

EBA/GL/2015/04

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Guidelines

on factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of business tool under Article 39(4) of Directive 2014/59/EU

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Status of these guidelines

This document contains guidelines issued pursuant to Article 16 of 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 ('the EBA Regulation'). In accordance with Article 16(3) of the EBA Regulation, competent authorities and financial institutions must make every effort to comply with the guidelines.

Guidelines set out the EBA's view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. The EBA therefore expects all competent authorities and financial institutions to whom guidelines are addressed to comply with guidelines. Competent authorities to whom guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

Pursuant to Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise provide reasons for non-compliance, by 07.10.2015. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided in Section 5 to compliance@eba.europa.eu with the reference 'EBA/GL/2015/04'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.

Notifications will be published on the EBA website, in line with Article 16(3).

Title I - Subject matter, scope and definitions

1. The guidelines specify the factual circumstances amounting to a material threat to financial stability arising from or aggravated by the failure or likely failure of an institution under resolution within the meaning of point (a) of Article 39(4) of Directive 2014/59/EU and the elements where compliance with requirements to market the institution as specified in Article 39(1) of Directive 2014/59/EU would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective specified in point (b) of Article 31(2) of Directive 2014/59/EU.
2. The guidelines apply to resolution authorities.

Title II - Circumstances amounting to a material threat to financial stability

3. When assessing whether there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution in the context of the requirement to market the institution relating to the application of the sale of business tool, resolution authorities should consider the impact on other institutions and financial markets including infrastructure providers and non-financial institution customers. Resolution authorities should in particular consider, but not limit themselves to, factual circumstances that are relevant for the risk that marketing the institution under resolution may result in aggravating uncertainty and a loss of market confidence. These circumstances should include at least any of the following:
 - (a) the risk of a systemic crisis, as evident from the number, size or significance of institutions that are at risk of meeting the conditions for early intervention or the resolution conditions or at risk of undergoing an insolvency procedure, or as evident from public financial support to institutions or extraordinary liquidity facilities provided by central banks;
 - (b) the risk of a discontinuance of critical functions or a significant increase in prices for the provision of these functions as evident from changes in market conditions for these functions or their availability, or the expectation of counterparties and other market participants in this respect;
 - (c) the withdrawal of short-term funding or deposits;
 - (d) decreases in share prices of institutions or in prices of assets held by institutions, in particular where they can have an impact on the capital situation of institutions;
 - (e) a reduction in short or medium-term funding available to institutions;

- (f) an impairment to the functioning of the interbank funding market, as particularly apparent from an increase in margin requirements and a decrease in collateral available to institutions;
 - (g) increases in prices for credit default insurance or a decrease in ratings of institutions or other market participants that are relevant with respect to the financial situation of institutions.
4. Resolution authorities should assess the likelihood of an imminent impairment to any of these elements which could affect institutions other than the institution under resolution that are relevant with respect to the financial stability of one or more Member States based on their relevance as individuals and collectively, as appropriate.

Title III - Elements relating to the effectiveness of the sale of business tool and to financial stability

5. When assessing whether compliance with the requirements specified in Article 39(1) of Directive 2014/59/EU would be likely to undermine the effectiveness of the sale of business tool or achieving the resolution objective of avoiding significant adverse effects on financial stability, resolution authorities should consider at least the following elements:
- (a) With regard to the requirement of transparency stipulated in point (a) of Article 39(2) of Directive 2014/59/EU, the risk that marketing to a wider circle of potential purchasers and that the disclosure of risks and valuations or the identification of critical and non-critical functions in respect of the institution under resolution may result in additional uncertainty and in a loss of market confidence. In particular, preparations for the marketing process should not increase the risk that the institution may enter resolution.
 - (b) With regard to the principle of non-discrimination established by point (b) of Article 39(2) of Directive 2014/59/EU, the fact that certain potential purchasers may be more likely to ensure financial stability, in particular due to factors such as their financial or market position, their structure and business model, which may facilitate the business integration and the legal and organisational feasibility or may have positive effects on the time required for the implementation of the resolution action and the expectation that critical functions can be continued. Resolution authorities should take into account the needs and expectations of counterparties, infrastructure providers, depositors and liquidity providers and those of the wider market.
 - (c) Resolution authorities should ensure that arrangements to ascertain that parties involved in the marketing process are free from conflicts of interest as stipulated by point (c) of Article 39(2) of Directive 2014/59/EU do not impede the practicability and the timely implementation of the resolution action. Resolution authorities should take into account that, given the limited number of service providers, advisers and potential purchasers in the market, a certain risk of conflicts of interests may be inherent to the sales process.

- (d) When assessing whether advantages to potential purchasers are unfair within the meaning of point (d) of Directive 2014/59/EU, resolution authorities should take into account that the resolution objectives and the need for rapid action may justify incentivising purchasers or limiting their risk, in particular in the context of the use of the financing arrangements for these purposes as mentioned in Article 101(1) of Directive 2014/59/EU.
- (e) When aiming to maximise the sale price as required by point (f) of Directive 2014/59/EU, resolution authorities should take into account the need for rapid action, which may be in conflict with prolonged price negotiations or bidding processes, and the resolution objectives, in particular the continuance of critical functions, which may be in conflict with maximising the sale price for certain business areas. In addition, resolution authorities should take into account that certain potential purchasers may be more likely to ensure financial stability, in particular due to factors such as their financial or market position, their structure and business model.
6. When the resolution authority assesses the need to effect a rapid resolution action in accordance with point (e) of Directive 2014/59/EU, it should pay particular regard to the continuance of critical functions, the confidence of depositors and the public, the functioning of infrastructures and the trading times in relevant markets.

Title IV - Final provisions and implementation

These guidelines shall apply from 1 August 2015.

These guidelines should be reviewed by 31 July 2017.