



EBA/CP/2014/18

11 July 2014

Consultation Paper

Draft regulatory technical standards on independent valuers

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1. Responding to this consultation

The European Banking Authority (EBA) invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 11 October 2014. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive summary

The Bank Recovery and Resolution Directive ('BRRD')¹ specifies, among other things, that independent valuers shall be appointed to perform valuations of the assets and liabilities of institutions to determine: whether an institution is failing or likely to fail, the scope and size of resolution measures to be taken, and whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, instead of having been subject to those resolution measures.

In this regard, Article 36(14) of the BRRD mandates the EBA to draft regulatory technical standards (RTS) concerning the circumstances in which a valuer is independent from any public authority, including the resolution authority, or the institution subject to valuation.

Following the mandate, the draft RTS set forth general criteria which shall be used to examine the open-ended list of possible situations which may materialize and affect independence, and to determine with respect to them whether a valuer complies with the legal requirement of independence. Only two specific situations are identified by the draft RTS as situations which preclude *per se* the independence of the valuer: when the valuer is not separate from the resolution authority or the institution, and when (s)he has been the auditor of the bank within the last year. The option of introducing a comprehensive list of situations of incompatibility with respect to the requirement of independence has been considered inappropriate. Such list on the one hand would turn out to be incomplete, leading to 'false negatives' (i.e. cases of a lack of independence which in fact are not considered as such by the RTS), and on the other hand too rigid, leading to 'false positives' (i.e. cases which would be qualified as incompatible with the requisite of independence even though in fact the valuer is perfectly independent).

As a precondition for being considered an independent valuer, the draft RTS require that the valuer has the qualifications and expertise required in the fields of valuation, accounting and banking, and has sufficient capacities, so to ensure that (s)he is able to perform the valuation without depending on support from third parties, in particular the resolution authority and/or the institution.

With regard to the criteria used to assess the circumstances that may affect the independence of the valuer, the draft RTS defines the scope and magnitude of interests which are relevant to assess the independence of a valuer. For this purpose, the draft RTS require the consideration of all material interests which the valuer may have in common or in conflict with the resolution authority and the institution, which could compromise the independence of the valuer. The test of materiality is not defined through quantitative criteria or thresholds but it is rather linked to a

¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, (OJ L 173, 12.6.2014, p.190).

case-by-case assessment of the potential impact of these interests on the valuer's objectivity. Furthermore, the draft RTS require that this assessment be carried out with respect not only to the resolution authority and the institution, but also to the shareholders and the creditors of the institution, and the affiliate undertakings of the latter. Within this context, the draft RTS also provide that the independence is to be considered in any case impaired for the person having performed auditing services for the institution one year before the valuation is carried on.

Finally, the draft RTS provide that the independent valuers are to be legally, structurally and operationally separated from the resolution authorities, and the institutions subject to valuation and its affiliate undertakings. Moreover, the draft RTS provide that the valuers shall not take any guidance from the resolution authority or the institution, which could affect its impartiality in the performance of their tasks. Nevertheless, the resolution authorities may give instructions to the independent valuers as long as these instructions are necessary for achieving the goals of the valuation.

3. Background and rationale

The present Consultation Paper for draft RTS will be part of the single rulebook strengthening regulatory harmonization in Europe and is to be read in the wider context of the recovery and resolution rules provided for in Directive 2014/59/EU.

The BRRD sets out a number of tasks for an independent valuer in order to inform the determination of whether an institution is failing or likely to fail, determine the appropriate resolution tool to be used subject to the resolution plan, define the treatment shareholders and creditors had received had the institution entered normal insolvency proceedings.

Article 36(14) of Directive 2014/59/EU requires the EBA to draft regulatory technical standards to identify the circumstances in which a valuer is to be considered independent from any public authority, including the resolution authority, and the institution. By carrying out this mandate, the draft RTS increase legal certainty, ensure a level playing field, and enhance confidence in the quality of the valuation within the resolution process.

For these purposes the draft RTS set forth general criteria which shall be used in order to frame the open-ended list of possible situations which may materialize, and determine with respect to them whether a valuer complies with the legal requirement of independence. The alternative option of listing in a comprehensive way in the draft RTS fact-specific situations that rule out independence has been considered inappropriate. The approach adopted in the draft RTS allows to create harmonized criteria for an independent valuer while avoiding the pitfall of certain cases being left out of the scope, which would be an inherent risk with an approach based on a list of absolute incompatibilities.

With regard to the criteria used to assess the circumstances that may affect the independence of the valuer, the draft RTS define the scope of interests which are relevant to assess the independence of a valuer. For this purpose, the draft RTS require to consider all material interests, in common or in conflict, which can compromise the independence of the valuer. The test of materiality is not defined through quantitative criteria or thresholds but it is rather linked to a case by case assessment of the potential impact of these interests on the valuer's objectivity. Furthermore, the draft RTS require that this assessment be carried out with respect not only to the resolution authority and the institution, but also to the shareholders and the creditors of the institution, and the affiliate undertakings of the latter. Within this context, the draft RTS ensure that the valuer has not provided past services to the institution subject to valuation the nature and timing of these services might compromise the valuer's independence. In any event, the valuer should not have performed auditing services for the institution one year before the valuation is carried out. Finally, an independent valuer needs to disclose any factors or situations giving rise to such interests to the resolution authority without any delays, so that it can be established whether the specified conditions for an independent valuer are still met.

The draft RTS also cover qualitative preconditions for being considered independent. Establishing such preconditions aims to ensure that the valuer has the professional expertise and capacity to perform valuations without having to rely on support from third parties, in particular the resolution authorities and the institution.

4. Draft regulatory technical standards on independent valuers

In between the text of the draft RTS that follows, further questions can be found on specific aspects of the proposed text, which respondents to the public consultation should consider in their responses.

Q1	Do you agree that the approach followed in the draft RTS to determine and identify conflicts of interest is the appropriate one?
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COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards on independent valuers

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and 2013/36/EU, and

Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council², and in particular Article 36(14) thereof,

Whereas:

- (1) It is necessary to ensure, that independent valuers are not being influenced by either the resolution or other public authorities or the institutions or entities subject to resolution, when performing the valuation of assets and liabilities of those institutions or entities.
- (2) For the purpose of ensuring fair, prudent and realistic valuation of assets and liabilities, uniform rules should apply to determine the circumstances in which a valuer shall be considered independent from the public authorities, including the resolution authority, and from the institution or the entity referred to in point (b), (c) or (d) of Article 1 of Directive 2014/59/EU.
- (3) Independence of the valuer is further re-inforced by conditions ensuring their adequacy, both at the level of its expertise and at the level of its available means: more specifically, it should be ensured that the valuer possesses the necessary qualifications, ability and knowledge and expertise in all relevant subjects and in particular in economics, accounting, and finance, including banking. It should also be safeguarded that the valuer holds sufficient human and technical resources, to carry out the valuations. This overall sufficiency of the valuer should be seen as a precondition for its independence.
- (4) Independence can be endangered, if valuation is performed by the same institution or entity evaluated or by the resolution authority, even in cases that full functional separation (chinese walls) has been established. Therefore, there is a need to ensure that the valuer is a separate legal entity with respect to both the resolution authority and the institution (legal separation). For similar reasons, which may of course arise at a consolidated level, the valuer and the evaluated institution or entity should not belong to the same group of companies (structural separation).
- (5) It is necessary to ensure that the valuers do not have material interest in common or in conflict with the public authorities or the institution, as this would hamper their independence. To assess whether such circumstances are present, material common or conflicting interests should be considered also with respect to undertakings affiliated to the evaluated institution or entity, with the shareholders or significant creditors of that institution or entity as well as with the management of that institution or entity or of its affiliated undertakings. Conflicts should not only be assessed at the level of the legal entity, notably at the level of the valuer, but also at the level of the natural persons, thus of the staff members, performing the valuation.
- (6) Particular attention should be given to the issue of past services offered by the valuer to the evaluated institution or entity or to its affiliated undertakings.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (EBA) to the Commission.
- (8) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, in accordance with Article 15 of Regulation (EU) No 1093/2010 and requested

² OJ L173, 12.6.2014, p.190.

the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council³,

HAS ADOPTED THIS REGULATION:

Article 1
General

A person shall be deemed independent from both the public, including the resolution, authorities and the institutions or entities referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU, if all the following conditions are met:

- a) The person possesses the expertise and resources required in accordance with Article 2.
- b) The person is separated from the resolution authority and the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU in accordance with Article 3.
- c) The person has no material conflicting or common interest within the meaning of Article 4.

Article 2
Expertise and resources

1. The independent valuer shall possess the necessary qualifications, experience, ability and knowledge in all relevant subjects and in particular in economics, accounting, and finance, including banking.
2. The independent valuer shall hold sufficient human and technical resources, to carry out the valuation; the assessment of adequacy of resources shall take into account the nature, size and complexity of every specific valuation.

Article 3
Legal and structural separation

1. The independent valuer shall be a separate legal person from the resolution authority, the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU.
2. The independent valuer shall not be an affiliated undertaking and shall not belong to the same group of companies with the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/XX/EU.

³ 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/EC (OJ L 331, 15.12.2010, p. 12).

3. The independent valuer shall not take instructions nor guidance from any public authority, including the resolution authority, or the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU or any of its affiliated undertakings.
4. Notwithstanding paragraph 3. the resolution authority may give instructions to the independent valuer only to the extent that such instructions shall be deemed necessary for achieving the goals of the valuation as identified by Article 36 of Directive 2014/59/EU.

Article 4

Conflicting or common interest

1. An independent valuer shall not have actual or potential material interest in common or in conflict with the public, including the resolution, authorities or the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU or any of its affiliated undertakings.
2. For the purpose of this article interests shall be deemed material whenever they could influence, or be reasonably perceived to influence the independent valuer's judgement in performing the valuations for the purposes of Articles 36 or 74 of that Directive.
3. An independent valuer shall not have actual or potential material interest in common or in conflict with the shareholders or the creditors, or the management, including the senior management and the members of the management body, of the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU or of any of its affiliates.
4. An independent valuer shall take appropriate steps to ensure that none of the staff involved in performing the valuations for the purposes of Articles 36 or 74 of Directive 2014/59/EU have any specific material interest in common or in conflict with the tasks to be performed.
5. Subject to paragraph 7, an independent valuer shall not have offered services or have had business or other relationships with the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU or with any of their affiliates for the last 3 years before the assessment of the valuer's independence, if these services or relationships could influence, or be reasonably perceived to influence the independent valuer's judgement in performing the valuations for the purposes of Articles 36 or 74 of that Directive.

Q2	Do you agree that three years is the appropriate period of time for the purposes of Article 4(5)?
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6. The temporary administrator referred to in Article 29 of Directive 2014/59/EU may be tasked as the independent valuer, provided the administrator fulfills the conditions referred to in this Regulation.

Q3	Do you agree with the possibility to task the temporary administrator as an independent valuer, subject to the condition set forth in the above provision?
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7. The statutory auditor referred to in Directive 43/2006/EC of the European Parliament and of the Council⁴ shall not be deemed as an independent valuer, if that person has audited the institution or the entity referred to in points (b), (c) or (d) of Article 1 (1) of Directive 2014/59/EU or any of their affiliates in the year preceeding its assessment as an independent valuer.

Q4	Do you reckon there are other cases of where independence should be ruled out in any case?
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8. The independent valuer, who identifies actual or potential material interests in accordance with this Regulation, both before and after its appointment as a valuer, shall declare these interests to the resolution authority without undue delay.
9. Fees and expenses of the independent valuer for the purposes of performing the valuation shall not be considered as giving rise to interests in common or in conflict within the meaning of this Regulation, provided they are deemed as reasonable.
10. Premises, technical equipment and other measures temporarily granted to the independent valuer for supporting the valuer whilst performing the valuations for the purposes of Articles 36 or 74 of Directive 2014/59/EU shall not be considered as giving rise to interests in common or in conflict within the meaning of this Regulation, provided they are deemed as reasonable.

Article 5

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

⁴ Directive (EU) No 43/2006 of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

5. Accompanying documents

5.1 Draft Impact Assessment

Introduction

Article 36(14) of the BRRD requires the EBA to specify through a Regulatory Technical Standard (RTS) the circumstances under which a person is independent from both the resolution authority and the institution or entity.

As per Article 10(1) of the EBA regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft implementing technical standards/regulatory technical standards developed by the EBA, when submitted to the Commission for adoption, shall be accompanied by an Impact Assessment (IA) annex which analyses ‘the potential related costs and benefits’. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

This annex presents the impact assessment and a cost-benefit analysis of the provisions included in the RTS described in this Consultation Paper. Given the nature of the study, the impact assessment is high level and qualitative.

Problem definition

The absence of a common regulatory framework to ensure the independence of a valuer increases the risk of the poor quality of valuations in terms of fairness, prudence and accuracy.

- Under the current framework, situations where valuers could be influenced by the resolution authority or the institution when performing their valuation are hardly captured. Therefore, valuations could be affected by conflicts of interest which could undermine the credibility and the quality of the valuation.
- It also increases the likelihood of litigation cases arising during the resolution process. Litigation cases are more likely to occur when the regulatory framework ensuring the independency of the valuer is not credible. The parties injured by the results of the valuation are potentially more tempted to take an action during the resolution process.
- It reduces the overall efficiency of the resolution framework. The current framework is not proactive due to the legal uncertainty on whether a valuer is independent. As a result, potential problems caused by the lack of independency of the valuer would

only be raised at a very late stage of the resolution process which may cause delays and/or disrupt the resolution process as a whole.

Primary legislation defining the circumstances under which a valuer is independent is rare in EU countries, and provides mostly general principles governing the issue.

Two **main problems** emerge when trying to specify the circumstances under which a valuer cannot be considered independent:

- whether general criteria should be identified to assess whether the valuer is independent, or whether a list of specific situations where the valuer cannot be considered independent should be established;
- whether there are certain positive qualitative or quantitative features that can be identified as necessary preconditions that the valuer has to meet in order to be considered independent and whether a particular process should be set forth to identify an independent valuer.

Objectives

These RTS aim to ensure that the person/entity performing the valuation of the assets and liabilities of an institution under a resolution process is independent from the resolution authority and from the institution.

In particular, the RTS aim to:

- Prevent undue influence from the resolution authority or the institution with an interest in the final value and content of the valuation,
- Ensure a fair and prudent valuation of the balance sheet,
- Enhance transparency and governance over the valuation,
- Enhance market confidence in the quality of the valuation of the resolved entity,
- Reduce litigation cases during the resolution process,
- Strengthen the efficiency of the resolution process as a whole.

Policy options

In relation to the problems and objectives listed above, the EBA has considered various policy options which are partly cumulative. These options relate to the scope and the content of the RTS:

Policy option 1: List of conflicts of interest.

Option 1 proposes the provision by the RTS of a detailed list of conflicts of interest between the valuer and the resolution authority and the institution.

Policy option 2: General criteria to frame each specific situation and assess independence on a case-by-case basis

Option 2 proposes that the RTS introduce a list of situations which may not be compatible with the requirements for independence.

Policy option 3: Sufficient expertise and resources

Option 3 proposes the specification of qualitative preconditions for being considered an independent valuer, in addition to the criteria ensuring the legal, structural and operational separation of the valuer from the resolution authorities and the institutions.

Assessment of the policy options

This section identifies the advantages and disadvantages of the policy options, taking into account the relevant costs and benefits of the policy options. However, it is worth noting that the implementation of the RTS are not expected to generate additional costs. When drafting the RTS, the EBA focused on the key criteria and concepts needed to ensure the independence of the valuer. The circumstances identified in the RTS are deemed to be reasonable, clear and simple which should ensure the smooth and easy implementation of the standards by the public authorities. As a result, the costs stemming from the implementation of the new framework will be limited while the costs caused by the current legal uncertainties (costs of litigations, disruptions in the resolution process) are expected to decrease.

Policy option 1: List of conflicts of interest

- *Advantages*
 - A prescriptive list of conflicts of interest would decrease the risk for misinterpretation and potential conflicts between parties.
 - It also creates less uncertainty for the institutions and regulators.

- *Disadvantages*
 - It is very difficult to identify all potential cases (ie. introducing a prescriptive list) of conflicts of interest. There may be risks of gaps in regulation.
 - A prescriptive list is not proactive and flexible because new cases may arise in the future which will require policy makers to amend the regulatory framework.

Policy option 2: General criteria to frame each specific situation and assess independence on a case-by-case basis

- *Advantages*
 - General criteria would decrease the risk of giving false signals, which would be an inherent feature with detailed criteria. In fact, it is likely that detailed criteria would be incomplete right from the start, leading to ‘false negatives’ (i.e. cases of lack of independence which in fact are not considered as such by the RTS), and on the other too rigid, leading to ‘false positives’ (i.e. cases which would be qualified as incompatible with the requisite of independence even though in fact the valuer is perfectly independent).
 - This criteria would allow also quicker action in cases when a valuer needs to be appointed quickly.
 - General criteria decreases the risk of excluding certain events outside of the scope.
- *Disadvantages*
 - General criteria can be considered redundant and may increase risks of litigation.

Policy option 3: Sufficient expertise and resources

- *Advantages*
 - The competence of valuers is a necessary precondition for valuations. Without this, the framework will not be able to ensure the complete independence of valuers as a valuer may need to seek support from third parties or the resolution authority or the institution concerned during a valuation.
 - While minimising legal risks, this option would also allow the competent authorities to react quickly in emergency situations when a valuer would have to be appointed or substituted.

- Requiring that an independent valuer needs to possess sufficient expertise and resources enhances the credibility of a valuer’s performance.
- *Disadvantages*
 - Qualitative preconditions for an independent valuer are not explicitly covered in Article 36(14) of the BRRD. This article only refers to the circumstances under which a person is independent of the resolution authority and institution or entity. The implementation of Option 1 will therefore be based on a broad interpretation of Article 36(14) of the BRRD.

Preferred policy options

Given the assessment of the policy options, the most suitable options for the RTS are:

- **The high-level specification of the circumstances under which conflicting or common interests may occur, without establishing a prescriptive list.**
- **To specify preconditions for being considered an independent valuer to ensure that valuers are able to perform the valuation without support from a third party.**

Q5	Do you agree with the approach outlined in the impact assessment and more specifically, with the elements included in the assessment of costs and benefits?
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5.2 Overview of questions for Consultation

Respondents are invited to comment in particular the specific questions raised out within the draft RTS and the draft GL.

Questions relating to the draft RTS

Q1: Do you agree that the approach followed in the draft RTS to determine and identify conflicts of interest is the appropriate one?

Q2: Do you agree that three years is the appropriate period of time for the purposes of Article 4(5)?

Q3: Do you agree with the possibility to task the temporary administrator as an independent valuer, subject to the condition set forth in the above provision [art 4(6) of the draft RTS]?

Q4: Do you reckon there are other cases of where independence should be ruled out in any case?

Q5: Do you agree with the approach outlined in the impact assessment and more specifically, with the elements included in the assessment of costs and benefits?