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***EBA/CP/2012/03: Consultation paper on Draft Guidelines for assessing the suitability of member of the management body and key function holders of a credit institution***

*Dear Sir, Madam,*

*The Associazione Nazionale fra le Banche Popolari welcomes the opportunity to provide comments to EBA/CP/2012/03: Consultation paper on Draft Guidelines for assessing the suitability of member of the management body and key function holders of a credit institution.*

*Please find our remarks on the following pages.*

*We remain at your disposal for any further questions or requests for information.*

*Yours sincerely,*

  
Giuseppe De Lucia Lumeno  
General Secretary

## **GENERAL REMARKS**

### **I) Legal basis**

Firstly, we want to highlight that there is no specific legal basis to issue these Guidelines; with respect to the background and rationale of the Guidelines, we like to underline that:

a) the matter is still under discussion at the European level (European Commission, Parliament and Council): it therefore seems unreasonable that EBA draft the Guidelines before the text of the proposed CRD IV becomes definitive. Moreover, the final text of the CRD IV - especially as regards corporate governance - is still very controversial.

Hence, to safeguard the principle of legal certainty, we believe that the Guidelines should be drafted and issued only after the text of CRD IV becomes definitive.

b) In any case, both the Directive 2006/48/EC and EU Commission 's proposal of 20 July 2011 for a Directive on the access to the activity of credit institutions and investment firms (CRD IV) only deal with the assessment of the suitability of the members of the management board: neither the supervisory board nor the 'key function holders' are covered by the mandate.


Hence in our opinion both the supervisory board and the 'key function holders' must be removed from the scope of the guidelines: the scope must be restricted to those "who effectively direct the business" of the credit institution as stated in article 11 of Directive 2006/48/EC.

### **II) Principle of Subsidiarity**

In our opinion the guidelines are too prescriptive and extensive: some requirements will be very difficult to meet, considering also their impact from a labour law perspective.

Furthermore, the Supervisory Authorities already have the means to assess the soundness of a credit institutions' governance arrangements and to take action if those arrangements are considered not sufficient.

We also believe that for Italian companies the requirements are already sufficient and more specifications are not needed. As regards the Italian framework, in particular, the existing legislative framework for the banking sector concerning the professional standing of the board of directors is already sufficiently detailed: article 26 of the Consolidated Law on Banking, Legislative Decree 385/1993; Regulation of the Treasury Ministry 161/1998; Supervisory provisions of the Bank of Italy; provisions of the Bank of Italy of 4 March 2008, "Supervisory instructions concerning banks' organisation and corporate governance" and related "Clarification notes" of 19 February 2009; Supervisory Provisions of the Bank of Italy of January 11, 2012 "Application of the supervisory instructions concerning banks' organisation and corporate governance".



Hence, considering also that there are many issues which may have disproportionate consequences, we believe that it is not necessary to further regulate in this respect.

### **III) Diversity of the corporate governance systems in Member States**

We'd like to underline that there are very significant differences in the legislative and regulatory frameworks across countries regarding the governance structure.

Given the differences in governance models, in our opinion guidance in the field of corporate governance should remain principle-based, balanced and adequately flexible (comply or explain principles) to reflect the different national structures and business models.

As financial institutions also vary in size, activities and complexities, we believe that a one size fits all solution would just not be efficient and successful.

Under Italian law, for example, the assessment of the suitable composition of the board of directors and the election of its members is responsibility of the Board itself and of the members' General Assembly.

We don't think the supervisor Authority should be the 'final arbiter' on the board's skills appropriateness and balance. This should remain the domain of the General Assembly of company's members.

#### **SPECIFIC REMARKS**

##### **Question 1**

As mentioned above, especially as concerns this matter, the principle of proportionality needs flexibility: too detailed criteria at European level will risk a too rigid application by national Supervisory Authorities with the result that nature, scale and complexity of the credit institutions can't be taken in due regard.

##### **Question 2**

As mentioned above, the key function holders must be deleted from the scope of application of the guidelines. Therefore in our opinion there should not be a requirement for the Authority to assess the policies of credit institutions for assessing the suitability of key function holders.

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#### **SPECIFIC COMMENTS TO ARTICLES**

##### **Art. 11 Assessment technique**

The election of the board of directors in the traditional/latin model (widely spread across Italy) - or of the supervisory board in the dualistic model - is the responsibility of the shareholders' Assembly and the task should remain as

such. There has to be a clear cut between the responsibility of the members' Assembly and the Authority.

Moreover, in our opinion there is no need for the Authority to interview a person when assessing the suitability.

In any case, the Authority should not assess the suitability of key function holders.

#### **Art. 12 Supervisory corrective measures**

As mentioned above – and also stated by the Guidelines (art. 4) – assessing the initial and ongoing suitability of the board members is a responsibility of the credit institution.

Further consideration has to be taken to other regulation, e.g. civil law, labour law and collective bargaining agreements: it may be very difficult for the credit institution to dismiss or terminate an employment contract for reasons based on rumours and discretionary evaluations.

In any case, it's our opinion that a candidate can't be considered unsuitable merely on the basis that the information provided is considered not sufficient.

Hence article 12 should be deleted.

#### **Art. 13 Reputation criteria**

We underline that the assessment of reputation criteria must be based on provable facts. The guidelines refer to presumptions, rumours and subjective judgements – even 'doubt' - which should be avoided as far as possible – especially in this matter - to reach legal certainty.

It must be also highlighted that – almost under Italian law – there is the presumption of innocence : everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law (art. 27, co. 2, of Italian Constitution).

Moreover, we consider that art. 13, taking into account “any administrative or criminal records”, “indictment of a relevant criminal offence”, “current investigations and/or enforcement actions relating to the member, or the imposition of administrative sanctions (...)” is too broad.

On the consequence, in our opinion the matter may need to be reconsidered thoroughly, paying due regard to the presumption of innocence.

#### **Art. 14 Experience criteria**

In our opinion with regard to article 14 (6) the assessment should take into consideration the Knowledge and experience of the management board **collectively** : the proposed requirements in article 14 (6) should not be referred to each member but to the collective knowledge and skills of the entire body.

Otherwise, in our opinion there would be the risk that banks will have difficulties to comply with the required diversity in skills, age, gender, etc. when composing boards.

Therefore, more than defining a rigid profile for candidate board members, which would not allow necessary diversity within a board, it would be better to adopt a principle by which it is to be ensured that board directors have

collectively the knowledge and understanding of the business to enable them to contribute effectively to ensure the sound and prudent management of the bank.

#### **Art. 16 Implementation**

There should be a more proper transitional period: the proposed term – by six months after the publication of the Guidelines – seems too brief.