

Consultation Paper

Draft Regulatory Technical Standards

On Passport Notifications under Articles 35, 36 and 39 of the proposed Capital Requirements Directive



Consultation Paper on Draft Regulatory Technical Standards On Passport Notifications under Article 35, 36 and 39 of the proposed Capital Requirements Directive

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1. Responding to this Consultation

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.

Please send your comments to the EBA by email to EBA-CP-2013-12@eba.europa.eu by **21.08.2013**, indicating the reference 'EBA/CP/2013/12' on the subject field. Please note that comments submitted after the deadline, or sent to another e-mail address will not be processed.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please indicate clearly and prominently in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an e-mail message will not be treated as a request for non-disclosure. 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

Information on data protection can be found at www.eba.europa.eu under the heading 'Legal Notice'.

2. Executive Summary

The proposed Capital Requirements Directive (CRD) sets out requirements concerning the exercise by credit institutions of the freedom of establishment and the freedom to provide services and mandates the EBA to develop draft regulatory technical standards (RTS) in order to specify the information to be notified pursuant to Articles 35, 36 and 39 of the CRD.

The draft RTS recognise both the information needs of the competent authorities of the home Member State in order to take a decision on the adequacy of the administrative structure or the financial situation of the credit institution, as well as the need for exchanging complete and clear information between the competent authorities of the home and host Member States to allow host competent authorities to prepare for the supervision of the credit institution and to indicate, if necessary, any general good conditions.

Provisions in these draft RTS require credit institutions to submit details on the programme of operations, indicating the types of business envisaged, providing appropriate links between the branch activities and how these fit and contribute to the overall strategy of the credit institution. In addition, and as a new provision introduced by these draft RTS, credit institutions are expected to indicate their core business activities and the intended start date for such activities. The structural organisation of the branch, including its governance arrangements, is also targeted by these RTS as part of the information to be notified, as well information on the financial plan of the branch for a period of three years.

Information on the termination of the operation of a branch was considered as part of changes in the initial branch notification, and as such specific set of information concerning mainly the management of the relationships of the branch with its existing customers is also specified in these draft RTS.

Following the end of the consultation process, the EBA will finalise the draft RTS considering the responses to this consultation paper as well as any opinion of the Banking Stakeholder Group. The EBA envisages submitting the draft RTS to the European Commission by the end of this year.

3. Background and rationale

In accordance with the principle of single authorisation, the decision to issue an authorisation, which is valid for the whole of the EU, is the sole responsibility of the competent authorities of the home Member State. A credit institution may then provide the services or perform the activities, for which it has been authorised, throughout the Union, either through the establishment of a branch or the free provision of services.

Building on the level 1 text of the proposed CRD, these RTS specify further the information that a credit institution, wishing to establish a branch within the territory of another Member State, shall provide and the information that will need to be provided in case of changes in the initial branch notification. The information to be communicated in the case of services notifications is also specified.

Apart from the detailed list of information concerning programme of operations and the structural organisation of the branch, there are also provisions requiring the credit institution to indicate the main activities that it intends to exercise in the territory of the host Member State and the intended start date for these activities. Such provisions are expected to:

- ▶ improve the information available to the competent authorities of both home and host Member States;
- ▶ improve the supervision and monitoring of a credit institution cross-border activities; and
- ▶ minimise additional requests for clarifications on the activities that a branch performs cross-border.

Information on the termination of a branch operating in the territory of a host Member State was also considered as an important element of information for the performance of the tasks and responsibilities of the competent authorities of home and host Member States.

These RTS build to a large extent on the Passporting Guidelines developed by the Committee of European Banking Supervisors (CEBS), the predecessor of the EBA, and should be read along with the draft implementing technical standards that establish standard forms, templates and procedures for the purposes of the passport notifications.

The EBA has developed these RTS proposals on the basis of the legislative texts for the CRD agreed by the European Parliament and the Council in April 2013.¹ This text will be subject to legal-linguistic review before being formally adopted and the final text published in the Official Journal of the European Union. The EBA will review the RTS proposals to ensure that they take account of any changes made in the final text of the CRD, as well as to take account of any changes arising out of the consultation process.

¹ The CRD/CRR text as agreed by the Council can be found at <http://register.consilium.europa.eu/pdf/en/13/st07/st07746.en13.pdf>

4. Draft implementing technical standards

COMMISSION DELEGATED REGULATION (EU) No .../..

supplementing Directive 2013/xx/EU of the European Parliament and of the Council with regard to regulatory technical standards on the information to be notified when exercising the right of establishment and the freedom to provide services

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2013/xx/EU of the European Parliament and of the Council of [dd mmmm yyyy] on prudential requirements for credit institutions and investment institutions² [the Directive 2013/xx/EU], and in particular to Article 35(5), Article 36(5) and Article 39(4) thereof,

Whereas:

- (1) The provisions in this Regulation are closely linked, since they deal with notifications related to the exercise of the right of establishment and the freedom to provide services. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, it is desirable to include certain regulatory technical standards required by Directive 2013/xx/EU in a single Regulation.
- (2) Competent authorities of home and host Member States should receive updated information in case of change in the particulars of a branch passport notification in order to be in a position to make informed decision within their powers and respective responsibilities.
- (3) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Banking Authority) (EBA) to the Commission.
- (4) 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 and requested the

² OJ.....

opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010].

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation specifies the information to be notified when exercising the right of establishment and the freedom to provide services in accordance with Article 35(5), Article 36(5) and Article 39(4) of Directive 2013/xx/EU.

Article 2

Definitions

In this Regulation the following definitions shall apply:

- (1) “branch passport notification” means a notification made in accordance with Article 35(1) of Directive 2013/xx/EU to the competent authorities of its home Member State by a credit institution wishing to establish a branch within the territory of another Member State;
- (2) “change in branch particulars notification” means a notification made in accordance with Article 36(3) of Directive 2013/xx/EU to the competent authorities of the home and host Member States by an institution of a change in the particulars communicated pursuant to points (b), (c) or (d) of Article 35(2) of that Directive;
- (3) “services passport notification” means a notification made in accordance with Article 39(1) of Directive 2013/xx/EU to the competent authorities of its home Member State by a credit institution wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time;
- (4) “passport notification” means a branch passport notification, a change in branch particulars notification or a services passport notification.

Article 3

Right of establishment – initial notification

The information to be notified in a branch passport notification is:

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- 1) name and address of the credit institution and name and intended principal place of business of the branch;
 - 2) programme of operations, comprising the following items:
 - a) types of business envisaged, comprising the following items:
 - i) the main objectives and business strategy of the branch and an explanation of how the branch will contribute to the strategy of the institution and, where applicable, of its group;
 - ii) a list of the activities in Annex I of Directive 2013/xx/EU that it is envisaged that the branch will conduct;
 - iii) an indication of the activities that will constitute the core business in the host Member State, including the intended start date for each core activity;

Questions for consultation:

1. To what extent will the information on core activities contribute to transparency and monitoring of activities in host Member State?

- iv) a description of the target customers and counterparties;
 - b) structural organisation of the branch, comprising of the following items:
 - i) a description of the organisational structure of the branch, including functional and legal reporting lines and the position and role of the branch within the corporate structure of the institution and, where applicable, of its group;
 - ii) a description of governance arrangements and internal control mechanisms of the branch, including:
 - risk management procedures of the branch and details of liquidity risk management of the institution, and where applicable, of its group;
 - any limits applying to the branch activities, in particular lending;
 - details of the internal audit arrangements of the branch, including details of the person responsible for these arrangements and, where applicable, details of the external auditor;
 - anti-money laundering arrangements of the branch including details of the person appointed to ensure compliance with these arrangements;

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- controls over outsourcing and other arrangements with third parties in connection with the activities carried on in the branch that are covered by the institution's authorisation;
 - iii) in relation to investment services and activities (as defined in Article 4(2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC³), where applicable:
 - the arrangements for safeguarding client money and assets;
 - the arrangements for compliance with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 of Directive 2004/39/EC and measures adopted pursuant thereto by the relevant competent authorities of the host Member State;
 - the internal code of conduct including controls over personal account dealing;
 - details of the person responsible for dealing with complaints in relation to the investment services and activities of the branch;
 - the details of the person appointed to ensure compliance with the arrangements of the branch relating to investment services and activities.
 - iv) details of professional experience of the persons responsible for the management of the branch;
 - c) other information, comprising the following items:
 - i) a financial plan containing forecasts for balance sheet and profit and loss account covering a period of three years;
 - ii) the name and contact details of the Union deposit guarantee and investor protection schemes, together with the maximum coverage of the investor protection scheme, of which the institution is a member and which cover the activities and services of the branch;
 - iii) details of the branch's IT arrangements.

³ OJ L 145, 30.4.2004, p.1.

Article 4

Change in branch particulars notification and termination of the operation

- (1) Other than in relation to a change concerning the planned termination of operation of a branch, the information to be notified in a change in branch particulars notification is the information specified in points (1), (2)(a) and (2)(b) of Article 3 to the extent that there has been a change in that information since the previous time that it was provided.
- (2) The information to be notified in a change in branch particulars notification which concerns the proposed termination of the operation of a branch is:
 - a) the name and contact details of the persons who will be responsible for the process of terminating the operation of the branch;
 - b) the schedule for the planned termination; and
 - c) information on the process of terminating the business relations with branch customers.

Questions for consultation:

2. Do you think that the information in case of planned termination of the operation of a branch will contribute to the transparency of related process and contribute to the protection of consumers?

Article 5

Services passport notification

The information to be notified in a services passport notification is:

- (1) the activities that will be carried on for the first time in the host Member State;
- (2) the activities that will constitute the core business in the host Member State;
- (3) the intended start date for each core service activity in so far as possible.

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.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

5. Accompanying documents

5.1 Draft Cost- Benefit Analysis / Impact Assessment

5.1.1 Introduction

CEBS Guidelines on passporting notifications (August 2009), were developed and agreed by CEBS members and observers recognising the need to cooperate and exchange information to ensure clarity and consistency in the content of the information to be notified from credit institutions want to operate cross border in the European Economic Area through the establishment of branches or through the exercise of the freedom to provide services. While non-binding these Guidelines represent a set of common standards already agreed on. In addition, the national supervisory authorities have gained sufficient experience in the implementation of the common framework to identify positive aspects as well as drawbacks and elements that could be taken into account and lead to the development of the better regulatory framework.

Thus, the draft regulatory technical standards build on a large extent on the existing Guidelines. In order to assess the impact expected from the add-on elements that are proposed by the draft RTS, the draft impact assessment was performed based on a questionnaire that was developed and internally by EBA substructures, in which competent authorities from all Member States are represented. The draft impact assessment aims to assess, inter alia, the level of implementation of the existing Guidelines by the national supervisory authorities, as well as the level of compliance of credit institutions with the implemented part of the guidelines.

5.1.2 Procedural issues and stakeholder consultation

While developing the draft regulatory technical standards and before the publication of the consultation paper it was felt important to consult competent authorities on the policy options and the approaches favoured by the draft RTS, with special focus on information to be provided from the credit institution to the competent authorities of the home Members States and from the competent authorities of the home Member States to the competent authorities of the host Member States.

In this context, an impact assessment questionnaire was developed addressing the following issues:

- Level of implementation of the existing guidelines and compliance (Guidelines on Passport Notifications), with focus on the information to be notified;
- Current supervisory framework, with focus on the number of notifications received from authorities in their capacity both as home and as host;
- Comparison between current and future framework, with focus on expected changes as a result of the proposed regulatory technical standards only (meaning that any changes resulting from the implementing technical standards were kept aside for the purposes of this comparison);
- Costs and Benefits of the draft RTS, with focus on specific policy options that have been noted as the ones from which main incremental costs and benefits are expected.

The sections below describe in detail the results from the analysis of the submitted responses for all these four areas.

5.1.3 Level of implementation and current supervisory framework

From the responses received during the draft impact assessment 79% of them reported 100% level of implementation, while 21% of them reported 75% level of implementation.

5.1.4 Comparison between the current and future supervisory framework

In general, the scope of the proposed draft regulatory technical standards is wider compared to the current regulatory framework regarding the information to be notified on the i) establishment of a branch, ii) changes in the initial branch notification and iii) branch termination. The draft regulatory technical standards are assessed as of similar scope for the information to be provided in case of notification for the exercise of the freedom to provide services

5.1.5 Problem definition

The main problem addressed by the EBA is the specification of the information to be notified from i) the credit institutions to the competent authorities of the home Member State, and from the competent authorities of the home Member State to the competent authorities of the host Member State (in case of initial notification), and ii) from the credit institution to the competent authorities of the home and host Member States (changes in the initial notification).

To accomplish this, the EBA took into account that the goal of every BTS is to achieve the maximum possible harmonisation as a mean to reach the objectives of the level playing field, the prevention of regulatory arbitrage opportunities, enhance supervisory convergence and legal clarity. In addition, provisions included in the draft regulatory technical standards shall clearly specify the information that needs to be notified and by doing so, reduce the burden of compliance for the credit institutions and contribute in the efficient and effective cooperation between the competent authorities in the home and host Member States.

5.1.6 Objectives

The impact assessment has been carried out having in mind that the four general objectives of the CRD are met and the negative externalities have been contained⁴. However, for the purpose of the forthcoming analysis three general objectives are more relevant to the specific RTS:

- Enhance financial stability (G-1). This objective is satisfied in that the RTS specify in detail the information required for the exercise of the right of establishment and of the freedom to provide services, thus providing the home and host Authorities with a common and comparable set of information across EEA, a tool that contributes to efficient supervision of banking groups with cross border activities and enhanced financial stability;
- Enhance safeguarding of depositor interests (G-2). The RTS satisfy this objective in two directions by building a more coherent requirement on information concerning the core business of the intended activities abroad, thus enabling both the home and the host authorities to have a better understanding and overview of the activities of the credit institution

⁴ For more information refer to the “Commission Staff Working Paper – Impact Assessment” accompanying the document “Regulation of the European Parliament and the Council Regulation on prudential requirements for the credit institutions and investment firms” (http://ec.europa.eu/internal_market/bank/docs/regcapital/CRD4_reform/IA_regulation_en.pdf)

in the host Member State; In fact, the new set of rules on the information to be notified restricts the possibility of “unclassified notifications” by creating a material link between the intended activities abroad and the programme of operations in case of the establishment of a branch abroad (indication of the core business activities);

- Ensure international competitiveness of EU banking sector (G-3). The common and standardized set of information required by the RTS will foster the level playing field among credit institutions operating in different jurisdictions, reducing compliance costs and reinforcing their opportunity to expand in a European integrated banking sector.

The operational (specific) objectives that are the most relevant and addressed, implicitly or explicitly, by this draft impact assessment are the following:

- Prevent regulatory arbitrage opportunities (S-3). In line with the task of building up a Single Rule Book of Supervision at European level, the RTS reduce the chance of national approaches that could result in inconsistent approaches in the set of information required by credit institutions that intend to operate cross-border in the EEA;
- Enhance legal clarity (S-4). It is of paramount value both for the competent authorities of home and host Member States and for the credit institutions to rely on provisions covering the content of the passport notifications that reduces at a minimum possible level the chance of providing incomplete information.
- Reduce compliance burden (S-5). A harmonized framework of technical standards among competent authorities in the EU will have a beneficial impact of the compliance costs sustained by credit institution, by reducing the chance of having to comply with “gold-plating” rules or practices at national level;
- Enhance level playing field (S-6). A harmonized framework of technical standards among competent authorities in the EU will foster the chance for credit institutions to offer services cross-border, making the notification procedures rely on a single common mechanism implemented and binding in all jurisdictions;
- Enhance supervisory cooperation and convergence (S-7). The cooperation among Authorities will benefit by the introduction of the RTS, providing more clarity on the information that is expected to be communicated from the competent authorities of the home Member State to the competent authorities of the host Member State, avoiding unnecessary and burdensome requests as well as delays caused by the provision of incomplete information.

5.1.7 Policy options: analysis and comparisons / preferred options

The current impact assessment study considered the following policy options as being the most relevant for the draft technical standards;

- I. Developing the Regulatory Technical Standards based on the Guidelines on Passport Notifications;

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- i. Developing the Regulatory Technical Standards from scratch, ignoring the already implemented guidelines.

While developing the draft impact assessment the following policy options were identified as the most important ones in terms of resulting incremental costs and benefits. The questionnaire that was used for the purposes of the impact assessment analysis invited competent authorities to note the three most important incremental costs and benefits and to identify the policy options from which these costs and benefits resulted.

- i. Information on core services/activities and intended start date

Experience of competent Authorities revealed that credit institutions tend to submit passport notifications – both for the right of establishment and the freedom to provide services- that encompass a wide range of financial services, regardless of the activities that the institution in fact intends to perform in the host Member State (unclassified notifications).

Very often notifications include all the activities for which the credit institution is authorized in the home Member State, while only a few of these activities are actually performed in the host country within a reasonable time after the approval of the notification.

This practice makes it particularly burdensome for competent authorities of home and host Member States to handle notifications and have an up-to-date overview of the services provided abroad due to the lack of clarity on the actual activities performed by the credit institution.

An unclassified notification also poses difficulties for the home supervisor to perform its obligatory assessment keeping in mind the activities envisaged by the institution. It is noted that the main purpose of the home supervisor's assessment is to evaluate the institution capacity to operate a cross border branch with certain activities.

On this issue, the future RTS on the notifications for branches will include the requirement for credit institutions to submit – together with the selection of the activities provided in Annex I to Directive 2006/48/EC – an “indication of the services and/or activities that will constitute the core business in the host country in line with the main objectives of the branch, including the intended starting date for each core service and/or activity.

The merits of this solution are: a) to ensure compliance with the level 1 legislation both in terms of guarantees to the credit institution and the scope of the information required by the CRD; b) to provide the competent authorities of the home and host Member States with a more focused information on the intended activity of the credit institution in the territory of the host Member State.

- ii. Forecasts of balance sheet and profit and loss account for a period of 3 years (versus period of 1 year which is the current legal requirement)

Competent Authorities felt that in case of the establishment of a branch the requirement of forecasts of balance sheet and profit and loss account for a period of 3 years helps building a more robust set of

information for the benefit of both the home and host Authorities on the business and activities of the group in the host Member State compared to data covering only a period of 12 months, as it is currently the requirement in the Passporting Guidelines.

iii. Information on the termination of the operations of a branch.

The termination of the operation of the branch can be considered to fall under the category of changes to the initial notification; it was also felt that this business decision is of particular relevance for the competent authorities of the host Member State. To this end, Article 4 of the draft RTS, which states that the termination of a branch shall be notified in accordance with Article 36 (3) of the CRD, also specifies that the notification shall include the following information: indication of the persons responsible for dealing with the termination of the branch operations; the schedule of the planned termination; overview of the process to terminate the business relations with the branch customers.

It is intended that in case the termination comes as a result of the resolution of the credit institution or of the withdrawal of the banking license, the termination will fall under the scope of collaboration concerning supervision and as such will be dealt under the technical standards on information exchange (information to be provided from home to host), given that drivers behind the termination of the branch in this case can't be regarded as a business decision.

5.1.8 Cost-benefit Analysis

(1) General assessment

In the opinion of the national competent authorities the policy options mentioned above are on the whole perceived to potentially generate incremental benefits rather than incremental costs. The envisaged incremental benefits are expected to affect mostly the competent authorities, rather than the credit institutions or any other possible stakeholders. On the other hand, the incremental costs are expected to affect equally the competent authorities and the credit institutions, while no incremental costs mentioned while assessing the impact to other stakeholders. The most frequently source of benefits to the competent authorities concern the provisions enable them to have access to harmonised and complete set of information for the purposes of passporting notifications. Such benefits are partially set off by costs arising from the need to consider and analyse this information. With regards to credit institutions incremental costs are basically to the same provisions specifying the information to be notified, while benefits are mainly expected to arise from the level playing field and common regulatory standards in the EU.

(2) Benefits

- Competent authorities: As mentioned above, the draft cost/benefit analysis shows that on the whole the competent authorities would be the main stakeholders affected by the incremental benefits arising from the new regulation while the incremental costs would impinge on them to a lesser extent. Provisions covering the information on core services/activities and intended start date is the one referred the most as possible source of incremental benefits for the competent authorities, given that it is believed that they enable competent authorities of home and host members states to have access to information of higher quality, and therefore to have a better understanding of credit institution cross border activities. Provisions requiring

forecasts of balance sheet and profit and loss account for a period of 3 years vs period of 1 year which is the current legal requirement, as well as provisions requiring information on the termination of the operations of a branch, were also indicated as sources of benefits for the competent authorities given that they are perceived to provide more accurate and complete information.

- Credit institutions: As mentioned above, the draft cost/benefit analysis shows that in the opinion of the national competent authorities, credit institutions may be burdened by the costs arising from the policy options to be introduced by the new regulation to a greater level than competent authorities and other stakeholders. No specific benefits for the credit institutions were discussed during the draft cost-benefit analysis.
- Other stakeholders (depositors, investors, etc.): The large majority of the respondents does not consider that the new regulation will produce significant benefits or costs for the other stakeholders. However, benefits that have been referred the most in the responses are associated to: i) better information for the clients/depositors of EEA credit institutions in the host country; 2) enhanced market transparency; 3) higher economic safety.

(3) Costs

- Competent authorities: Policy option (i) (information on core services/activities and intended start date) is the most frequently option indicated as source of incremental costs for the competent authorities, as the competent authorities are expected to need more time or resources to consider and analyse the information provided while handling passport notifications. Same arguments were mentioned for policy option (ii) (Forecasts of balance sheet and profit and loss account for a period of 3 years vs period of 1 year which is the current legal requirement) and policy option (iii) (Information on the termination of the operations of a branch).
- Credit institutions: The policy option mentioned the most as the one from which incremental costs for credit institutions are expected to occur is the one covering provisions on the information on core services an/activities and intended start date, mainly due to the fact that credit institutions will need to provide more information. Same arguments were listed for policy option (ii) and (iii), even though they were referred as possible sources of cost to a lesser extent.

5.2 Overview of questions for Consultation

1. To what extent will the information on core activities contribute to transparency and monitoring of activities in Host Member State?
2. Do you think that the information in case of planned termination of the operation of a branch will contribute to the transparency of related process and contribute to the protection of consumers?