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— **EBA Consultation Paper on draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2013/03)**

18 June 2012

Dear Sir, Madam,

Ref. BdB: RE.35

The Association of German Banks, which represents the interests of over 200 private banks and 11 regional member associations in Germany, welcomes the opportunity to comment on the *EBA Consultation Paper on draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2013/03)*.

I. General Remarks

— 1. We are seriously concerned that the EBA is trying to broaden its own mandate by extending the guidelines to cover "key function holders", which is the level below the board and comprises a group to be defined by the individual credit institution (see sections III.2. and III.3.c of the consultation paper). Article 11 (1) of Directive 2006/48/EC (introduced by Directive 2010/76/EC) only says that the "*Committee of European Banking Supervisors shall ensure the existence of guidelines for the assessment of the suitability of the persons who effectively direct the business of the credit institution.*" The draft provides no explanation of why this extension is needed, nor does it specify a legal basis (the wording in section III.2 even seems to put the existence of such a legal basis in doubt). Our basic concern is not only that guidelines of this kind would inevitably generate additional red tape, but also that a fundamental principle is being undermined – namely that public authorities should act within the remit of the mandate assigned to them by legislators. The doubtful, if not non-existent, legal basis for the guidelines could trigger legal disputes, not only between banks and their supervisors (which rarely occur) but also by a bank's employees suing their employer (which happens more frequently).

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Our second major concern is that whilst the rules in Directive 2006/48/EC and CRD IV, for which the guidelines seek to develop harmonised practices, make the fit-and-proper test the responsibility of regulators, the guidelines' starting point is a self-assessment by the bank and extensive process and documentation requirements. Furthermore, we do not believe that this reflects reality; in practice, a bank would normally approach regulators informally and review the candidate and criteria with them before starting the paperwork. The guidelines should therefore recognise that, notwithstanding all the criteria they define, the decision will ultimately be a "judgment call". The guidelines should take current practices into account and invite banks to liaise with the competent authority (or authorities) at the earliest stage possible.

3. The proposed independence requirement in Article 15(2) (*"The following situations should be considered in assessing the independence of a member: past and present positions held in the credit institution or other firms; personal, professional or other economic relationships with the members of the management body in their management function, in the same credit institution, in its parent company or subsidiaries; personal, professional or other economic relationships with the controlling shareholders of the same credit institutions, with its parent institution and subsidiaries."*) could create problems when composing the boards of subsidiaries. It reflects an unresolved (though growing) ambiguity surrounding the subsidiary as a legal entity in its own right with a separate licence and the responsibility of the parent company to be a source of strength for the group. We are very concerned to note that, in the context of acquiring or creating a subsidiary, the parent's ability to support it in terms of finance and management is a critical component of the change-of-control review by the subsidiary regulator (see Article 19a(1)(c) of Directive 2006/48/EC, (introduced by Directive 2007/44/EC) and paragraph 61 of the *Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC* issued by CEBS, CEIPOS and CESR (CEBS/2008/214; CEIOPS-3L3-19/08; CESR/08-543b)). But when it comes to the composition of the board of the subsidiary, it becomes important for board members to be independent of the group. The guidelines even exacerbate this ambiguity, as Article 15(2) uses independence as a wide and open concept and does not specify what purpose it should achieve or how it relates to the "source of strength" requirement mentioned above.

II. Specific comments

1. Question 1: *While the principle of proportionality is a general principle within European legislation, it may be desirable to spell out this principle in more detail for the application of the Guidelines. Which criteria could be applied by institutions and competent authorities to differentiate the assessment process and the assessment criteria regarding the nature, scale and complexity of the business of the credit institution and how should such a differentiation look like?*

We do not consider it desirable to spell out the proportionality principle in more detail. Given the current level of financial market integration, we believe it is doubtful that general criteria could be found (for example, linked to a total assets amount on the balance sheet) which could accommodate the situation in all 27 member states. Moreover, further differentiation in the guidelines would lose itself in endless details and suffocate the process, banks and regulators.

2. Question 2: *Should competent authorities be required by the Guidelines to assess the policies of institutions for assessing the suitability of key function holders aiming to ensure that institutions have appropriate policies in place ensuring that key function holders would fulfil the suitability requirements?*

CRD IV calls for an assessment of the candidate by the regulator. Unless this process would be swifter and more robust if regulators had already approved the bank's internal policies – which the draft guidelines do not suggest – these internal policies should remain the responsibility of the bank itself.

Yours sincerely,



Lothar Wand
Director



Thomas Lorenz
Director