

EBA/Op/2021/08

1 July 2021

Opinion of the European Banking Authority on appropriate supervisory and enforcement practices for the process of authorising investment firms as credit institutions under Article 8a of Directive 2013/36/EU

Introduction and legal basis

1. Article 8a of Directive 2013/36/EU¹, added by Article 62 (6) of Directive 2019/2034², requires certain investment firms³ that have been authorised in accordance with Directive 2014/65/EU⁴ to apply for authorisation as credit institutions under Directive 2013/36/EU.

2. Article 8a (6) of Directive 2013/36/EU empowers the EBA to develop – and the Commission to adopt by means of a delegated regulation – regulatory technical standards to specify *inter alia* the methodology for calculating the thresholds prescribed in Article 8(a) of Directive 2013/36/EU. The EBA is currently in the process of developing these regulatory technical standards, which have not yet been submitted to the Commission. Article 8a of Directive 2013/36/EU becomes applicable on 26 June 2021, at which time the delegated regulation will not have been adopted.

¹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ([OJ L 176, 27.6.2013, p. 338](#)).

² Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ L 314, 5.12.2019, p. 64)

³ See also Article 4 (1) (b) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1) as amended by Article 62 (3) (a) of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1)

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ([OJ L 173, 12.6.2014, p. 349](#)).



3. The EBA's competence to deliver this Opinion in the form of a non-action letter is based on Article 9c of Regulation (EU) No 1093/2010⁵, which provides that, where the absence of delegated or implementing acts that would complement or specify the act within the scope of the EBA's action would raise legitimate doubts concerning the legal consequences flowing from the act or its proper application, the EBA shall:

- (a) provide the Commission with an opinion on any action it considers appropriate, in the form of a proposal for a new delegated or implementing act, and in accordance with the urgency that, in the EBA's judgement, the issue entails;
- (b) issue opinions regarding specific provisions of those acts with a view to furthering consistent, efficient and effective supervisory and enforcement practices, and common, uniform and consistent application of Union law by competent authorities.

4. In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors⁶, the Board of Supervisors has adopted this Opinion, which is addressed to the Commission and to the competent authorities referred to in Article 4 (2) (i) and (viii) of Regulation (EU) No 1093/2010.

Description of the issue

5. Where certain thresholds are reached, Article 8a of Directive 2013/36/EU applies from 26 June 2021 and requires certain investment firms referred to in point (1)(b) of Article 4(1) of Regulation (EU) No 575/2013 which have already obtained an authorisation pursuant to Title II of Directive 2014/65/EU to submit or, in some cases, to have already submitted by 27 December 2020, an application for authorisation as credit institutions in accordance with Article 8 of Directive 2013/36/EU, or to continue an existing authorisation application submitted under Directive 2014/65/EU as an application for authorisation as a credit institution.

6. Article 8a(6) of Directive 2013/36/EU empowers the EBA to develop draft regulatory technical standards to specify the methodology for calculating the thresholds prescribed in Article 8(a) (1) (a) or (b) of Directive 2013/36/EU.

7. The EBA has already notified the Commission that, due to the complexity of the issue, more time is required for the draft technical standards to be developed; to that end, the EBA is currently running a second consultation on the relevant technical standards. They are therefore not expected to be submitted to the Commission for adoption as delegated acts before end-October 2021.

8. The absence of the adopted technical standards at the time when Article 8a of Directive 2013/36/EU becomes applicable is not expected to affect the application of Article 8a of Directive 2013/36/EU in cases where relevant investment firms are clearly reaching either of the relevant thresholds.

⁵ 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).

⁶ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).



9. Conversely, the absence of the technical standards raises legitimate doubts over the application of Article 8(a) of Directive 2013/36/EU in the exceptional cases in which, for the purpose of determining whether the relevant thresholds have been reached, the methodology to be laid down in the delegated regulation is of relevance. This applies only in specific cases where the question of whether the threshold has been reached would depend on the detail of the final methodology adopted. In these marginal cases, sufficient time for implementation should also be permitted after the methodology has come into place.

10. Given that Article 8a of Directive 2013/36/EU applies from 26 June 2021, significant issues are liable to be raised in terms of the legal consequences for the undertakings described and their supervisors flowing from the proper application of the legislation in the absence of the delegated regulation. There is therefore an urgent need for the EBA to adopt this Opinion in order both to provide the Commission with its view on any action it considers appropriate and to further the consistent, efficient and effective supervisory and enforcement practices, and the common, uniform and consistent application of that provision by competent authorities, pending the adoption of the delegated regulation specifying the relevant methodology.

Specific proposals

11. In the exceptional cases where whether the relevant thresholds set out in Article 8a(1) of Directive 2013/36/EU have been reached cannot be determined in the absence of the final methodology currently being prepared by the EBA, competent authorities referred to in Article 4 (2) (i) and (viii) of Regulation (EU) No 1093/2010 should not prioritise any supervisory or enforcement action in relation to the requirements in Article 8a of Directive 2013/36/EU until six months after the final methodology is in place. Competent authorities should, however, apply Article 8a in all other cases where the question of whether or not the threshold has been reached can be reliably determined without the final methodology.

11. While the EBA cannot provide a proposal for a delegated act with this Opinion, it intends to do so as soon as possible following the ongoing consultation period, and requests that the Commission adopt the technical standards by means of a delegated regulation as quickly as possible after their submission by the EBA in order to provide the necessary legal certainty and resolve the issues highlighted in this Opinion.

This Opinion will be published on the EBA's website.

Done at Paris, 1 July 2021

[signed]

José Manuel Campa

Chairperson
For the Board of Supervisors