

EBA/GL/2016/03

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19 April 2016

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# Final Report

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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. 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 (i) give guidance on how information should be provided in summary or collective form and (ii) define principle-based factors (i.e. number of institutions, specific patterns and context of disclosure) 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 taken in the draft guidelines is intended to strike a balance between the need to achieve an appropriate level of convergence of practices regarding how confidential information should be provided in summary or collective form, and the need to ensure flexibility, considering that there may be many different types of confidential information as well as many different circumstances and situations in which confidential information may need to be disclosed.

## Next steps

The guidelines will be translated into the official EU languages and published on the EBA website. The deadline for competent authorities and resolution authorities to report whether they comply with the guidelines will be two months after the publication of the translations.

## 2. Background and rationale

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1. Article 84 of Directive 2014/59/EU (the BRRD) introduces general rules in relation to professional secrecy and confidentiality requirements when dealing with confidential information.
2. Article 84(3) of the BRRD introduces the 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>1</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>2</sup> which provided the information (the third exemption).
3. Article 84(7) of the BRRD requires the EBA to issue guidelines to specify how information should be provided in summary or collective form for the purposes of paragraph 3 of Article 84.
4. Thus the EBA mandate relates only to the second exemption, namely the possibility of disclosing confidential information in summary or collective form such that individual institutions or entities cannot be identified.
5. 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) disclose confidential information, when not in the exercise of their functions under the BRRD (the first exemption) and without the express and prior consent of the institution (the third exemption).
6. However, despite the fact that the disclosure of information under the second exemption covers a limited number of cases compared with 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 received by defined persons during the course of their professional activities or from a competent authority or resolution authority in connection with its functions under the BRRD. Therefore, the scope of the draft guidelines cannot be limited to

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

<sup>2</sup> Referred to in point (b), (c) or (d) of Article 1(1) of the BRRD.

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.

7. 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 such a way that individual institutions cannot be identified. Therefore, the EBA mandate is even more limited, and the guidelines can only clarify which factors should be considered in order to ensure that individual institutions cannot be identified.
8. Following consideration of the mandate given to the EBA (for the options considered please see sub-section 5.1, 'Impact assessment') 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 principle-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 guidelines limit disclosure of confidential 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 still be made if, considering two other principles namely (i) specific patterns and (ii) context of disclosure, there is no risk of the individual institutions or relevant entities being identified.
  - **Specific patterns:** this factor requires the avoidance of any references to specific characteristics, distinctive features or names or to numerical, qualitative or other distinctive data which would allow the identification of 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 creates a risk that the individual institutions or entities will be identifiable.
9. The approach taken in the draft guidelines fulfils the mandate and at the same time provides flexibility, considering that there may be different types of confidential information as well as different circumstances and situations in which confidential information may need to be disclosed, which may increase or decrease the risk that individual institutions or entities will be identifiable from the information provided in summary or collective form. The principles defined in the draft guidelines will guide authorities as to which aspects have to be considered in order to eliminate that risk.



## 3. Guidelines

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# Guidelines

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on the provision of information in  
summary or collective form for the  
purposes of 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>3</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/2016/03'. 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 the EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

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<sup>3</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>4</sup>, pursuant to the mandate conferred on 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 by the persons referred to in Article 84(1) of that Directive.

### 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

8. 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

9. Competent authorities should implement these guidelines by [6 months from the date of publication of the translation of the guidelines in all EU official languages on the EBA's website]

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<sup>4</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 (OJ L 173 of 12 June 2014, p. 190).

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

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10. 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.
11. For the purposes of paragraph 10 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:
  - 11.1. **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 11.2 of this paragraph, and the context of disclosure, as specified in point 11.3 of this paragraph, do not create a risk of those individual institutions or entities being identified.
  - 11.2. **Specific patterns:** when disclosing confidential information any reference to specific characteristics, distinctive features, names or to numerical, qualitative or 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.
  - 11.3. **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 creates a risk of the individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU being identified.

## 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.

Article 16(2) of Regulation (EU) No 1093/2010 provides that the EBA should carry out an analysis of 'the potential related costs and benefits' of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

This document presents an 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 under Article 84(7) of the BRRD 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 such that individual institutions and entities cannot be identified. Inconsistency and variations in approaches could 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 disclosure is made to ensure that individual institutions or entities cannot be identified.

#### C. Options considered

Taking into account the mandate given to the EBA (for details please see section 3, 'Background and rationale'), the current impact assessment has considered the following options for how information should be provided in summary or collective form such that individual institutions cannot be identified:



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

If information in summary or collective form relates to only one institution or entity, there is a high risk that the individual institution could be identified, especially considering that certain information may already have been disclosed under the first and third exemptions. Thus, introduction of a minimum number of institutions to which confidential information should relate is a necessary prerequisite. A general rule that confidential information should relate to at least three institutions would minimise the risk that an institution or entity could be identified.

- **Option 2 – require consideration of specific patterns and context of disclosure before disclosure of confidential information**

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

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. mentioning that a bank specialises in shipping finance when in the Member State there is only one bank involved in that activity) or names (e.g. management position), or to numerical, qualitative data which relate only to the institution in question, greatly increase the risk that an individual institution could be identified.

In addition to such specific patterns, the context of the disclosure of confidential information might also be relevant, as the means of disclosure (e.g. information sent via email or on paper), number of addressees (e.g. depending on the confidential information in question, the greater the number of addressees the greater the risk of an individual institution being identified), timing (e.g. the risk that the institution will be identifiable may be higher when the information is disclosed soon after the event it relates to). The mitigation of the above factors could decrease the risk of identifying individual institutions being identified 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 fact that collective information relates to more than one institution already significantly diminishes the risk that an individual institution will be identified as a result of disclosure. Nonetheless, the existence of this precautionary measure could itself lead to a reduction in the sample of institutions which participate in the summary information from three to two.

- **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 a general rule which would allow disclosure of confidential information in summary



or collective form only if information relates to at least three institutions, unless, taking into account specific patterns and the context of disclosure, there would be no risk of an individual institution being identified; in which case disclosure would be allowed in cases where confidential information related to fewer than three institutions (i.e. one). This option would ensure the required flexibility, but at the same time encourage careful consideration of the factors which might decrease or increase the risk of an individual institution being identified when disclosing information in summary or collective form.

### **Cost–benefit analysis**

**Cost:** 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 the Level 1 text.

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

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



## 5.2 Views of the Banking Stakeholder Group (BSG)

The Banking Stakeholder Group (the BSG) agreed in general with the EBA's approach regarding the three factors that should be considered before the disclosure of confidential information in summary or collective form such that individual institutions or entities cannot be identified. In addition, the BSG made some suggestions for the EBA's consideration. For more details please see the feedback table below.

## 5.3 Feedback on the public consultation and on the opinion of the BSG

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 3 months and ended on 27 January 2016. Two responses were received which were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

Changes to the draft guidelines have been incorporated as a result of the responses received during the public consultation.

### Summary of key issues and the EBA's response

- One respondent said that a higher level of anonymity could be achieved if the confidential information disclosed under the second exemption were to be collected from a given percentage of the entities included in the BRRD context or if a minimum percentage of heterogeneity among entities were required for disclosure of this confidential information.

#### **EBA approach**

The EBA considers that the approach set out in the draft GL is proportionate and sufficient to guide authorities as to the aspects that have to be considered in order to eliminate the risk of individual institutions or relevant entities being identified.

The EBA does not consider that it would be practicable to specify percentages in the suggested manner. Furthermore, it might be too complicated for defined persons (which include not only competent and resolution authorities, but also private sector experts (such as lawyers, auditors, professional advisors and others as defined under Article 84(1) of the BRRD) to check whether they complied with such requirements. Finally, a proper calibration of adequate percentages might be too complicated.

- One respondent suggested clarifying that the GL apply only to confidential information collected under the BRRD.

#### **EBA approach**

The Level 1 text already defines the scope of confidential information. Article 84(3) covers 'confidential information received during the course of professional activities or from a competent authority or resolution authority in connection with its functions under the BRRD'. The EBA GL cannot change the scope defined in the Level 1 text.



- One respondent suggested introducing additional specifications on how entities would be compensated if they were identified when confidential information was disclosed.

**EBA approach**

Such provisions would go beyond the EBA’s mandate. Personal liability questions would be subject to Member States’ civil or criminal laws, as applicable.





## Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<b>General comments</b>			
The scope of confidential information	One respondent suggested clarifying that the GL apply only to confidential information collected under the BRRD.	The Level 1 text already defines the scope of confidential information. Article 84(3) covers 'confidential information received during the course of professional activities or from a competent authority or resolution authority in connection with its functions under the BRRD'. The EBA GL cannot change the scope defined in the Level 1 text.	No amendments proposed.
Compensation	One respondent suggested introducing additional specifications on how entities would be compensated if they were identified when confidential information was disclosed.	This goes beyond the EBA's mandate. Personal liability questions would be subject to Member States' civil or criminal laws, as applicable.	No amendments proposed.
<b>Responses to questions in Consultation Paper EBA/CP/2015/18</b>			
<b>Question 1.</b> Do you agree with the principle-based factors which have to be considered before disclosing information in summary or collective form such that individual institutions cannot be identified?	<p>Both respondents agreed with the principle-based factors defined in the draft GL.</p> <p>One respondent said that their application should be cumulative, that is, not on a standalone basis: factors (a), (b) and (c) of paragraph 10 (number of institutions, specific patterns and context of disclosure) must all be met at the same time. This needs to be a minimum requirement, in line with the policy objectives of 'key common factors which should be considered at a minimum' before disclosing confidential information such that individual institutions or entities cannot be</p>	Paragraph 10 of the GL already requires all principle-based factors to be considered before the disclosure of confidential information in summary or collective form.	No amendments proposed.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>identified.</p>	<p>The ‘number of institutions’ factor already requires that confidential information disclosed should relate to at least three institutions. However, considering the broad scope of Article 84(3), as well as the fact that the information may not relate to three or more institutions in all cases, but that there might nonetheless be a need to make a disclosure under the second exemption, the GL allow disclosure of confidential information when it relates to less than three institutions, but only if, after the assessment of other two factors, it can be concluded that there is no risk of an individual institution or entity being identified.</p>	<p>No amendments proposed.</p>
<p><b>Question 2.</b> If no, what kind of other principle-based factors might it be useful to introduce?</p>	<p>As mentioned above both respondents supported the principle-based factors. One respondent fully agreed with the current text and did not make any suggestions.</p> <p>Another respondent said that a higher level of anonymity could be achieved if the confidential information disclosed under the second exemption were to be collected from a given percentage of the entities included in the BRRD context or if a minimum percentage of heterogeneity among entities were required for disclosure of this confidential information.</p>	<p>The EBA has carefully considered the additional suggestions made by the respondent. However, the EBA considers that the approach set out in the current draft GL is proportionate and sufficient to guide authorities as to the aspects that have to be considered in order to eliminate the risk of individual institutions or relevant entities being identified from confidential information disclosed in summary or collective form.</p> <p>The EBA does not consider that it would be practicable to specify percentages in the suggested</p>	<p>No amendments proposed.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		<p>manner. Furthermore, it might be too complicated for defined persons (which include not only competent and resolution authorities, but also private sector experts such as lawyers, auditors, professional advisors, etc., as defined under Article 84(1) of the BRRD) to check whether they complied with such requirements. Finally, inadequately calibrated percentages could make it impossible to disclose information under this exemption even if other principle-based factors ensured that institutions could not be identified.</p>	
	<p>One respondent suggested that another principle that should be considered when sharing confidential information between the persons referred to in Article 84(1) of the BRRD is that it must be protected or encrypted.</p>	<p>The EBA mandate is limited to the specification of how confidential information should be disclosed in summary or collective form such that individual institutions cannot be identified (Article 84(3)(7) of the BRRD).</p>	<p>No amendments proposed.</p>

