

EBA/CP/2015/18

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27 October 2015

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# Consultation Paper

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## Guidelines

on the provision of information in summary or collective form for the purposes of Article 84(3) of Directive 2014/59/EU

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# 1. Responding to this consultation

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The 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 27 January 2016. 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) N° 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

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Article 84(7) of Directive 2014/59/EU mandates the EBA to specify how information should be provided in summary or collective form such that individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU cannot be identified.

To foster convergent practices these guidelines give guidance on how information should be provided in summary or collective form and define principles based factors which should be considered in order to ensure that the information in summary or collective form is disclosed such that individual institutions or entities cannot be identified (i.e. in an anonymised form).

The approach used in the draft guidelines is intended to strike a balance between the need to achieve an appropriate level of convergence of practices as to how confidential information should be provided in summary or collective form and the need to ensure flexibility, considering that there might be many different types of confidential information as well as circumstances and situations when confidential information is being disclosed.

### 3. Background and rationale

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Considering the mandate given to the EBA (for details please see impact assessment section of this paper) the draft guidelines specify that for the purposes of disclosing information in summary or collective form according to Article 84(3) of the BRRD, such that individual institutions or entities cannot be identified, the information should be provided either by means of a brief statement or on an aggregate basis, in anonymised form. The draft guidelines also introduce three principles based factors which should be considered before the disclosure in summary or collective form is made. Those factors are:

- Number of institutions. As a general rule the draft GL limits disclosure confidential of information which relates to fewer than 3 institutions or relevant entities. Given that there might not in all cases be 3 institutions to which the information relates, the GL clarifies that disclosure can be made if, considering two other principles namely i) specific patterns and ii) context of disclosure, there is no risk of identification of the individual institution or relevant entity.
- Specific patterns. This factor requires the avoidance of any references to specific characteristics, distinctive features, names or to numerical, qualitative and other distinctive data which would allow the identification of the individual institutions or entities.
- Context of disclosure. This factor requires the avoidance of disclosure of confidential information when a set of circumstances such as the means of the disclosure, the number and the characteristics of the addressees, the timing of the disclosure and any other distinctive circumstance create a risk that the individual institutions or entities will be identifiable.

The approach chosen in the draft guidelines fulfils the mandate and at the same time provides flexibility, considering that there might be different types of confidential information as well as circumstances and situations when confidential information might need to be disclosed, which might increase or decrease the risk to identify individual institutions or entities from the information provided in summary or collective form. Principles defined in the draft guidelines will guide authorities as to which aspects have to be considered in order to eliminate that risk.

## 4. Guidelines

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In between the text of the draft RTS/ITS/Guidelines/advice that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.

EBA/GL/20XX/XX

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## Draft Guidelines

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on the provision of information in  
summary or collective form under  
Article 84(3) of Directive 2014/59/EU

# 1. Compliance and reporting obligations

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## Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010<sup>1</sup>. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

## Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by [dd.mm.yyyy]. 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 available on the EBA website to [compliance@eba.europa.eu](mailto:compliance@eba.europa.eu) with the reference 'EBA/GL/201x/xx'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

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<sup>1</sup> 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).



## 2. Subject matter, scope and definitions

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### Subject matter

5. These guidelines specify how information should be provided in summary or collective form for the purposes of Article 84(3) of Directive 2014/59/EU<sup>2</sup>, pursuant to the mandate conferred to the EBA in Article 84(7) of that Directive.

### Scope of application

6. These guidelines apply in relation to the disclosure of confidential information in summary or collective form for the purposes of Article 84(3) of Directive 2014/59/EU.

### Addressees

7. These guidelines are addressed to competent authorities as defined in point (i) and resolution authorities as defined in point (iv) of Article 4(2) of Regulation (EU) No 1093/2010 and to financial institutions as defined in Article 4(1) of that Regulation.

### Definitions

Unless otherwise specified, terms used and defined in Directive 2014/59/EU have the same meaning in the guidelines.

## 3. Implementation

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### Date of application

8. These guidelines apply from **X February 2016**.

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<sup>2</sup> 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 (O.J.E.U. L 173 of 12 June 2014, p. 190).

## 4. Provision of information in summary or collective form

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9. For the purposes of disclosing information in summary or collective form according to Article 84(3) of Directive 2014/59/EU, such that individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of that Directive cannot be identified, the information should be provided either by means of a brief statement or on an aggregate basis, in anonymised form.
10. For the purposes of paragraph 9 of these guidelines all the following factors should be considered in order to ensure that the information in summary or collective form is disclosed in anonymised form:
  - a) **Number of institutions.** If the confidential information relates to fewer than three institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU, disclosure should be avoided, unless the specific patterns, as specified in point b) of this paragraph, and the context of disclosure, as specified in point c) of this paragraph, do not create a risk of identification of those individual institutions or entities.
  - b) **Specific patterns.** When disclosing confidential information any reference to specific characteristics, distinctive features, names or to numerical, qualitative and other distinctive data allowing identification of the individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU, should be avoided.
  - c) **Context of disclosure.** Disclosure of confidential information should be avoided when a set of circumstances such as the means of the disclosure, the number and the characteristics of the addressees, the timing of the disclosure and any other distinctive circumstance create a risk of identifying the individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU.

## 5. Accompanying documents

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### 5.1 Impact assessment

The EBA is mandated under Article 84(7) of the BRRD to issue guidelines specifying how information should be provided in summary or collective form for the purposes of paragraph 3.

As per Article 16(2) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any guidelines developed by the EBA shall be accompanied by an impact assessment annex which analyses ‘the potential related costs and benefits’. This annex shall provide the reader with an overview of the findings with regard to the problem identification, the options identified to rectify the problem and the potential impact of these options.

This document presents the impact assessment with cost-benefit analysis of the provisions included in the guidelines. Given the nature of the guidelines, the impact assessment is high-level and qualitative in nature.

#### **A. Problem identification and baseline scenario**

The mandate of Article 84(7) requires the EBA to issue guidelines specifying how information should be provided in summary or collective form for the purposes of paragraph 3, namely, such that individual institutions or entities cannot be identified.

Thus, the main question which needs to be addressed is how to disclose information in summary or collective form that individual institutions and entities cannot be identified. A lack of consistency and potential variations in approaches may lead to asymmetric information disclosure among Member States.

#### **B. Policy objectives**

The main aim of the GL is to promote symmetric information and convergence of supervisory and resolution practices regarding disclosure of confidential information in summary or collective form. In particular, the draft Guidelines aim to clarify how confidential information should be provided in summary or collective form and identify key common factors which should be considered at a minimum before the disclose is being made such that individual institutions or entities cannot be identified.

#### **C. Options considered**

Article 84 of Directive 2014/59/EU (the ‘BRRD’) introduces general rules in relation to professional secrecy and confidentiality requirements when dealing with the confidential information. Article



84(7) of the BRRD requires EBA to issue guidelines which should specify how information should be provided in summary or collective form for the purposes of paragraph 3 of Article 84.

Article 84 (3) of the BRRD introduces general rule that defined persons (Article 84(1) of the BRRD) shall be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with its functions under the BRRD, to any person or authority (the 'General rule'), unless it is:

- a. in the exercise of their functions under the BRRD (the 'first exemption'); or
- b. in summary or collective form such that individual institutions or entities<sup>3</sup> cannot be identified (the 'second exemption'); or
- c. with the express and prior consent of the authority or the institution or the entity<sup>4</sup> which provided the information (the 'third exemption').

Thus the EBA mandate relates only to the 'second exemption', namely, possibility to disclose the confidential information in summary or collective form such that individual institutions or entities cannot be identified.

It is important to mention that disclosure of confidential information under this exemption covers a limited number of cases, namely, when the defined persons (Article 84(1) of the BRRD) are disclosing confidential information, when not exercising their functions under the BRRD (the first exemption), and without having express and prior consent from the institution (the third exemption).

However, despite the fact that the disclosure of information under the 'second exemption' covers a limited number of cases comparing with the disclosure under the other two exemptions, there are no limitations in the level 1 text as regards the scope of confidential information which can be disclosed under the 'second exemption'. This means that it covers all possible confidential information collected under the BRRD. Because of that, the scope of draft guidelines cannot be limited to particular cases or situations, and that the guidelines should be general and principle-based when specifying how information should be provided in summary or collective form.

In relation to disclosure under the 'second exemption' the level 1 text already introduces the general principle that the disclosure of information in summary or collective form should be done in a way that individual institution(s) cannot be identified. Because of that, the EBA mandate becomes even more limited and the guidelines can just clarify which factors should be considered in order the individual institution cannot be identified.

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<sup>3</sup> referred to in point (b), (c) or (d) of Article 1(1) of the BRRD.

<sup>4</sup> referred to in point (b), (c) or (d) of Article 1(1) of the BRRD.



Taking into account the mandate given to the EBA, the current impact assessment has considered the following options on how information should be provided in summary or collective form such that individual institution cannot be identified:

- **option 1 – introduce a minimum number of institutions or entities to which the confidential information should relate to**

If information in summary or collective form relates to only one institution or entity, it is a high risk that the individual institution will be identified, especially considering that a number of information might be already disclosed under the first and the third exemptions. Thus, introduction of minimum number of institutions to which confidential information should relate is a necessary prerequisite. General rule that confidential information should relate to at least three institutions would minimise the risk of identifying institution or entity.

- **option 2 – require to consider specific patterns and context of disclosure before the disclosure of confidential information is being made**

The second option would be to not introduce a minimum number of institution to which confidential information should relate to, but rather focus on specific patterns and context of confidential information which will be disclosed.

It is hard to deny that references to specific patterns such as specific characteristics (e.g. using the term ‘agricultural’ when referring to a credit institution when there is only one agricultural bank in the Member State), distinctive features (e.g. a bank which specialises in shipping finance, where in the Member State there is only one bank involved in such an activity), names (e.g. management position) or to numerical, qualitative data which only relates to the institution about which the disclosure is being made, greatly increases the risk of an individual institution to be identified.

Besides the specific patterns, also the context of disclosure of confidential information might be relevant, as means of disclosure (e.g. information send via e-mail or in paper), number of addressees (e.g. depending on confidential information, the greater the number of addressees the greater the risk of identifying an individual institution), timing (e.g. the risk of identifying the institution might be higher when the information is being disclosed soon after the event it relates to). The mitigation of the above factors could decrease the risk of identifying individual institution(s) from summary or collective information.

Thus, it seems appropriate to consider specific patterns and the context of disclosure before disclosing confidential information. However, this approach is just a complementary precautionary measure, which in practice could be redundant as the disclosure of collective information that relates to more than one institution already significantly diminishes the chances of the identification of an individual institution. Nonetheless, the existence of this precautionary measure alone could lead to reducing the sample of the institutions which participate in the summary information from three to two institutions.



- **option 3** (preferred option) – **combine option 1 and option 2**

The EBA's view is that the best way of balancing these concerns is to combine the two approaches and introduce general rule which would allow disclosure of confidential information in summary or collective form only if information relates to at least three institutions, unless considering specific patterns and context of disclosure there would be no risk that individual institution would be identified and then the disclosure would be allowed in cases when confidential information relates to fewer than three (i.e. one) institution. This option would ensure needed flexibility, but at the same time encourage careful consideration of the factors which might decrease or increase the risk of identification of individual institution when disclosing information in summary and collective form.

#### **Cost – benefit analysis**

**Cost:** the magnitude of the cost of the preferred policy option, in relation to the current operational cost should be low as the guidelines just clarify how to fulfil the requirement which is already in level 1 text.

**Benefits:** the benefit of the preferred policy option in relation to the current operational cost should be medium, as guidelines clarify how to provide information in summary or collective such that individual institution could not be identified.

**Net impact of the preferred option:** the net impact (benefits – costs) of the preferred option is estimated to be of low magnitude, justifying the implementation of the preferred option.

## 5.2 Overview of questions

### Questions:

1. Do you agree with the principle based factors which have to be considered before disclosing information in summary or collective form such that individual institution should not be identified?
2. If no. What kind of other principle based factors might be useful to introduce?