

Decision of the European Banking Authority adopting a Procedure for developing and adopting Draft Technical Standards and Guidelines and Recommendations

The Board of Supervisors of the European Banking Authority

Having regard to Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC¹ (the 'Regulation' and 'the EBA'), in particular Articles 10 to 16 thereof,

Whereas:

- (1) It is necessary to specify the EBA's procedures for adopting draft regulatory technical standards, draft implementing technical standards, and guidelines and recommendations under Articles 10, 15 and 16 of the Regulation respectively.
- (2) The Committee of European Banking Supervisors (CEBS), as predecessor of EBA, adopted, in its Charter, under article 5, working procedures for CEBS; a Public Statement of Consultation Practices (dated 5 August 2008); and Impact Assessment Guidelines for Level 3 Committees (Ref: CEBS 2007 58) which continue to apply until amended or replaced.
- (3) It is necessary to make provision for waiving or altering parts of the standard procedures in urgent cases, or in relation to the transition process (i.e. where preparatory work has already commenced), provided that the Regulation's requirements are respected.
- (4) In the case of developing guidelines, it is appropriate for the Chairperson, to be responsible for ensuring receipt of the confirmation by competent authorities of compliance with guidelines, as provided in Article 16(3) of the Regulation. Also in relation to the development of guidelines, it is appropriate for the Chairperson to make preliminary proposals (to be approved by the Board of Supervisors) on whether to publish reasons for non-compliance, according to Article 16(3), third subparagraph of the Regulation (which is without prejudice to the conduct of peer review analyses by the EBA's Review Panel, according to Article 30 of the Regulation).

Has decided as follows:

Article 1– Applicability and scope

1. OJ L331, 15.12.2010, p. 12.

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- 1.1. This Decision prescribes the standard procedures for the development and adoption of draft technical standards and guidelines by the EBA.
 - 1.2. The Chairperson may waive some or all of these procedures subject to the requirements of the Regulation being met, and subject to the Board of Supervisors' ratification when it approves the guidelines or draft technical standards, where the particular urgency of the matter makes it impracticable to comply with all aspects of the procedures.
 - 1.3. Subject to the requirements of the Regulation being met, this Decision does not apply to guidelines for which consultation has started before this decision enters into force.
 - 1.4. All existing guidelines and standards adopted within the Committee of European Banking Supervisors (CEBS), as predecessor of the EBA before these Rules of Procedure came into effect, remain in full force and effect.

Article 2– Terminology and definitions

For the purposes of this Decision:

- a) 'guidelines' means guidelines and recommendations issued under Article 16 of the Regulation'; and
- b) 'draft technical standards' means draft regulatory and draft implementing technical standards to be adopted by the Commission in accordance with Articles 10 and 15 of the Regulation.
- c) 'regulatory project' means the project to develop specific draft technical standards or guidelines;
- d) 'project team' means the EBA Standing Committee, Sub-group, Task Force or Network identified in the work programme as responsible for developing the technical content of the project proposal;
- e) 'project leader' means the person identified in the work programme as the leader of the project team, who coordinates development of the technical content of the project proposal by the project team. This will ordinarily be the Chairperson of the relevant EBA Standing Committee, Sub-group, Task Force or Network, or in some cases a member of the EBA staff.

Article 3– Development phase

- 3.1. The list of regulatory projects, the assignment of responsibility for their delivery to a project team, and the Terms of Reference ('ToR') of the project team shall be made during the adoption of the EBA annual work programme, according to the relevant EBA internal processes.
- 3.2. Where a regulatory project relates to a mandate providing that the EBA may develop draft BTS, the project shall be provisionally included in the EBA work programme, and shall be assigned to a project team with the mandate to carry out a preliminary assessment of the need for regulatory intervention in the form of either draft technical standards or guidelines and their timing, according to the criteria defined in EBA's internal processes. The Chairperson shall make a proposal to the Board of Supervisors who will decide on the need for regulatory intervention, its form and timing.

Article 4– Drafting technical standards and guidelines

The formulation of draft technical standards and guidelines shall be done in accordance with the terms of reference for the project and shall take into account:

- a) the objectives and requirements set out in the EBA Regulation;
- b) the scope of any power to adopt draft technical standards, as defined in the relevant sectoral legislation, or any specific mandate to issue guidelines and recommendations, where applicable;
- c) compatibility with the requirements and objectives of relevant EU sectoral legislation, including delegated acts, implementing acts and guidelines (unless the drafting exercise relates to a review of these acts);
- d) general principles of EU law, including fundamental rights; and
- e) guidelines on the quality of drafting issued by the EBA specifying and implementing internally, for the EBA, the guidelines for drafting legislation produced by the EU institutions.

Article 5– Cost-benefit analysis and impact assessment

- 5.1. Cost-benefit analysis and the impact assessment of proposed draft technical standards and guidelines shall be carried out in accordance with the Regulation and EBA's internal procedures on conducting cost-benefit analysis.
- 5.2. The BSG shall be consulted before finalisation of the IA.
- 5.3. Cost-benefit analysis shall not be required if the Chairperson waives the requirement for cost-benefit analysis in accordance with Article 1.2 and either:
 - a) in relation to a draft technical standards project in accordance with Article 15.1 of the Regulation, it would be disproportionate in relation to the scope and impact of the technical standard concerned or in relation to the particular urgency of the matter; or
 - b) in relation to a guidelines project 'in accordance with Article 16.2 of the Regulation', it would not be appropriate to the scope, nature and impact of the guidelines).

Article 6- Consultation

- 6.1. Draft technical standards and guidelines shall be subject to consultation carried out in accordance with the EBA's public statement on consultation practices, and the EBA rules and practicalities that serve to apply the statement within EBA (collectively henceforth referred to as 'EBA public statement on consultation practices').
- 6.2. The project leader, on behalf of the project team may, taking account of EBA's internal procedures on consultation practices and with the Chairperson's agreement, publish a call for evidence on aspects of the project.

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- 6.3. Where a project reveals a need for a broader discussion before the development of a proposal, the project team may decide to publish an issues/discussion paper.
 - 6.4. An issues/discussion paper shall not normally contain draft technical standards or guidelines, and shall focus on broad options available.
 - 6.5. Call for evidence and issue/discussion papers shall be published on EBA's website and the EBA's consultation policy shall apply. The period for responses shall be varied from the periods provided for in EBA's consultation policies, if necessary to take account of any relevant deadlines for adopting draft technical standards or guidelines.
 - 6.6. Consultation shall not be required if the Chairperson waives the requirement for consultation in accordance with Article 1.2 and either:
 - a) in relation to a draft technical standards project in accordance with Article 15.1 of the Regulation it would be disproportionate in relation to the scope and impact of the technical standard concerned or in relation to the particular urgency of the matter; or
 - b) in relation to a guidelines project in accordance with Article 16.2 of the Regulation, it would not be appropriate to the scope, nature and impact of the guidelines.
 - 6.7. The Chairperson shall review draft calls for papers/draft issue or discussion papers and draft consultation papers, before they are submitted to the Board of Supervisors for approval of publication. The Chairperson shall note, in his/her transmittal to the Board of Supervisors, any potential disagreements with the Chair of the relevant Standing Committee of the EBA to which a project team reports.

Article 7– Banking Stakeholder Group

- 7.1. The Banking Stakeholder Group shall be consulted in accordance with Article 37 of the Regulation.
- 7.2. Requests for an opinion shall be prepared by or on behalf of the project leader and issued by the Chairperson following approval by the Board of Supervisors.
- 7.3. The requests for opinion shall specify a reasonable deadline for their receipt. Where the proposal is subject to consultation, the deadline shall normally be the end of the consultation period.

Article 8– Analysis of consultation comments

- 8.1. All consultation responses and the opinion of the Banking Stakeholder Group shall be analysed by the project team and taken into account in considering whether to revise the proposal. Their publication will take place in line with the provisions of the EBA's public statement on consultation practices.
- 8.2. If the analysis of the consultation responses reveals significant problems, or where a revised proposal differs significantly from the original proposal, the EBA shall, where possible, seek to proceed to a second round of consultation (as per its public statement on consultation practices). In this case, the project leader, on behalf of the project team, with the consent of the EBA Chairperson, shall proceed with a further consultation round in accordance with this Decision taking account of the overall project timetable.

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- 8.3. The cost-benefit analysis and impact assessment of the draft technical standards or guidelines shall, if necessary, be updated to reflect the revised proposal.
 - 8.4. The project team shall review and submit the revised proposal, cost-benefit analysis and draft technical standards or guidelines to the Chairperson who, after his approval, shall refer them to the Board of Supervisors for endorsement.

Article 9– Adoption and submission to the Commission

- 9.1. The Board of Supervisors shall adopt the draft technical standards or guidelines and approve any accompanying statement for publication, according to its rules of procedure.
- 9.2. The adopted draft technical standards shall be submitted by the EBA Chairperson to the Commission for endorsement.

Article 10 – Publication

The final proposal, cost-benefit analysis, draft technical standards or guidelines, consultation responses and any opinion received from the Banking Stakeholder Group shall be published in accordance with the EBA public statement on consultation practices.

Article 11 – Analysis of Commission amendments to draft technical standards

- 11.1. Where the Commission proposes amendments to draft technical standards adopted by the Board of Supervisors, the Commission’s amendments shall be reviewed by the project team.
- 11.2. Within three weeks from the receipt of the amendments, the project leader, following review by the Chairperson, shall submit the project team’s conclusions and proposal on whether or not to accept the proposed amendments in the form of a draft formal opinion to the Board of Supervisors for adoption.
- 11.3. The approved formal opinion shall be sent by the Chairperson to the Commission within six weeks from the receipt of Commission’s amendments.
- 11.4. A copy of the formal opinion shall be sent to the European Parliament and to the Council, and shall be published on the EBA’s website.

Article 12– Confirmation of compliance with guidelines

- 12.1. In compliance with Article 16(3) of the Regulation, the Chairperson shall be responsible for:
 - a) ensuring receipt of confirmation from competent authorities regarding their compliance with the guidelines and recommendations issued;
 - b) publishing the fact that a competent authority does not comply or intend to comply with those guidelines;

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- c) making proposals to the Board of Supervisors for its decision on a case by case basis on whether or not to publish the reasons provided by a competent authority for not complying with the guidelines; and
 - d) notifying a competent authority of an EBA decision under (c) to publish the competent authority's reasons for non compliance, in advance of such publication.

12.2. Where, within one week of the notification of a decision under (c) above to the national competent authority, the latter objects on a reasoned basis to that decision, the decision, together with the EBA's reasoning and the competent authority's objections shall be forwarded to the Board of Supervisors for confirmation of the decision. Such confirmation shall normally be done by written procedure.

Article 13– Review of guidelines and technical standards

- 13.1. Draft technical standards and guidelines may provide for their review, in accordance with the better regulation principles and the EBA's quality criteria for drafting guidelines and draft technical standards.
- 13.2. The Executive Director shall prepare an annual review programme for reviewing guidelines and drafting technical standards.
- 13.3. The review programme shall be incorporated as an annex in EBA's annual work programme.

Article 14– Joint development of technical standards and guidelines

Where draft technical standards or guidelines should be developed through the Joint Committee, as referred to in Article 56 of the Regulation, or when it is otherwise considered desirable to involve the Joint Committee, the procedure set out in this Decision shall be modified as necessary to take into account the Rules of Procedure of the Joint Committee in relation to the joint development of draft technical standards or guidelines.

Article 15– Access to documents

Access to documents held by the EBA in relation to rulemaking activities shall be governed by the EBA's internal practical arrangements on access to documents, adopted in accordance with Article 47 of the Regulation.

Article 16– Retention of documents

- 16.1. In respect of the EBA's procedures covered in this Decision, such documentation shall be maintained, according with the EBA's general rules and policies on retention of documents, to enable the EBA to demonstrate justification for its decisions and to show that the correct procedures have been followed.
- 16.2. The Executive Director shall ensure that a full set of all issued guidelines is retained indefinitely.

Article 17– Executive Director

- 17.1. The Executive Director shall ensure that the procedure prescribed in this Decision is correctly applied.
- 17.2. The Executive Director shall establish the necessary internal procedures for the implementation of this Decision, in particular with regard to Articles 3, 4, 5, 6, 7, 9, 12, 13 and 14.

Article 18- Delegation

In accordance with Article 41 of the Regulation, the Board of Supervisors may provide for the delegation of certain of the tasks and decisions mentioned in this Decision to internal committees, panels, the Management Board or the Chairperson.

Article 19– Review

Amendments to this decision shall be made by the Board of Supervisors, according to its Rules of Procedure.

Article 20- Entry into force

This decision enters into force on the day following that of its adoption.

Done at London on September 25, 2012

Andrea Enria
For the EBA Board of Supervisors