EBA/GL/2015/03

29 July 2015

Guidelines

Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU

Contents

EBA Guidelines on triggers for the use of early intervention measures

1. Compliance and reporting obligations

Status of these Guidelines

This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010[1]. 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.

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

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 29.09.2015. 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 with the reference 'EBA/GL/2015/03'. 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 EBA.

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

[1] 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

Subject matter

1. According to Article 27(1) of Directive 2014/59/EU, in situations where an institution is infringing or is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014, including national legal acts implementing Directive 2013/36/EU or the technical standards developed by the EBA pursuant to the relevant provision of Regulation (EU) No 575/2013 or Directive 2013/36/EU and endorsed by the European Commission, the competent authorities shall have at their disposal at least the set of early intervention measures listed in Article 27(1) of Directive 2014/59/EU, without prejudice to the supervisory powers referred to in Article 104 of Directive 2013/36/EU. Pursuant to Article 27(4) of Directive 2014/59/EU these Guidelines promote the consistent application of the triggers for the decision on the application of such early intervention measures.

2. In order to increase consistency in supervisory practices in relation to the application of such triggers, the Guidelines also clarify requirements that competent authorities should follow when setting thresholds related to financial and risk indicators to be routinely monitored under the supervisory review and evaluation process ('SREP') as specified in the SREP Guidelines, and the procedures to follow in the event of breaches of these thresholds.

3. The Guidelines do not address the interaction between the competent authorities and the resolution authorities in relation to breaches of the triggers, which is already disciplined in Article 27(2) of Directive 2014/59/EU.

4. The assessment of whether an institution 'infringes or is likely to infringe in the near future' the requirements of Regulation (EU) No 575/2013 or of Directive 2013/36/EU is carried out by the competent authorities based on their comprehensive assessment, including by means of SREP as described in Article 97 of Directive 2013/36/EU and further specified in the SREP Guidelines.

Definitions

5. The following definitions apply for the purposes of these Guidelines:

    a. 'Conditions for early intervention' means a situation when an institution infringes or is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014 or of relevant EU or national implementing legislation.

b. 'Early intervention measures' means the early intervention measures set out in Article 27(1) of Directive 2014/59/EU.

c. 'SREP' means the supervisory review and evaluation process as defined in Article 97 of Directive 2013/36/EU and further specified in the SREP Guidelines.

d. 'SREP Guidelines' means the EBA Guidelines on common procedures and methodologies for SREP developed in accordance with Article 107(3) of Directive 2013/36/EU[2].

e. 'Overall SREP assessment', as defined in the SREP Guidelines, is the up-to-date assessment of the overall viability of an institution based on an assessment of SREP elements.

f. 'Overall SREP score', as defined in the SREP Guidelines, is the numerical indicator of the overall risk to the viability of an institution based on the Overall SREP assessment.

g. 'SREP element', as defined in the SREP Guidelines, is one of the following components of the SREP framework: business model analysis, assessment of internal governance and institution-wide controls, assessment of risks to capital, SREP capital assessment, assessment of risks to liquidity and funding, and SREP liquidity assessment.

Addressees

6. These Guidelines are addressed to the competent authorities as defined in Article 4(2)(i) of Regulation (EU) No 1093/2010.

3. Triggers for application of early intervention measures

7. These Guidelines identify the following triggers for the competent authorities' decision on whether to apply early intervention measures:

   a. Overall SREP score and pre-defined combinations of the Overall SREP score and scores for individual SREP elements;

   b. material changes or anomalies identified in the monitoring of key financial and non-financial indicators under SREP revealing that the conditions for early intervention are met;

   c. significant events indicating that the conditions for early intervention are met.

[2] EBA/GL/2014/13 of 19 December 2014

8. The breach of the triggers identified in these Guidelines should prompt the competent authorities (a) to further investigate the situation, if the cause of the breach is not yet known, and (b) taking into account the urgency of the situation and the magnitude of the breach within the overall situation of the institution, to make a decision on whether to apply early intervention measures.

9. Breaches of the triggers, outcomes of associated further investigations and decisions on the application of early intervention measures, including the reasons for not taking a measure, should be clearly documented by the competent authorities.

10. Upon the breach of the triggers, when taking a positive decision to apply an early intervention measure, the competent authority should choose the most appropriate early intervention measure or measures to act with a response proportionate to the particular circumstances. For this purpose the competent authority should take into account recovery actions or measures specified in the recovery plan that the institution has taken or has decided to take in the immediate future.

11. When competent authorities assign to an institution an Overall SREP score of '4' they should consider gathering information for the valuation of the institution's assets and liabilities, as provided in Article 27(1)(h) of Directive 2014/59/EU.

3.1 Triggers based on the outcomes of SREP

12. The results of the Overall SREP assessment and specific pre-defined combinations of the results of the Overall SREP assessment and assessment of individual SREP elements, as defined in SREP Guidelines, should be considered triggers.

13. In particular, should the competent authority, as an outcome of SREP, assign to an institution the Overall SREP score of '4' in accordance with the methodology stipulated in the SREP Guidelines, it should, without undue delay, take a decision on whether to apply early intervention measures.

14. In addition, in certain circumstances, the competent authority should also consider the assessment of individual SREP elements resulting in a score of '4'. Such circumstances may arise when there is no high risk to the viability of an institution and the Overall SREP score is '3', but the assessment of the SREP elements covering the specific areas mentioned in Article 27(1) of Directive 2014/59/EU indicates that an institution may meet the conditions for early intervention, resulting in a score of '4' assigned to the corresponding SREP elements.

15. In particular, the competent authority should decide on whether to apply early intervention measures when the outcomes of SREP as performed in accordance with SREP Guidelines take the form of the following combinations of an Overall SREP score of '3' and '4' for individual SREP elements:

a. the Overall SREP score is '3' and the score for internal governance and institution-wide controls is '4';

b. the Overall SREP score is '3' and the score for business model and strategy is '4';

c. the Overall SREP score is '3' and the score for capital adequacy is '4'; or,

d. the Overall SREP score is '3' and the score for liquidity adequacy is '4'.

16. When deciding whether to apply early intervention measures based on the above SREP scores and choosing the most appropriate measure, competent authorities should address the particular weaknesses identified and highlighted in the narrative of the Overall SREP assessment or the assessment of a particular SREP element.

3.2 Monitoring of key indicators under SREP

17. The SREP process as set out in the SREP Guidelines requires competent authorities to carry out regular monitoring of key financial and non-financial indicators for all institutions. For the purposes of this monitoring, competent authorities need to identify indicators and set thresholds that are relevant to the specificities of individual institutions or groups of institutions sharing similar characteristics (peer groups).

18. When identifying thresholds for the indicators related to prudential requirements, as stipulated in Regulation (EU) No 575/2013, competent authorities should consider both minimum and additional requirements, i.e. minimum own funds requirements as specified in Article 92 of Regulation (EU) No 575/2013 and additional own funds requirements applied pursuant to Article 104(1)(a) of Directive 2013/36/EU without taking into account any buffer requirements set out in Chapter 4 of Title VII of Directive 2013/36/EU; or minimum liquidity requirements as specified in Part Six of Regulation (EU) 575/2013 and Commission Delegated Regulation (EU) No 2015/61[3], as well as additional liquidity requirements applied pursuant to Article 105 of Directive 2013/36/EU.

19. Where competent authorities, for the purpose of monitoring key indicators, set thresholds for capital adequacy indicators at a level of an optional 1.5 percentage points above an institution's own funds requirements as referred to in Article 27(1) of Directive 2014/59/EU, or any other thresholds, they should consider both own funds requirements, as specified in Article 92 of Regulation (EU) No 575/2013, and additional own funds requirements set in accordance with Article 104(1)(a) of Directive 2013/36/EU as specified in the SREP Guidelines, without taking into account any buffer requirements set out in Chapter 4 of Title VII of Directive 2013/36/EU.

20. Identification of material changes or anomalies in indicators, including breaches of thresholds, should be considered by the competent authority as a prompt for further investigation, and,

[3] Commission Delegated Regulation (EU) No 2015/61 of 10 October 2014, OJ L11, 17.01.2015, p.1

where relevant, they should review the assessment of the relevant SREP element in light of the new information. Specifically, the competent authority should:

1) determine the cause and make an assessment of materiality of the potential prudential impact on an institution, where relevant, engaging in the dialogue with the institution;

2) document the cause(s) and outcomes of the assessment (in order to ensure that SREP procedures are followed by all staff members of the competent authority and to keep track of the results of previous investigations); and

3) review the risk assessment and SREP score, where relevant, in light of any material new findings according to the requirements of the SREP Guidelines.

21. Where an institution's financial condition and risk outlook and SREP score for a particular element deteriorate significantly and impact one of the triggers based on the combination of the Overall SREP score and scores for individual SREP elements (i.e. the conditions described in paragraphs 14-15 are met), the competent authorities should take a decision on whether to apply early intervention measures.

22. Without prejudice to paragraph 21, in certain circumstances material changes or anomalies in indicators may be used directly as triggers for the decision on the application of early intervention measures. In particular, depending on the materiality of the changes or anomalies in indicators, on their causes and materiality of the potential prudential impact on the institution, and provided the institution meets conditions for early intervention, the competent authority, in the interest of time, may decide to apply early intervention measures immediately upon determination of the cause and the overall impact without updating the assessment of the respective SREP element. The assessment of the respective SREP element and Overall SREP assessment should nevertheless be subsequently updated without undue delay.

3.3 Significant events

23. Certain events may have a significant impact on an institution's financial conditions, putting it into a situation where conditions for early intervention are met relatively rapidly.

24. Generally, such events should prompt further investigations of an affected area. In particular, examples of significant events that may put an institution in a situation where conditions for early intervention are met may include:

a. major operational risk events (e.g. rogue trading, fraud, natural disaster, severe IT problems, significant fines imposed on the institutions by public authorities);

b. significant deterioration in the amount of eligible liabilities and own funds held by an institution for the purposes of meeting the minimum requirements for own funds and eligible liabilities (MREL);

c. signals of the need to review the quality of assets and/or conduct independent valuation of specific portfolios/assets, for instance:

    i. outcomes of the assessment of SREP elements, suggesting that there is a concern that assets might be lower than liabilities;

    ii. emphasis of matter paragraph[4] put in an external auditor's opinion on the financial statement of the institution, indicating material uncertainty;

    iii. unfavourable events that occur between the end of the reporting period and date when the financial statement are authorised for issue, which provide evidence of conditions that arose after the reporting period and therefore do not require adjustment/restatement of financial statements (non-adjusting events); for each material category of non-adjusting events the institution should disclose the nature of the event and estimate its financial effect, or make a statement to the effect that such an estimate cannot be made);

    iv. perpetual and material adjustments to the institution's financial statements due to errors in valuation of assets/liabilities and frequent changes in the accounting assumptions.

d. significant outflow of funds, including retail deposits of customers, caused, e.g. by the reputational damage of the institution;

e. unexpected loss of senior management or key staff, who have not been replaced;

f. one or more members of the management body fail to comply with regulatory requirements specified in Directive 2013/36/EU to become or remain a member of the management body;

g. significant rating downgrades by one or more external rating agencies, potentially leading to substantial outflows of funds, inability to renew funding or activation of contractual covenants related to external ratings.

[4] An emphasis of matter paragraph is a type of paragraph in, or section of an external auditor's opinion on financial statements which is added to draw users' attention to a matter which is appropriately presented or disclosed in the financial statements, but which is of such importance that it is fundamental to users' understanding of the financial statements (e.g. information about an uncertainty relating to the future outcome of exceptional litigation or regulatory action; a major catastrophe that has had, or continues to have, a significant effect on the entity's financial position). The emphasis of matter paragraph does not qualify the auditor's opinion; therefore it does not mean that the financial statements do not present a true and fair view of the financial position.

25.Upon becoming aware of the occurrence of a significant event, the competent authority should identify its cause, assess its potential prudential impact on the institution, where relevant, engaging in the dialogue with the institution, and document its assessment.

26.The competent authority should update the risk assessment and score of the respective SREP element in light of any new material findings according to the requirements of the SREP Guidelines. Where, as a result of the updated analysis, the Overall SREP score or combination of the Overall SREP score and scores for SREP elements deteriorates and impacts one of the triggers based on the outcomes of SREP when the conditions specified in paragraphs 14-15 are met, the competent authorities should take a decision on the need to take early intervention measures.

27.Without prejudice to paragraph 26, in certain circumstances significant events may be used directly as triggers for the decision on the application of early intervention measures. In particular, depending on the magnitude of the significant event and on the materiality of the potential prudential impact on the institution and provided the institution meets conditions for early intervention, competent authorities, in the interest of time, may decide to apply early intervention measures immediately upon determination of the cause and the overall impact without updating the assessment of the respective SREP element. The assessment of the respective SREP element and Overall SREP assessment should nevertheless be subsequently updated without undue delay.

28.The fact that a resolution authority commences a consultation process with a competent authority while determining whether an institution is ‘failing or likely to fail’ should be considered by the competent authority as a significant event prompting assessment as to whether early intervention measures should be applied towards the institution in order to maintain or restore its viability and prevent its failure. Such a situation may occur when the resolution authority is empowered to determine that an institution is ‘failing or likely to fail’ pursuant to Article 32 of Directive 2014/59/EU.

4. Implementation

29.These Guidelines apply from 1 January 2016.