



EBA/CP/2014/47

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19 December 2014

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## Consultation Paper

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Draft Regulatory Technical Standards on procedures and contents of notifications referred to in Articles 81(1), (2) and (3) and the notice of suspension referred to in Article 83 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.

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 20 March 2015. 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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Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD) mandates the EBA under Article 82(3) to develop draft Regulatory Technical Standards in order to specify the procedures and contents relating to the notification referred to in Articles 81(1), (2) and (3) and the notice of suspension referred to in Article 83. The draft RTS contained in this consultation paper has been developed to meet these mandates.

The draft RTS addresses three distinct notifications (i) the management body of an entity consider the entity to be failing or likely to fail and should duly notify the competent authority (ii) in turn, the competent authority should inform the resolution authorities of any notification received from an entity as well as of any measures that the competent authority requires the entity to take pursuant to Article 104 of Directive 2013/36/EU; (iii) relevant authorities identified in Article 81(3) of Directive 2014/59/EU should receive communication by the competent or the resolution authority, as the case may be, that in accordance with Article 32(1), letters (a) and (b), an institution or an entity is failing or likely to fail and that there is no reasonable prospect that any alternative private measure or supervisory action would prevent the failure of the institution or the entity within a reasonable timeframe.

Upon receipt of such communication or on its own initiative, the resolution authority should take a decision whether or not to take resolution action as set out in Article 82(2) of Directive 2014/59/EU.

In addition, this draft RTS sets out the procedures and the content of the notice summarising the effects of the resolution action, including the decision to suspend or restrict the exercise of certain rights in accordance with Article 69, 70 and 71 of Directive 2014/59/EU. The contents of the notice sets out the impact of resolution action on different categories of stakeholders and their contractual rights: e.g. temporary suspension of termination rights, contractual payment or delivery obligations, secured creditors of the institution, availability and access to deposits and other client assets or funds held at the institution

Following the end of the consultation process, the EBA will finalise the draft RTS considering the responses to this consultation paper. The EBA envisages submitting the draft RTS to the European Commission by June 2015.

## 3. Background and rationale

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The Banking Recovery and Resolution Directive (2014/59/EU) requires the designation of a Resolution Authority in each member state for the purpose of carrying out the specified resolution functions within the directive. The delineation of responsibilities between competent

authorities and resolution authorities for prudential supervision and resolution matters requires close cooperation and coordination. In particular, the assessment that a firm is failing or likely to fail is a 'trigger event' for the potential transfer of responsibility from the prudential supervisor to the resolution authority for placing an entity into resolution. In the event of such an assessment, the resolution authority shall decide whether or not to take resolution action.

The BRRD envisages three types of notifications related to a firm assessed as failing or likely to fail. In the first instance, the management body of an institution has a responsibility for establishing whether the entity is failing or likely to fail and to notify the competent authority. In turn, it is the responsibility of competent authority to notify the relevant resolution authorities of the receipt of a notification from an entity and to additionally notify of any actions that the competent authority has instructed the entity to take in response to the notification that the entity is failing or likely to fail. The third type of notification envisaged occurs when either the competent or resolution authority independently perform an assessment that a firm is failing or likely and that having regard to the timing and other relevant circumstances, there is no reasonable prospect that an alternative measure would prevent the failure of the institution.

In the context of an EU single market, it is vital that there is a uniform approach in achieving coordination between home-host authorities as well as between competent authorities and resolution authorities, particularly at the moment that an institution is assessed as failing or likely to fail. This draft RTS provides a clear and transparent process to be followed in this eventuality. It also ensures that resolution authorities have the necessary information and are in a position to take swift resolution decisions. The draft RTS specifies a consistent information requirement for all three types of notification to enable the relevant authorities to respond promptly, irrespective of whether the assessment of failing or likely to fail has been established by the entity, the competent authority or the resolution authority.

Similarly, in the event that a resolution authority takes a resolution action, it is important that the impact and consequences of this action are clearly communicated to stakeholders. The draft RTS provides a harmonised process and consistent information to affected stakeholders on the impact of resolution action. This helps to reduce uncertainty and thereby support the stabilisation of the failing institution.

## 4. Draft Regulatory Technical Standards on notifications and notice of suspension

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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 relating to notification requirements in circumstances that an institution or entity referred to in points (b) (c) and (d) of Article 1(1) is failing or likely to fail and as regards notice of suspension**

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 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) N° 1093/2010<sup>1</sup>, and in particular to Article 82 thereof,

Whereas:

- (1) The framework laid down in Directive 2014/59/EU includes notification and information obligations among the relevant authorities respectively involved in the recovery and resolution process as well as with the specific entity that may be failing or likely to fail.
- (2) In particular it is envisaged that (i) competent authorities should be duly notified by the management body of an entity that they consider to be failing or likely to fail; (ii) resolution authorities should be informed by the competent authority of any notification received by the entity as well as of any measures that the competent authority requires the entity to take pursuant to Article 104 of Directive 2013/36/EU; (iii) authorities identified in Article 81(3) of Directive 2014/59/EU should receive communication by the competent or the resolution authority, as the case may be, that in accordance with Article

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<sup>1</sup> In OJ L 173, 12.6.2014, p. 190.

32(1), letters (a) and (b), an institution or an entity is failing or likely to fail and that there is no reasonable prospect that any alternative private measure or supervisory action would prevent the failure of the institution or the entity within a reasonable timeframe. Upon receipt of such communication or on its own initiative, the resolution authority should take a resolution decision meeting the requirements set out in Article 82(2) of Directive 2014/59/EU.

- (3) In order to achieve a uniform approach across the Union ensuring effective coordination among the relevant authorities and to enable the resolution authority to take adequately informed and swift resolution decisions, this Regulation lays down the procedures and content of the envisaged above notifications provided in Article 81(1), (2) and (3).
- (4) In addition, with the view to provide a EU harmonised approach to adequately inform stakeholders of resolution actions, this Regulation sets out the procedures and the content of the notice summarising the effects of the resolution action, including the decision to suspend or restrict the exercise of certain rights in accordance with Article 69, 70 and 71 of Directive 2014/59/EU.
- (5) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.
- (6) The European Banking Authority 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 opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010].

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### *General provisions for notifications*

1. Notifications submitted under this Regulation shall have written form and shall be transmitted by adequate and safe electronic means reflecting the urgency and importance of the subject matter.
2. The relevant authorities referred to in Article 81(1), (2) and (3) and in Article 83(2) of Directive 2014/59/EU ('relevant authorities') shall make information publicly available further specifying the relevant means and additional procedural details for submitting a notification.
3. Immediately before sending a notification, the sender may make contact orally with the relevant authorities to anticipate that a notification is being submitted.
4. For the purpose of notifications referred to in Article 81(3) (a), (b), (c), (d), (h) (j) and Article 83 (2) (a) (b) (f) (h) of Directive 2014/59/EU, competent authorities and resolution authorities should use the language of common use for cooperation with the consolidating supervisor and the group level resolution authority that has been agreed upon by the relevant authorities.

5. The relevant authorities should acknowledge receipt of the notification to the sender specifying the date and time of receipt as recorded by the recipient and the contact details of the staff handling the notification.

#### *Article 2*

##### *Notification by the management body to a competent authority*

- 1 The notification by the management body of an institution or entity, in accordance with paragraph (1) of Article 81 of Directive 2014/59/EU, shall include:
  - a. The name of the notifying institution or entity;
  - b. The address of the registered office of the institution or entity;
  - c. The legal entity identifier of the institution or entity, where available;
  - d. The name and address of the registered office of the immediate and ultimate parent undertaking of the institution, where relevant;
  - e. The relevant information and analysis that the management body considered in performing the assessment for determining that the requirements under Article 32(4) of Directive 2014/59/EU have been met;
  - f. A copy of the management body written resolution confirming its assessment that the institution or the entity is failing or likely to fail; and
  - g. Any additional information that the management body considers relevant to its assessment such as private sector solutions available to restore the financial viability of the institution or entity.
- 2 The notification pursuant to Article 81(1) of Directive 2014/59/EU shall be communicated immediately to the competent authority following the management body determination that institution or entity is failing or likely to fail.
- 3 For purposes of this Regulation, 'entity' means the entities referred to in Article 1(1), letters (b), (c), (d) of Directive 2014/59/EU.

#### *Article 3*

##### *Communication of the competent authority to the resolution authority of the received notification*

- 1 Upon receipt of the notification under Article 2 of this Regulation, the competent authority shall inform without delay the resolution authority, including:

- a. The name of the institution or entity;
- b. The address of the registered office of the institution or entity;
- c. The legal entity identifier of the institution or entity, where available;
- d. The name and address of the registered office of the immediate and ultimate parent undertaking of the institution or entity, where relevant;
- e. The date of the receipt of the notification from the institution or entity;
- f. A copy of the notification received from the management body;
- g. The details of crisis prevention measures or actions referred to in Article 104 of Directive 2013/36/EU that the competent authority has taken or requires the institution or entity to take, where relevant;
- h. Any additional supporting documents the competent authority deems necessary for the recipient authorities to have a full understanding of the notification.

#### *Article 4*

*Notification of assessment that an institution meets the conditions for resolution set out in Article 32(1), letters (a) and (b) of Directive 2014/59/EU*

- 1 The notification of a competent authority or resolution authority for purposes of Article 81(3) of Directive 2014/59/EU shall include:
  - a. The name of the institution or entity;
  - b. The address of the registered office of the institution or entity;
  - c. The legal entity identifier of the institution or entity, where available;
  - d. The name and address of the registered office of the immediate and ultimate parent undertaking of the institution, where relevant;
- 2 A summary of the assessment required in in points (a) and (b) of Article 32(1) Directive 2014/59/EU. The notification shall be made without delay of determining that the conditions referred to in points (a) or (b) of Article 32(1) of Directive 2014/59/EU have been met.
- 3 The competent authority shall, without delay, provide the resolution authority with any additional information that the resolution authority requests in order to inform its assessment.

#### *Article 5*

##### *Notice*

- 1 The notice referred to in Article 83(4) of Directive 2014/59/EU to be published by the resolution authority, shall include:
  - (a) The name of the institution or of the entity under resolution;
  - (b) The address of the registered office of the institution or entity;
  - (c) A summary of the names of other group entities and branches in respect of which resolution actions exercise their effects;
  - (d) A summary of the effects of the resolution action, in particular on retail customers:
    - (i) information on the access to deposits according to the Directive 2014/49/EU, other clients' assets or funds held at the institution affected by the resolution action;
    - (ii) on the contractual payment or delivery obligations subject to suspension under Article 69 of Directive 2014/59/EU, including the commencement and expiration of the suspension period, where applicable;
    - (iii) on the secured creditors of the institution or entity under resolution subject to restrictions on the enforcement of security interest including the commencement and expiration of that restriction period in accordance with Article 70 of Directive 2014/59/EU, where applicable.
    - (iv) on the contractual parties affected by the temporary suspension of termination rights including the commencement and expiration of the restriction period under Article 71 of Directive 2014/59/EU, where applicable.
  - (e) The confirmation of the ordinary course of contractual commitments, including repayment schedules, not subject to suspensions under Article 69, 70, 71 of Directive 2014/59/EU.
  - (f) The point of contact within the institution where customers and creditors can seek further information and updates on the institution and its operations.
  
- 2 The notice shall be published as soon as reasonably practical after taking a resolution action.

### *Article 6*

#### *Entry into force*

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.

CP on RTS on Notifications and Notice of Suspension

Done at Brussels,

*For the Commission  
The President*

*[For the Commission  
On behalf of the President*

*[Position]*

## 5. Accompanying documents

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### 5.1 Draft Cost- Benefit Analysis / Impact Assessment

#### 5.1.1 Introduction

Article 82(3) of the BRRD mandates the EBA to develop draft Regulatory Technical Standards (RTS) that specify the procedures and contents relating to the notification referred to in Articles 81(1), (2) and (3) and the notice of suspension referred to in Article 83.

As per Article 10(1) of the EBA regulation (regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft regulatory technical standards developed by the EBA – when submitted to the EU Commission for adoption- shall be accompanied by an Impact Assessment (IA) annex which analyses ‘the potential related costs and benefits’. Such annexes 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.

A cost-benefit analysis of the provisions included in the RTS is part of the IA described in the present Consultation Paper. Given the nature of the study and being compliant with the proportionality principle when assessing the problems addressed by the pieces of regulation, the IA is mostly qualitative and addresses the issue at high level.

#### 5.1.2 Problem Definition

This RTS seeks to address two core policy issues:

- (1) The lack of a defined notification process and contents of notifications across the EU when an institution is deemed to be failing or likely to fail; and,
- (2) The process and contents of information, to be made publically available, that informs all stakeholders of the consequences of resolution action(s) taken by a resolution authority.

The lack of a common standard in terms of the process and content of a notification, arising from an assessment of whether an entity is failing or likely to fail, increases the potential risks and costs associated with a failing institution. These inter alia include: excessive forbearance, poor co-ordination between supervisory and resolution authorities within the same country or amongst supervisory and resolution authorities amongst different countries, loss of market confidence on the part of regulatory authorities to effectively coordinate and manage actions taken that at the failing institution. The consequences of these failures include increased contagion risks, ring-fencing that results in a disorderly resolution, or other unilateral legal actions that increase the overall costs of resolution.

Similarly, the lack of a common standard in terms of process and content of a notice outlining the implications of a resolution action, increases the challenge for resolution authorities in stabilising the position of the failing entity and likelihood of negative spill-over effects such as contagion risk impacting financial stability.

### 5.1.3 Objectives

The impact assessment has been carried out with specific consideration of the objectives of the Resolution Directive including:

- To avoid significant adverse effects on financial stability, in particular by preventing contagion or mitigating contagion risks, by maintaining market discipline.
- To protect public / taxpayers' funds by minimising the reliance on extraordinary public financial support
- To protect depositors covered by Directive 2014/49/EU and investors covered by Directives 97/9/EC
- To protect client funds and client assets.

The provision of consistent, accurate and timely information, following an assessment that an entity is failing or likely to fail, increases the chances of relevant authorities taking prompt actions. In turn, this helps to maintain the confidence of the marketplace and the ability of relevant authorities to act in a coordinated manner and thereby further minimising the risks and costs associated with a potential contagion. By acting promptly, authorities enhance the protection of depositors and minimise the need for public funds to support a failing institution.

In circumstances where a resolution action is taken (rather than liquidation), it is vital that all stakeholders have access to basic information on the consequences of resolution action. This will help to ensure that stakeholders have access to accurate information that informs their current and future actions. For example, having the stakeholders informed on terms and conditions of the access to their funds, increases the certainty / trust of stakeholders regarding the current position of the failing entity. This will help resolution authorities in taking steps to stabilise the failing institution and avoid further impairment to financial stability.

### 5.1.4 Policy Options: analysis and comparisons / preferred options

Regarding the content of notifications two different options were considered:

**Option 1:** A detailed notification containing all information regarding the circumstances of an institution failing or likely to fail.

**Option 2:** A summary notification containing the necessary information regarding an institution assessed as failing or likely to fail.

The provision of the full set of information on the circumstances of a credit institution failing or being likely to fail would be helpful to authorities. However, from a practical perspective, this would involve additional delays and uncertainties where the agreed causes of failure may take some time to be established. From a resolution standpoint and consistent with the BRRD requirements, it is important an institution has been assessed as failing or likely to fail, having regard to timing and other relevant circumstances, there is no reasonable prospect that would prevent the failure of the institution. The underlying causes of the failure, while important, do not need to be incorporated into a notification to a competent or resolution authority to take necessary actions. Furthermore, it is of paramount importance the speed of response by the relevant authorities to stabilise an institution and help to minimise the loss of financial stability.

In respect of the notice of suspension, two policy options were considered:

**Option 1:** A detailed notice containing all relevant information to stakeholders on the consequences of resolution action.

**Option 2:** A summary notice containing the necessary information to stakeholders on the consequences of the resolution action.

Following a resolution action, stakeholders are interested in identifying the impact of a resolution action on the availability of funds and terms of access to their funds. Given the scale of potential affected stakeholders by resolution action it is not feasible on the part of resolution authorities to provide information at an individual level. However, as part of resolution authority's efforts to stabilise a failing entity, it is important that practical information is available in terms of the impact of resolution action on the client funds and deposits. Furthermore, there is a need for the information to be accurate and available in a timely manner to stakeholders and to maintain market confidence. On feasibility grounds, Option 2 is considered the only workable approach by assessing the impact of resolution action on different categories of stakeholders and their contractual rights such as temporary suspension of termination rights, the contractual payment or delivery obligations, secured creditors of the institution, information on the access to and availability of eligible deposits according to the Directive 2014/49/EU, other client assets or funds held at the institution.

### 5.1.5 Cost-Benefit Analysis

In the opinion of sampled national competent and resolution authorities, the policy options mentioned above are on the whole perceived to generate incremental benefits rather than incremental costs.

#### (1) Benefits

The main benefits that arise concern the provision of a harmonised set of information following the assessment that an entity is failing or likely to fail. The certainty and clarity of this information requirement is beneficial in terms of speeding up the process for entities, competent authorities and resolution authorities in communicating the determination that an entity is failing or likely to fail. It also helps to minimise the potential costs associated with iterative information demands and the associated risk and costs of information leakage that could undermine efforts to stabilise an institution. It also helps to mitigate broader risk of contagion and damage to financial stability.

Similarly, in the context of notice of suspension, the provision of harmonised information on the impact of resolution action is expected to positively contribute to reducing the level of individual stakeholders seeking similar information from the resolution authority and the failing institution. This is important in the context of strain on resources and IT systems and knock-on implications in trying to stabilise the position of the failing entity.

#### (2) Costs

The costs of providing the information for notifications and notice of suspension from the perspective of entities assessed as failing or likely to fail and relevant competent and resolution is considered to be negligible. This is due to one-off nature of this information request that will directly affect a very small proportion of the 6,000 credit institutions and over 3,000 investment firms operating in the EU. Furthermore, the information will be known and would most likely have to be provided in any case, as a result of an entity failing or likely the fail. The proposed approach delivers certainty in terms of specifying the exact information to be provided in circumstances of an entity failing or likely to fail and the resultant impact of resolution action.

#### (3) Net impact

In overcoming two important policy issues (i) the need for an adequate notification process and content following an assessment that a firm is failing or likely (ii) a harmonised notice summarising the impact of resolution action on stakeholders, the RTS helps to mitigate the potential significantly increased costs that may arise during a resolution in circumstances where currently no harmonised requirements exist. The net impact of the draft RTS is assessed as a moderately beneficial from an economic perspective.