

**Response to the EBA  
Consultation Draft Guidelines  
on Internal Governance**

28 January 2017

## General remarks

The regulation in consultation can be fully ascribed into the wider process of European integration.

This process, although based on a mechanism of transfer of sovereignty from Member States to the European Union, must respect the boundary marked by the fundamental constitutional principles in force in the national systems, with which it must be compatible.

These national constitutional principles therefore represent the rule and the limits of European integration.

**Q1: Are the guidelines regarding the subject matter, scope, definitions and implementation appropriate and sufficiently clear?**

The consultation document confirms the *Guidelines for internal organisation* of 27 November 2011, offering a broad definition of the management body (point 10, p. 12), with the aim of establishing common rules for all the corporate governance models adopted by European banks.

It is thus designed to be applicable to any corporate law system, without asking that the general laws, specific to each national system, be modified, given the CRD IV Directive limits on this subject (see Art. 3 paragraph 2).

This choice should be more clearly expressed and should also include in the "Definitions" listed in paragraph 13 (page 13) the provisions contained in paragraph 10 (page 12).

Indeed, the management body encompasses both strategic supervision and management/control tasks, that could be differently allocated in the context of the one-tier model and the two-tier model.

In this perspective, it seems reasonable that the notion of "management body" includes also the "traditional" model, adopted by many Italian companies, based on a board of directors and a board of auditors.

Particularly, we deem it important to consider that the definition of the "management body" should clearly include not only the board of directors, but also the Chief Executive Officer, the General Manager or other senior management positions, who will take responsibility for the executive management of the bank, even if not part of the board.

In practical terms, the document should establish, on the one hand, that the whole Board (made up of executive and non-executive members), has the duty of steering and defining strategic objectives, risk management policies and governance structures and, on the other hand, that the Executive

Committee, the Chief Executive Officer or the General Manager(s) – regardless being members of the Board or not – are appointed to the management of the ordinary administrative tasks and the implementation of the strategies approved by the Board.

The responsibilities of the management body, distinguished in the “supervisory function” and the “management function”, should be better expressed, ensuring that the supervision includes the task of strategic direction and the approval of main transactions, together with the task of monitoring and control the management body performing its management function.

In this way, the control functions which is typical of the Italian statutory audit system could, in a broad sense, be clearly included in the management body’s role.

Following the above made considerations, some points of the document should be supplemented as follows.

#### **Rationale and objective of the guidelines**

*19. Member States’ company law usually provides for either a unitary and/or a dual board structure; the Guidelines apply to both structures. The Guidelines do not advocate any particular structure and are intended to embrace all existing governance structures. The management body in its management function sets the direction for the institution and is responsible for the day-to-day running of the institution. The management body in its supervisory function **approves the strategies and the main transactions**, oversees and challenges the management function and provides appropriate advice. The oversight role includes reviewing the performance of the management function and the achievement of objectives, **monitoring** and ensuring the integrity of financial information as well as the soundness and effectiveness of the risk management and internal controls.*

#### **Scope of application**

*10. For the purposes of these guidelines, any reference to the members of the management body or to the members of the management body in its management function should be understood as applying also **to the Executive Committee or to the Chief Executive Officer (CEO)**, as defined in these guidelines, **or to the General Manager**, even if he or she has not been proposed or appointed as a formal member **of the Board**. Likewise, any reference to the management body or to the management body in its management function should be understood as including the CEO **or the General Manager/Managers**.*

**Q2: Are there any conflicts between the responsibilities assigned by national company law to a specific function of the management body and the responsibilities assigned by the Guidelines, in particular**

**within paragraph 23, to either the management or supervisory function?**

No specific conflicts are evident, but the Guidelines should give more prominence to the governance model that involves the presence of the Board of Auditors, as better argued in Q3.

**Q3: Are the guidelines in Title I regarding the role of the management body appropriate and sufficiently clear?**

The consultation document does not seem to consider the specific nature of the one-tier model and the traditional Italian model, when it appears to impose (not only a functional but) a structural separation between the responsibility for supervision and dialogue with the advisory committees, on the one hand, and that of the management function, on the other.

Particularly, in points 17 and 24, supervision seems to be entrusted to non-executive members only, with no chance for the executive members of the management body to take part in it.

Such an organisational distinction in structural terms is not acceptable.

Given the features of the governance models largely adopted in European company law, the tasks and responsibilities of strategic supervision are accountable to the board as a whole, not to individual non-executive members, even when these tasks consist of the steering, challenging and supervising of the work of the management.

Only the monitoring and review of the integrity of the internal control system can be reserved for certain non-executive members of the management body. In this regard, some jurisdictions in fact reserve these tasks to a special Committee, which may either be part of the board (one-tier and two-tier Italian model) or separate (Board of Auditors).

Similarly, it is not acceptable that the advisory committees' work, meant to ensure better corporate governance, is carried out for the benefit of non-executive members, as it should instead cover the entire management body (para. 37).

The work done by the various Committees (risk, remuneration, nomination) is in fact relevant to the exercise of the powers of the management body in its supervisory function, including, therefore, all its executive and non-executive members.

Although the preparatory and consultative work done by the Committees is certainly aimed at creating greater awareness in decision-making for those members who are less informed on the matters regarding the decisions (not

having taken part in the initial and intermediate stages of the decision or operation), it is also however intended to enrich and improve the content of the decision to be adopted by the Board in its entirety, including executive members and/or the CEO, who are also members.

Only if this interpretation and rephrasing of the EBA guidelines is accepted, will the entire document become compatible with the one-tier model and the traditional Italian model, also for further paragraphs (see the final insert of Section 4, pages 19-20).

**We therefore propose the following addition to point 17:**

17. The duties of the management body should be clearly defined distinguishing between the **tasks members** of the management body in its management function (~~executive members~~) and **tasks members** of the management body in its supervisory function (~~non-executive members~~). The responsibilities and duties of the management body should be described in a written document and duly approved by the management body in its supervisory function. **The management body in its supervisory functions may include executive and non executive members.**

It should also be noted that the point 44 clauses, requiring that the Chairman of each Committee must be an independent member of the management body in its supervisory role, appears excessively stringent with regard to the appointments Committee, wherein it could be enough to elect the Chairman from among the non-executive directors.

**We therefore propose that point 44 be reworded.**

Regarding the duties assigned to the advisory committees, there are inconsistencies in the role assigned to the Risk Committee in its review functions on the proposal for appointments of consultants who do not belong to the supervisory function. In fact, the reason for this choice is not clear; nor is it clear whether consultant appointments should be confined to the risk function (see point 47, letter e) or not.

**We therefore request clarification of the provisions of point 47, letter e).**

Regarding the duties assigned to the Audit Committee, it seems appropriate that the Committee should make recommendations to the Board to ensure the adequacy of the financial reporting process; but it is not acceptable that the Committee should hold exclusive power of proposal in this domain, which should be assigned to the CEO (see point 50, letter c).

**We therefore request intervention on point 50, letter c) as said above.**

**Q4: Are the guidelines in Title II regarding the internal governance policy, risk culture and business conduct appropriate and sufficiently clear?**

The consultation paper provides for the management body's adoption of an "*Internal Governance Policy*" (see point 70, p. 28) that covers the information listed in Annex I, including: the shareholder structure, the group structure, the composition of the management body and how it works, the composition of the committees, the identification of key roles, the internal control system, etc.

This information is, for the most part, already included within other corporate documents, which are provided to accomplish specific statutory measures (Articles of Association, Board of Directors regulations, internal control system regulation and other rules adopted by the Board).

**We therefore deem it necessary to allow the reference to other governance documents adopted by the management body, in order to comply to the internal governance policy provisions.**

**Q5: Are the guidelines in Title III regarding the principle of proportionality appropriate and sufficiently clear?**

We generally appreciate the criteria used to give substance to the principle of proportionality, but we deem necessary to clarify whether the conditions laid down in paragraph 112 are cumulative or not.

The Guidelines should also contain a reference to the competence of the national authorities in setting out implementing provisions, to ensure clear and uniform application in the different countries and safeguard competition.

**Q6: Are the guidelines in Title IV regarding the internal control framework appropriate and sufficiently clear?**

Within the scope of the internal audit function, there is a lack of clarity regarding the reason at the basis of the involvement of the risk committee only, in the monitoring of critical issues identified by internal audit activities. In this respect, it would seem appropriate that the recommendation be expanded with reference to the tasks of the audit committee.

**We therefore propose the following addition to point 193:**

*All audit recommendations should be subject to a formal follow-up procedure by the respective levels of management to ensure and report their effective and timely resolution. The head of the IAF should be able to report directly, where appropriate and on his own initiative, to the management body in its*

*supervisory function of the non-implementation of the corrective measures decided on. This should not prevent him from reporting, where relevant, to the risk committee and/or the audit committee on the basis of their respective responsibilities.*

**Q7: Are the guidelines in Title V regarding transparency of the organization of the institution appropriate and sufficiently clear??**

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**Q8: Are the findings and conclusions of the impact assessments appropriate; please provide to the extent possible an estimate of the cost to implement the Guidelines differentiating of one-off and ongoing costs?**

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