicts of laws issues and corporate benefit issues);

(d) Due execution (including whether the agreement was within the capacity and powers of the parties, duly authorised, with all necessary consents and approvals); and

(e) Whether the provision of the loan facility, and exercise of the rights thereunder, would conflict with any applicable laws or regulations.

4. In order to satisfy the above condition in the waiver, the legal opinion must have found that the Loan Facility Agreement complies with all the stipulations and is enforceable in all relevant jurisdictions and under all relevant systems of law.

5. The FCA will impose a requirement within the waiver (i.e. will amend the Handbook rules) such that the applicant firm must make reasonable efforts to keep under review any legal or regulatory changes that could affect the efficacy of the Loan Facility Agreement, and that it will take all reasonable steps to amend the agreement in the light of any such changes in order to maintain the Loan Facility Agreement's efficacy.