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# EBA Outsourcing Guidelines: getting your contract remediation project over the line

## The remediation deadline

Notwithstanding the UK's withdrawal from the EU, the [FCA confirmed back in 2021](#) that the European Banking Authority Guidelines on outsourcing arrangements ("[EBA Guidelines](#)") will continue to apply to financial services institutions in the UK (with a slight reprieve extending the compliance deadline for legacy agreements).

Institutions have only until **31 March 2022** - less than 6 weeks - to bring certain legacy outsourcing agreements into compliance with the EBA Guidelines.

The PRA also incorporated the requirements of the EBA Guidelines, with several variations, into [Supervisory Statement SS2/21](#), which comes into effect on 31 March 2022. Therefore, a similar, but not identical, regime applies to PRA regulated insurance/reinsurance firms and branches of overseas banks and insurers.

The EBA Guidelines and PRA SS2/21 impose a combination of overarching principles and prescriptive requirements that must be addressed in outsourcing agreements. Many of these go above and beyond what was best practice, and so most (if not all) legacy agreements will need to be remediated.

## Notification obligations

Institutions must notify the FCA if they have not remediated legacy agreements for the outsourcing of critical or important functions by the 31 March 2022 deadline.

The PRA have adopted a slightly more pragmatic approach, stating that firms should aim to remediate legacy contracts entered into prior to 31 March 2021 at the first appropriate contractual renewal or revision point on or after 31 March 2022. The PRA has also confirmed it no longer expects firms to inform it of non-compliance.

## In-scope institutions and in-scope contracts

The EBA Guidelines apply to credit institutions and investment firms, and payment institutions and electronic money institutions, and apply to all "outsourcing" arrangements (e.g. the provision of services or activities that would otherwise be undertaken by the institution itself). This includes intra-group outsourcings.

Some more stringent requirements in the EBA Guidelines only apply to the outsourcing of a "critical or important function". This is a multi-limed assessment and requires an analysis of the services and the potential impact that would arise from a disruption to the outsourced function arising from a failure of the outsourced provider.

Similar concepts to the above apply under PRA SS2/21 to PRA regulated insurance/reinsurance firms and branches of overseas banks and insurers.

## EBA contract requirements

In addition to setting out detailed guidance on the essential governance framework for outsourcing arrangements, including obligations for effective due diligence, business continuity, audit, risk assessments and exit arrangements, the EBA Guidelines (and PRA SS2/21) set out key contractual requirements to be covered in outsourcing agreements (including intra-group arrangements).

Section 13 (Contractual phase) includes 7 pages of key requirements that should be included as a minimum in contracts for outsourced critical or important functions (some of which also apply to non-critical outsourcings). Whilst some of these would likely be covered in most legacy outsourcing agreements, there are many that go above and beyond what was mainstream best practice, and so will need to be negotiated into legacy agreements before the remediation deadline. Examples of the minimum requirements that need to be covered include:

- controls on the locations from which critical or important functions can be provided or where relevant data will be kept and processed;
- an obligation on the service provider to cooperate with relevant regulators, and for the institution to monitor the service provider's performance;
- a clear reference to relevant BRRD requirements;
- an "unrestricted right" for the institution and its regulators to inspect and audit the service provider, including "full access" to all relevant business premises, systems, networks and information;
- prescriptive termination rights;
- detailed controls on sub-contracting, including a right to audit sub-contractors and to object to the sub-contracting and/or terminate the contract; and
- provisions to ensure that institutions can continue to access data in the case of insolvency, resolution or discontinuation of the service provider.

### Remediation approach

Given the fast-approaching remediation deadline we appreciate that most institutions are well on their way to achieving compliance by 31 March 2022. However, with the majority focusing on critical and important outsourcings, many still have on-going projects and a back-log of contracts to remediate.

We continue to advise clients to have regard to the proportionality principle and to continue to concentrate on the most critical and important legacy outsourcing arrangements first, however institutions must ensure that they have effective processes in place to seek to remediate all in-scope contracts by the appropriate deadline.

For outsourcings of critical or important functions it remains that these contracts (due to the nature of the services, complexity of the underlying terms and the sophistication of the suppliers) generally need to be re-negotiated following a bespoke review and update process. In respect of non-critical outsourcings, from a practical perspective any remediation approach will likely include:

- re-negotiating the contracts, where practicable;

- requiring counterparties to sign up to the institutions EBA contract addendum containing clauses which meet the requirements of the EBA Guidelines; and
- where appropriate, accepting the suppliers' standard EBA contract addendums (provided they have been carefully checked against, and found to comply with, the requirements of the EBA Guidelines).

If, following any negotiations, the arrangements still fail to meet the EBA requirements, this must be documented through a formal risk acceptance process, with appropriate mitigations and controls put in place to address the risk. In some cases, institutions may need to revisit negotiations, or even replace the service provider.

### Our expertise

We have an in-depth knowledge and understanding of the EBA Guidelines and have helped a number of institutions on their EBA remediation projects. Our specialists are adept at providing prompt, focused and commercial advice and support to navigate through the regulatory complexities, covering both customer and supplier perspectives.

We have a strong track record as a trusted advisor across the financial services sector, and act for a number of financial institutions and outsourced services providers. Examples of recent experience from the team include:

- **EBA compliance project:** Advising a financial services institution on its project to remediate material contracts for compliance with the EBA Guidelines, and re-negotiating EBA compliant contracts for critical outsourced services.
- **Supplier EBA addendums:** Reviewing third party supplier financial services addendums and advising on the issues that require modification (and on any key points of non-compliance to be noted in a risk register).
- **EBA compliant supply chains:** Advising on the establishment of a new technology business set up to provide an end-to-end credit management solution and managed services to regulated third party lenders. This involved drafting EBA compliant customer templates, advising on intra-group services, data protection and IP arrangements, and negotiating material EBA compliant subcontracts.

- **Supply side negotiations:** Supporting a NASDAQ listed payments platform negotiate high value customer/partner agreements, including advising on compliance with the EBA Guidelines from a supplier perspective.

### Key contact

Simon is a partner in our Commercial, Outsourcing and Technology team in London. He has significant experience advising on complex IT and managed services arrangements, BPO/IT outsourcings, and digital transformation projects. He has extensive experience advising on outsourcing arrangements, including critical outsourcings under the EBA Guidelines (and other regulatory regimes).



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