

EBA/CP/2014/23

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Consultation Paper

Draft Guidelines on the minimum list of services or facilities that are necessary to enable a recipient to operate a business transferred to it under Article 65(5) of Directive 2014/59/EU

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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.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 22 December 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) 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

To ensure the effectiveness of the partial transfer of the business of an institution or group, Directive 2014/59/EU establishes a number of powers ancillary to the resolution tools, including the power to require continuity of essential services from other parts of a group or, where following the partial transfer of the business the residual part of the institution is liquidated, to require services to enable the purchaser, bridge institution or asset management vehicle to carry out the activities or services transferred to it.

The guidelines specify a core list that resolution authorities should consider requiring as a minimum and taking into account the specific circumstances of the case. The services are grouped in categories under the following headings:

- (a) Human resources support;
- (b) Information Technology;
- (c) Transaction processing, including legal transactional issues, in particular anti-money laundering;
- (d) Real estate and facility provision or management;
- (e) Legal services and compliance functions;
- (f) Treasury-related services;
- (g) Trading/Asset Management;
- (h) Risk management and valuation;
- (i) Accounting;
- (j) Cash handling.

3. Background and rationale

Directive 2014/59/EU confers to resolution authorities the power to transfer the shares or all or part of the assets of an institution to a private purchaser, a bridge bank or an asset management vehicle ('recipient'). The decision what to transfer out of the failing institution is based upon the objectives of ensuring the continuity of critical functions and avoiding adverse effects on financial stability. The Directive establishes a number of supplementary powers, including the power to require continuity of essential services from other parts of a group.

Where the resolution tools have been used to transfer the systemically important services or viable business of an institution to a sound entity such as a private sector purchaser or bridge institution, the Directive stipulates that the residual part of the institution should be liquidated within an appropriate time frame having regard to the need for the failing institution to provide services or support to enable the purchaser or bridge institution to carry out the activities or services acquired by virtue of that transfer. Also in this case, the Directive gives resolution authorities the ancillary power to require the residual institution that is being wound up under normal insolvency proceedings to provide services that are necessary to enable the institution to which assets or shares have been transferred by virtue of the application of the sale of business tool or the bridge institution tool to operate its business.

Under Article 65(5), the EBA is mandated to issue guidelines to specify the minimum list of services or facilities that are necessary to enable a recipient to effectively operate a business transferred to it.

The resolution tools of the Directive are inspired by international standards, in particular the Financial Stability Board (FSB) standard 'Key Attributes of Effective Resolution Regimes for Financial Institutions'. Correspondingly, the guidelines draw upon international work supporting these standards, in particular the FSB document 'Recovery and resolution planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services'. The objective of this FSB document is to identify critical shared services to enhance resolvability. Critical shared services are defined as activities performed within the institution or outsourced to third parties where failure would lead to the inability to perform critical functions. With a view to the objective of the transfer to ensure continuity of critical functions, the criteria for identifying these critical services are the same as to identify the core services and facilities that may be required to enable a recipient to operate the business transferred to it.

The list in the guidelines is to be construed as a minimum list, which means that the authorities may identify the need to require additional services. On the other hand the core list should not be interpreted as though the services would always have to be required from the institution under resolution or the group entities concerned. On the contrary, it is likely that in most cases the recipient will not need the provision of all of the services. Where the recipient is a private sector

purchaser, in many cases the recipient will be in the position to perform some of the services on its own, in particular management and business related functions such as risk management or treasury-related services.

4. EBA Guidelines on the minimum list of services or facilities that are necessary to enable a recipient to operate a business transferred to it under Article 65(5) of Directive 2014/59/EU

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

According 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 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 provided at Section 5 to 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.

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

Title I - Subject matter, scope and definitions

1. These guidelines specify the minimum list of services that are necessary to enable a recipient to effectively operate a business transferred in resolution.
2. The guidelines apply to resolution authorities.

Title II - Minimum list of services or facilities

3. When identifying necessary services or facilities resolution authorities should assess whether the services or facilities are required to maintain the internal essential infrastructure to continue operation of the transferred business, assets and liabilities, in particular of critical functions.
4. When deciding on requiring the institution under resolution or any of its group entities to provide services or facilities, resolution authorities should consider at least the following:
 - (a) Human resources support:
 - (i) Staff administration, including administration of contracts and remuneration;
 - (ii) Internal communication;
 - (b) Information Technology:
 - (i) IT and communication hardware;
 - (ii) Data storage and processing;
 - (iii) Other IT infrastructure, workstations, telecommunications, servers, data centres and related services;
 - (iv) Administration of software licenses and application software;
 - (v) Access to external providers, in particular data and infrastructure providers;
 - (vi) Application maintenance, including software application maintenance and related data flows;
 - (vii) Report generation, internal information flows and data bases;
 - (viii) User support;
 - (ix) Emergency and disaster recovery;

- (c) Transaction processing, including legal transactional issues, in particular anti-money laundering;
- (d) Real estate and facility provision or management:
 - (i) Office premises and storage;
 - (ii) Internal facilities management;
 - (iii) Security and access control;
 - (iv) Real estate portfolio management;
- (e) Legal services and compliance functions:
 - (i) Corporate legal support;
 - (ii) Business and transactional legal services;
 - (iii) Compliance support;
- (f) Treasury-related services:
 - (i) Coordination, administration and management of the treasury activity;
 - (ii) Coordination, administration and management of entity refinancing, including collateral management;
 - (iii) Reporting function, in particular with respect to regulatory liquidity ratios;
 - (iv) Coordination, administration and management of medium and long term funding programs, and refinancing of group entities;
 - (v) Coordination, administration and management of refinancing, in particular short term issues;
- (g) Trading/Asset Management:
 - (i) Operations processing: trade capture, design, realisation, servicing of trading products;
 - (ii) Confirmation, settlement, payment;
 - (iii) Position and counterparty management, with respect to data reporting and counterparty relationships;
 - (iv) Position management (risk and reconciliation);

(h) Risk management and valuation:

- (i) Central or business line or risk type related risk management;
- (ii) Risk report generation;

(i) Accounting:

- (i) Statutory and regulatory reporting;
- (ii) Valuation, in particular of market positions;
- (iii) Management reporting;

(j) Cash handling.

5. The resolution authority should ensure that the provision of services, in particular the services mentioned in points (f), (g) and (h) of paragraph 4 above, does not imply the taking of financial risks which might constitute financial support, which would be in conflict with Article 62(5) of Directive 2013/59/EU.

Question:

Are there additional services which should be included in the list above?

Title III- Final Provisions and Implementation

These guidelines shall apply from [...] 2015.

These guidelines should be reviewed by [1 July 2017].

5. Accompanying documents

5.1 Cost- Benefit Analysis / Impact Assessment

Introduction

Article 39(4) of Directive 2014/59/EU requires the EBA to issue Guidelines that specify the minimum list of services or facilities that are necessary to enable a recipient to effectively operate a business transferred to it.

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 (IA) annex which analyses ‘the potential related costs and benefits’. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

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

Problem definition and the baseline scenario

Current EU regulatory framework is in the process of building a resolution mechanism where Member States aim to achieve an orderly winding-out of the institutions in resolution by preventing potential adverse effects of the resolution process. This objective requires the equipment of the resolution authorities with all necessary tools and powers.

Article 65 of the Directive 2014/59/EU requires that the resolution authorities have the power to require an institution under resolution, or any of its group entities, to provide any services or facilities that are necessary to enable a recipient to operate effectively the business transferred to it. However, the Article does not specify what these necessary services or facilities are.

The lack or potential gaps in the information on these services and facilities and potential variations across Member States when planning their strategies may lead to several problems in the EU regulatory framework, e.g.:

- Lack of clear information on what necessary services and facilities are puts an obstacle for the timely and orderly functioning of the resolution process. This can then have adverse effects on financial stability.

- Lack of consistent and symmetric information on the resolution practice may hinder cooperation between resolution authorities when they handle cross-border cases. This may cause delays in the resolution practice.
- Uneven playing field for institutions in the EU, i.e. different treatment of various entities belonging to the same cross-border groups due to different supervisory/resolution practices.

Objectives

The objective of the Guidelines is to promote symmetric information and convergence of supervisory and resolution practices regarding the services and facilities that are necessary to enable a recipient to operate a business transferred to it. In particular, the draft Guidelines aim at the identification of core services and facilities so that the exchange of information and cooperation across resolution authorities is effective. Table 1 presents the objectives of the draft Guidelines.

Table 1: Operational, specific and general objectives of the Guidelines

Operational objectives	Specific objectives	General objectives
Equip resolution authorities with precise and accurate information and tools.	Harmonise the practices in relation to resolution actions across Member States and achieve effective cross-border cooperation.	Improve the regulatory framework to achieve optimal resolution practices and reduce threats to financial stability.

Technical options

The section presents the major technical options discussed among the WS members during the preparation of the draft Guidelines and presents qualitatively the potential costs and benefits associated with the preferred options.

- Option 1: Inclusion of finance-related operational services in the minimum list
- Option 2: Exclusion of finance-related operational services in the minimum list

The list in the draft Guidelines include a set of elements related to operational shared services. This assessment discusses whether finance-related operational services should also be included in the minimum list of the draft Guidelines. Finance-related operational services involve the management of financial resources of the firm and cover the following indicative list:

- Treasury-related services
- Trading/Asset management

- Risk management and valuation
- Accounting, and
- Cash handling

The resolution process requires rapid transfer of shares/assets to the recipient and in most cases the recipient may not be in a position to replace the services/facilities or provide them internally. In this respect, finance-related operational services are considered as activities of which the failure “would lead to the inability to perform critical functions and, therefore, to the disruption of functions vital for the functioning of the real economy or for financial stability”.¹ The list therefore includes these elements so that the resolution authorities are aware that they should consider requiring them from the institution in resolution.

Option 2 is expected to be costlier for both the resolution authorities if the crucial elements in finance-related operational services are not taken into account in the transfer of the shares/assets when necessary. The cost in this case falls both on the industry and the tax payers. Under this policy option the market players and the tax payers bear a higher risk. On the other hand, the marginal cost of adding finance-related operational services is zero. In terms of operational costs associated with the implementation of Option 1, they are not expected to go beyond the work that the resolution authorities need to carry out under the Level 1 text.

In terms of benefits, the marginal benefit of adding in the list the elements under finance-related operational services is positive. The inclusion of the elements is expected to have a great added value in implementation. In addition, a more precise and harmonised regulatory framework is expected to tackle the identified problems. Resolution authorities are expected to benefit from symmetric information, and more effective and efficient cooperation across jurisdictions. Option 1 therefore generates net benefit in terms of mitigated risk for financial stability and real economy. As a result and in line with the international approach², Option 1 is selected as the preferred option.

¹ Financial Stability Board (FSB), “Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services”, July 2013

² Financial Stability Board (FSB), “Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services”, July 2013