Brussels, 27 January 2017

EACB Answer to

Consultation on Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders EBA/CP/2016/17

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The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

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Question 1

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 to either the management or supervisory function?

Recognition of different governance structures

Strict compliance with the Guidelines may lead to circumstances where the supervised entity is required to reform its governance in a way that is unfamiliar with the structures that are common in the Member States and allowed in the national company legislation. The Guidelines should clearly provide that they do not advocate any particular governance structure nor interfere with the allocation of tasks of different governance bodies as governed by the national laws in accordance with recitals 55 and 56 of the CRD IV.

Member states' national legislations provide different company law frameworks (such as unitary or dual board structures). Moreover, banks are organized in different forms of company including cooperative entities. Cooperatives are a well-recognized form of business entities, as stated in the Statute for a European Cooperative Society (Reg. 1435/2003) and Art. 54 of the TFEU. of The Guidelines have to provide enough flexibility to the competent authorities so that they apply the provisions in the governance systems provided by national company law.

Due to the diversity of different business entities and governance structures, it should be clarified (for instance in the executive summary or the background chapter) that the guidelines do not advocate any particular governance model or structure. This would also be in line with the CRD recital 55 that states: *Different governance structures are used across Member States. In most cases a unitary or a dual board structure is used. The definitions used in this Directive are intended to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aimed at a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competences in accordance with national company law.*

We believe that a reference or even the quote of recital 55 would be very helpful.

On the other hand, recital 56 of CRD IV states that *"… a management body should be understood to have executive and supervisory functions. The competence and structure of management bodies differ across Member States. In Member States where management bodies have a one-tier structure, a single board usually performs management and supervisory tasks. In Member States with a two-tier system, the supervisory function is performed by a separate supervisory board which has no executive functions and the executive function is performed by a separate management board which is responsible and accountable for the day-to-day management of the undertaking. Accordingly, separate tasks are assigned to the different entities within the management body."*

EACB believes that the dichotomy between executive function and supervisory function within the management body, established in these Guidelines, leads to an uncomplete picture and

does not fit into the national company laws of the Member States. In fact, it does not mention other central roles of statutory bodies, such as competence of deciding on company strategy and the overall direction of the institution. We would like to point out that, the CRR's definition of management body (Art. 3(1)(7)) infact refers to "*body or bodies, which are appointed in accordance with national law, which are empowered to set the institution's strategy, objectives and overall direction ….".* However the CRD does not allocate these functions, which we consider very important for the understanding of the specific governance system, to either the executive or supervisory function..

While in some jurisdictions the company strategy is more in the hand of the executive function and the supervision of its implementation in the hands of the supervisory function, the company law in other jurisdiction may stipulate that it is the supervisory function which has the decisive role regarding the company strategy. Other jurisdiction may even have a specific body to define and monitor the implementation of the company strategy and the overall direction. These differences are also recognized in the Basel Committee's Corporate Governance Principle for Banks (2015, see p. 6). Similar reflection should be included in the EBA Guidelines. In particular, the management body in its supervisory function should not be understood all cases as mere monitoring and overseeing body.

Due to the varieties of legal frameworks and of the governance models among the Member States, EACB suggests that the Guidelines should expressly state that they do not intend to give guidance on the allocation of tasks (such as competence on company strategy) between different legal and organizational bodies. It should rather underline that the governance structure should result in an efficient system of "checks and balances".

In particular, the particularities of the different national cooperative laws should be respected.

Independence

EBA should not give guidance or requirements on formal independence ('fully independent members') as EBA has no mandate to create a definition of formal independence on the basis of Article 91 (12) of the CRD IV. The definition of formal independence is dealt with exclusively by national legislation and well-established governance culture, principles and arrangements. Therefore the Guidelines should abstain from the giving such definition. EBA should only focus on clarifications on 'independence of mind' as provided by Article 91(12) of the CRD IV.

In many member states specific independency requirements do not necessarily exist in the specific provisions of banking law, but such requirements are included in broader company law principles and other similar flexible legislative frameworks. EACB finds that Guidelines in terms of independency inappropriately interfere with the well-functioning principles of independency in each member state, even though there are no conflicts with particular statutes.

For example, it is well established principle in many member states that shareholders' representatives are considered as independent, without any ownership limitations. The reasoning behind this is that such principle ensures the proper functioning and steering of the company.

Moreover we see a conflict between EBA's suggestions on the definition of formal independence and the Charter of Fundamental Rights of the European Union, particularly regarding the freedom to conduct a business and the right of property (Art 16 and 17 of the Charter).

Within a cooperative banking group, it is fundamental to maintain cross-directorships between the affiliated cooperative banks, the central body and the other subsidiaries to the extent that

(a) they all have a common interest in the proper functioning of the entire network, and (ii) the plurality of mandates between the central level and the local level of the cooperative banks ensures an efficient level of control by the central body over its affiliated banks (such as the proper application of the laws and regulations and also all the prevention of conflicts of interest rules in force). Moreover, directors in such circumstances are mainly much more motivated to actively take part into the management and monitor the company. This also reduces the need for completely external members and therefore avoid additional management costs.

The ECB has already taken a standing on not to give further guidance on the formal independence of the management body members, but leaves this matter up to national laws (See ECB Draft Guide to fit and proper assessments, November 2016, p. 14). EACB supports this approach. EACB finds that such approach is proportionate and sufficiently complies with the Article 74 of the CRD IV that requires robust governance from the institutions.

It is also quite common to appoint representatives from the parent company to the management bodies of subsidiaries. When the parent company is also supervised by the NCA, it considers these supervisory board members formally independent. These members should be independent 'in mind' and 'in appearance' at all times. This practice is considered 'good governance' in those member states. The draft Guidelines do not consider these members as formally independent. This would potentially undermine the capacity of the management bodies on group level to supervise all of their operations and also to secure compliance with regulations and supervisory requirements on a group level which make the guidelines problematic in terms of group structures. It would also give rise to significant practical issues given the number of subsidiaries banks have. Especially if it is not clarified that certain subsidiaries are excluded from the scope of the guidelines, as detailed in this position paper in relation to Q2.

Finally, we would like to point out that according to the cooperative law of some member states only the members of the cooperative can be board members or managers of the cooperative ("Selbstorganschaft", § 9(2) GenG[D] (German Cooperative Law); §§ 15,24 GenG[Ö] (Austrian Cooperative Law).. Therefore, being a member and (then necessarily) shareholder of a cooperative should not be taken as a relevant element when assessing the independence of a manager or board member.

Employee representatives

The Guidelines do not recognize that the nomination process of employee representatives, as regulated by the national laws, differ from the nominations of ordinary members of management bodies. This creates inconsistencies and conflicts between the Member States' laws and the Guidelines. Therefore, the Guidelines should address how they should be applied to employee representatives in management bodies as provided by national laws and how conflicts with the national laws can be prevented.

Many Member States' national laws require that employees must be represented in the management bodies in certain sizes of companies, including financial institutions. Usually such representatives are not nominated by the shareholders or members of such companies, but by the employees or corresponding trade unions. Banks as addressees of these rules are not in a position to ensure the compliance, if there are conflicts with the Guidelines.

EACB suggests that the EBA clarifies what fit and proper criteria should be applied and how suitability assessment should be conducted in terms of employee representatives, especially in terms of time commitment (chapter 5), knowledge, skills and experience (chapter 7), independence of mind (chapter 10), and training (chapter 12). EBA should clarify how the

collective suitability requirements (chapter 8) and diversity requirements (chapter 13) should be applied to the board with employee representatives. According to the current draft Guidelines, employee representatives would not be considered as independent members, which is in conflict with Annex II of the Commission recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC). Employee representatives should be considered any case as independent members.

ECB Guide

While the ECB "Draft Guide to fit and proper assessments" is not exactly national legislation, we would nevertheless wish to point out that differing approaches, especially, regarding conflict of interest, independence of mind and formal independence could create difficulties. Already, these concepts seem difficult to understand and not easy to distinguish and therefore not evident to comply. Moreover, there are overlaps and deviations, which could make the application of the Guide and these Guidelines difficult to apply.

Question 2:

Are the subject matter, scope and definitions sufficiently clear?

CRR Article 10 banking groups

Pursuant to Article 21 of the CRD IV, the competent authorities may waive certain requirements for credit institutions that are permanently affiliated to a central body as regulated in CRR Article 10. Through reference to Article 13, also requirements in the Article 91 of the CRD IV may be subject to such waiver. Therefore, the Guidelines should provide that the competent authorities may waive, fully or in part, suitability requirements of management body members for credit institutions permanently affiliated to a central body.

Other companies than financial institutions in consolidated groups

It should be clarified or amended that the suitability assessment requirements and procedures only apply to financial institutions and other entities within the prudential consolidation.

According to the paragraph 10, the Guidelines seem to apply to all subsidiaries of CRD-institutions (even to some extent to branches – see point 6 of the "Background" page 6 – which is not acceptable due also to the fact branches are not legal entities), including those that are not subject to CRD IV. EACB finds that this is not consistent with the scope of CRD IV and CRR, nor proportionate. For various reasons, financial institutions have many legal entities, including entities with banking activities and other entities that do not exercise banking or other financial activities. The reference "*including their subsidiaries not subject to Directive 2013/36/EU"* in paragraph 10 should be deleted to reflect that the scope of the guidelines is limited to subsidiaries in the EU which are under direct supervision.

EACB also notes that paragraph 10 is in conflict with paragraphs 106–110, according to which requirements on suitability policy must solely be followed in subsidiaries that fall within prudential consolidation.

Group companies outside the EU

The Guidelines are disproportionate to as they set requirements of all companies that belong into the consolidation, regardless of the companies' location and applicable jurisdiction.

EACB finds that it is disproportionate that non-EU subsidiaries should comply with the Guidelines. Application of the Guidelines into companies that are subject to foreign jurisdiction may have unintended consequences.

Definition of Geographical Provenance

First, we do not see a need at all for this criterion to be applied at the level of local banks, which operate in an area of limited size only.. In this context we would like to remind that already general legislation in EU states does not allow any discrimination due to geographical provenance.

Moreover, definition of "Geographical Provenance" does not really seem operational since it does not really provide elements that would allow to banks to establish a benchmark for compliance, i.e. when in fact the management body sufficiently diverse regarding individuals from diverse "cultural backgrounds".

Question 3:

Is the scope of assessments of key function holders by CRD-institutions appropriate and sufficiently clear?

According to the Guidelines, it seems that each and every CRD-institution would be obligated to always assess the suitability of four key function holders (Chief Financial Officer, Chief Risk Officer, Chief Compliance Officer, Chief Audit Executive). Such approach does not take into consideration the legal basis, different governance arrangements of banking groups nor it is proportionate. EBA and ESMA should take into consideration the flexibility CRD IV Article 74 provides. Therefore, EACB suggests that the recommendation to assess the suitability of such key function holders should only apply to the central institution/parent entity level in banking groups and the key function holders should only be assessed by the institutions.

The definitions 'Key function holders' and 'Heads of internal control functions' as set out on page 19 indicate that at least Chief Financial Officer, Chief Risk Officer, Chief Compliance Officer and Chief Audit Executive would always fall into the category of a 'Key function holder'. A strict interpretation of the Guidelines may lead to a result that every individual CRD-institution should have such specific position, and in every institution such four suitability assessments should always be conducted.

EACB finds that such approach is not appropriate for the following reasons:

1. Not all CRD institutions have separate positions for such functions. These functions and responsibilities may be combined or centralized in the central institution/parent entity level. If the establishment of such positions was required in each and every CRD-institution, it would

cause significant cost burden especially for co-operative banking groups and similar groups of financial institutions.

2. When the above-mentioned functions are centralized in the central institution/parent entity, requiring suitability assessment of all key function holders of all individual institutions is not proportionate. Often only the key function holders in the central institution/parent entity level have influence on the corresponding functions in the entire prudential consolidation. The key function holders of subsidiaries and other entities in the prudential consolidation are often subordinates of the executives in the top level, or there is an effective monitoring and reporting organized by other means. This is especially in Article 10 banking groups and other similar governance arrangements where the central institution is responsible for the oversight of all entities that fall into the same prudential consolidation. Therefore, the suitability assessment of all key function holders in every CRD-institution would not have added value in developing and maintaining robust governance arrangements.

3. Taking into consideration the reasons 1–2 above, the Guidelines would cause disproportionate administrative burden both for institutions and authorities. Administrative burden would be imposed particularly in co-operative banking groups. As the assessment procedures would increase the administrative work it would possible lead to several obstacles for the overall risk management of co-operative banks.

An assessment of at least 4 key function holders at the level of each institution would bring about in practice a massive inflow of approval files sent to the national competent supervisor and an effective risk of paralysis of the banks prior to the appointment of the said financial and internal control functions. Please note that any delay in the treatment of the approval files of the key function holders would increase the liability of the supervisors in the event that there is an unjustified delay to deal with the file on time or a failure in the approval process of the applicant (i.e. if the approval of the latter is harmful for the institution). This is the reason why the clear interference of the supervisors in the appointment procedure might turn against the supervisors themselves.

Moreover, it would lead to significant competitive disadvantages compared with large commercial banks. For instance, an additional assessment of 4 key function holders for each regional cooperative bank of a French cooperative banking group would require the supervisor to assess 156 additional assessment files (4 multiplied by 39 regional banks) irrespective of the central body and the other subsidiaries within such group..

4. From the perspective of applicable level 1 legislation, the EBA and ESMA should consider that the suitability assessment of key function holders is not expressly provided by the CRD IV, unlike the suitability assessment of members of management bodies (Art. 91). EBA now sees a legal base for suitability assessment of the key function holders in the Article 74, requiring that the CRD-institutions must have *"robust governance arrangements"* in place. This is a very extensive interpretation, provided that there is a more restrictive specific clause (lex specialis) in Art. 91. From this perspective, the draft guidelines regarding the suitability assessment of key function holders are too categorical especially in co-operative banking groups, as they do not take into consideration the most common features of such governance arrangements.

For these reasons, and taking into consideration the proportionality principle, the guidance regarding key function holders should be deleted or the Guidelines should at least clearly provide that the requirement on suitability assessment of key function holders only apply to the central institution/parent entity level in banking groups where the main responsibility of the said functions is centralized and not to require the assessment of key function holders at the level of local and regional cooperative banks.

An equally restrictive approach should be applied to less significant institutions in general.

The same approach should be adopted for the "other key function holders" having a significant influence over the direction of the institution. This reference is very vague and any assessment regarding an unknown category of staff (outside the management body) should be left aside.

Furthermore, EACB finds that, especially taking into consideration the flexibility as provided by the Article 74 of the CRD IV, key function holders not assessed by the regulatory authorities according to the above-mentioned criteria should only be assessed by institutions. Such assessment should then be subject to supervisory scrutiny in the context of the SREP.

EACB finds that diversity obligations do not fully fit in the context of key function holders. Therefore, such provisions should be either deleted (given that CRD IV does not provide for any assessment for such category, or be limited to the central bodies for the 4 key function holders at the highest hierarchical level only and be applied in a highly proportionate and reduced manner and depending on local feasibility.

EACB fears that the diversity requirements could be problematic for key function holders. Taken into account the specific high-level expertise required, knowledge and experience requirements are emphasized when nominating key function holders. Therefore, it should be clarified that diversity requirements exclusively apply to the members of the collegial management body taken as a whole.

Question 4:

Do you agree with this approach to the proportionality principle and consider that it will help in the practical implementation of the guidelines? Which aspects are not practical and the reasons why? Institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.

The paragraphs on the application of the proportionality principle should rather be mentioned in the beginning of the guidelines. Moreover, it should be mentioned explicitly that the proportionality principle applies to the provisions of the entire paper.

Please also see our answer to Question 5.

Question 5:

Do you consider that a more proportionate application of the guidelines regarding any aspect of the guidelines could be introduced? When providing your answer please specify which aspects and the reasons why. In this respect, institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.

EACB welcomes introducing more detailed description on the applicability of proportionality principle. EACB suggests that the Guidelines would make a clear distinction between the central institutions and other affiliated (local/regional) institutions. This is the core element of the governance arrangements of co-operative banking groups. In addition, EBA and ESMA should develop more guidance on the proportional application of the Guidelines into subsidiary entities. EACB finds that such aspects are core matters in applying the proportionality principle. Furthermore, adding such factors would help both the institutions and competent authorities applying the Guidelines in practice.

EACB very much regrets that, unlike the Basel Committee's Corporate Governance Principles for Banks (July 2015), the Guidelines does not explicitly address the application of the Guidelines to different group structures (see Principle 5 of the BCBS publication). Especially the levels of the affiliated local banks and subsidiaries and the parent/central institution have to be seen in different light. The preference should be given to a strong governance of the entire group. One reason for this is that there are group policies, in particular in the governance area, that have to be implemented and complied with at the level of subsidiaries and other affiliated institutions. Emphasis on independence at local bank and subsidiary level would be contrary to a strong group governance.

Tasks and responsibilities of all aspects of operating as a financial institution (including banking business, governance, risk management and risk monitoring) are allocated between the local/regional banks and the central institution (and its subsidiaries) in co-operative banking groups. Central institutions play a significant role in the core functions of all associated member banks, such as risk and liquidity management, internal audit, product management and development, and ICT. Many banking groups have established a joint liability system (statutory or contractual) or the banking groups are responsible for maintaining deposit protection funds.

Therefore, taking into consideration the roles of each member bank and the central institution, the focus should be put in the central institutions that are mainly responsible for steering the banking group, whereas the individual member institutions should not be subject to excess administrative burden. Such view should be clearly addressed in the Guidelines as it is a crucial factor in the application of the principle of proportionality. Proportionality in this sense should be applied both for the suitability requirements and the assessment process itself.

Co-operative banking groups that comprise consolidations for the prudential purposes should be seen as a single institution also from the suitability assessment perspective. In particular, banking groups that follow the Article 10 of the CRR are one example of this category. Such banking groups have gone through significant structural reforms in order to take benefit from

the prudential consolidation. These reasonable expectations to be treated as a single institution should be protected.

In order to better address the key functionalities of co-operative banking groups and networks, EACB proposes including the following criteria to the proportionality assessment:

- Co-operative banking groups that comprise consolidations for the prudential purposes should be seen more as a single entity also from the suitability assessment perspective. In particular, banking groups that follow the Article 10 of the CRR should be seen as single institution. In those cases the suitability assessment obligations should primarily apply in the central institution/parent entity level.
- The more centralized the business operations, risk management and internal audit, the lighter requirements should apply in the local/regional/sunsidiary level, taken into consideration, among other things, the following factors:
- Products offered and to what extent the institution is responsible of the product development and management or whether such functions are centralized in the group-level.
- Whether significant risk management or audit functions are organized in the prudential consolidation level.
- Whether there is an institutional protection scheme (cross-guarantee) or an equivalent system in place.
- Whether the subject of the assessment is a member/nominee to the management body in its supervisory function or management function.

If the institutions in the local/regional/subsidiary level had to follow strict suitability assessment requirements it would lead to massive administrative burden without corresponding benefits, as the core functions are centralized. In fact, this would also lead to significant competitive disadvantages compared with commercial bank peers. Whereas just a few members of commercial banks' management bodies and key function holders would be subject to suitability assessment, a similar-sized co-operative banking group would be obligated to perform even thousands of suitability assessments. The workload for such procedures would cause massive costs, and might even hamper the efficiency of both business operations and risk management. It is very likely that the authorities would not have sufficient resources in handling massive number of assessment files.

Local member banks should be subject to simplified fit and proper process. For example, in Finland the suitability assessment process of the supervisory boards of the local cooperative member banks would mean approximately 4.000 new assessment files.

In addition, EACB has pointed out some specific proportionality concerns in its responses to later questions.

Question 6:

Are the guidelines with respect to the calculation of the number of directorships appropriate and sufficiently clear?

'Separate single directorship' counting rule regarding qualified holdings

EACB finds that directorships in group, institutional protection scheme, and qualified holdings should be counted together as one. There is no legal basis for counting directorships in qualified holdings separately as one, apart from directorships held in the same group.

According to para. 49 directorships in undertakings in which the institution has a qualifying holding and directorships within the group shall be counted separately. EACB finds such restrictive approach does not comply with the Article 91(4) of the CRD IV. The wording of that Article provides that directorships held in same group (a), IPS scheme (b(i)), and qualified holdings (b(ii)) should be counted together as one. EBA Guidelines should not take stricter approach but be in line of the applicable level 1 legislation.

The 'separate single directorship' counting rule would lead to distortions. An executive director of the parent undertaking would have to withdraw from a directorship he rightfully held in a former subsidiary only because the parent undertaking sells some shares and loses the majority in another undertaking.

Above all, we find that EBA's guidance on 'separate single directorships' does not sufficiently take into account the role of directors in corporate groups. Limiting the directors' ability to be appointed to the management bodies of other associated companies will not reduce the time consumption, but actually may lead to increased inefficiency in the management bodies. Directors' core duties include supervising subsidiaries and other associated undertakings. Should the directors' participation in such companies' management be limited, a parallel reporting and supervising line must be established.

Entities which do not pursue predominantly commercial objectives

Due to the variety of commercial and non-commercial entities among the Member States EACB suggests the list on non-predominant commercial entities on paragraph 53 should not be exhaustive. Therefore, EACB suggests to include words "for example" in the first sentence of paragraph 53 to clarify that it is an indicative list: "*Entities which do not pursue predominantly commercial objectives include, for example…*"

Question 7:

Are the guidelines within Title II regarding the notions of suitability appropriate and sufficiently clear?

Time commitment

Proportionality principle requires that time commitment assessments should be significantly streamlined.

EACB finds that the time commitment assessment according to the Annex III should not be set mandatory in all cases, especially in the local cooperative bank level. In the light of principle of proportionality, such detailed time commitment assessment should only be limited to central institutions. These cases much higher time commitment is expected than in the local/regional bank level.

Also, the requirement on keeping records of relevant activities (paragraph 44) is far too broad and requires excessive burden in particular for the smaller institutions, such as local/regional co-operative banks. Therefore, it should be deleted.

European Central Bank has already taken a view to simplify the time commitment assessment, as it has introduced presumptions on sufficient time commitment (see Draft Guide to fit and proper assessments, November 2016, p. 16–17). EACB suggests that similar practical tools should be introduced in the ESMA/EBA Guidelines as well.

Synergies within a group context should be taken into consideration.

For co-operative banking groups and networks (including CRR Article 10 groups) it is characteristic that the entities in the same prudential consolidation have streamlined governance arrangements within the group. Cross-directorships within such consolidated group have significant synergies and allow consistency of the control, strategy and solidarity mechanisms within the network of affiliates. Therefore, EACB suggests that, in the light of proportionality, the synergies within such banking groups should be mentioned in paragraphs 39 and 51 as a factor that mitigate the time commitment in each directorship.

EACB finds that 'time buffer' requirement is too vague and impossible to apply in practice. Such requirement would not bring added value to time commitment assessments. Therefore, time buffer requirement should be deleted from the Guidelines. Otherwise, it would take the form of an unjustified quotas of days prefixed by the national supervisors to anticipate a potential crisis, restructuring of the institution or legal proceedings in the future.

Should the time buffer requirement retained, it could only be taken into consideration within the framework of the overall assessment of the appointee on the basis of the situation of the applicant and the institution and also the context of the financial markets at the time when the assessment takes place.

When nominating or re-appointing directors in undertakings that currently are, or are expected to be, under circumstances where more time commitment is needed for the directorship, additional time commitment will be taken into consideration through the normal assessment process. Members of the management bodies practically distribute the available time

appropriately and spend more time on necessary issues when more time is needed for such activities even without specific requirement on time buffer.

It is practically impossible to determine for the institutions and authorities what would be the appropriate time buffer in each case. Therefore, the time buffer requirement might lead to unpredictable outcomes both for the institutions, nominees and particularly to the authorities due to its vagueness.

For these reasons, the second sentence of the para. 38 regarding "time buffer" should be omitted:

The assessment of whether a member of the management body has sufficient time to commit to his or her role should also include the assessment of whether there exists an appropriate "buffer" of time for the member to be able to fulfil his or her duties in such periods of increased activity.

Time commitment benchmarking is not relevant, for which reason such requirement should be deleted.

EACB members find the requirement on relevant benchmarking (para. 39 j) on time commitment not relevant. Even though benchmarking could provide some information on the common practices in the financial sector, it still does not take into account the special features of each institution. Therefore, EACB suggests to delete paragraph 39(j).

Knowledge, skills and experience

As the Article 91(7) of the CRD IV provides, the main focus of knowledge, skills and experience requirements should put into the management body as collective, not into each member on individual basis. More proportionate approach is needed for local/regional co-operative bank level, such as recognizing customer insight and knowledge on local market situation.

EACB understands and is fully aware of the importance of highly skilled management bodies, but the emphasis should put into the collective knowledge, skills and experience instead of focusing on each and every board member individually, as clearly provided by the Article 91(7) of the CRD IV. Otherwise the EBA Guidelines would go beyond the provisions of the said applicable level 1 legislation.

EACB suggests more proportionate view on knowledge, skills and experience requirements in particular in local and regional bank level. As stated in our answer in Question 5, in many co-operative banking groups significant functions of the group are centralized and led in the central institution level, and the central institution has the core responsibility in steering and monitoring the entire group and its supervision.

Therefore, the requirements as stated in paragraphs 60 (individual suitability) and 66 (collective suitability) should be adjusted depending on whether the central institution already provides steering and guidance to the (local and regional) member banks. Central institution's involvement significantly mitigates the knowledge, skill and experience gaps in the local and regional member banks.

Furthermore, the draft Guidelines would not necessarily give enough room for sufficient diversity of the management body of a local or regional co-operative bank. When the major functions of the banking group are centralized in the central institution, or such central institution provides significant management support for the bank, it is important for the local bank to have management body members that are familiar with the local economy and market

situation. Also, customer insight is crucially important in the co-operative business model. Paragraphs 54–60 do not however consider such factors relevant. The Guidelines should leave room for institutions in detecting similar important skills, depending on the institution's special features.

Independence of mind

Independence of mind criteria should be adjusted in order to be meaningfully applicable to group context. Independence of mind requirements should be adjusted in a way that they support effective group-level governance.

EACB very much regrets that, unlike the Basel Committee's Corporate Governance Principles for Banks (July 2015), the Guide does not explicitly address the application of the Guide to different group structures (see Principle 5 of the BCBS publication). Especially the levels of the affiliated local bank/subsidiaries and the parent/central institution have to be seen in different light. The preference should be given to a strong governance of the entire group.

Current wording of the draft guidelines may lead to an interpretation that independence of mind requirements may limit the parent entity's representatives or its management body members to be nominated to the subsidiary companies' management bodies, as well as member co-operative banks' representatives' nomination to the central institution's management bodies. In particular, paragraphs 77a and 77d may lead to this interpretation. However, cross-directorships within a cooperative banking group should be considered as a mean for the central body and its affiliated institutions to ensure:

- The cohesiveness of the network of affiliated institutions within the group,
- A common interest on the proper functioning of all the institutions affiliated to the central body given the overall strategy and the financial solidarity in place (solvency and liquidity mechanism),
- The first level of control effected by the central body prior to the second level of control made by the supervisors.

EACB members' main concern is that EBA Guidelines might potentially hamper the member co-operative banks' representation in the central institutions' management bodies and therefore, endanger the proper functioning of central institutions and the entire group whose homogeneity should be controlled. Strict interpretation of assessment criteria included in paragraph 77 (in particular a and d) indicates that a personal, professional or economic relationship (such as owning shares) between the central institution and the member bank might lead to potential conflict of interests and therefore make it impossible to have adequate representation from the member banks in the central institution's management body. EACB finds this is not an appropriate interpretation given that cross-mandates favor a common interest between the central body as guarantor of the proper functioning of the network of affiliated banks and each affiliated and cooperative credit institutions.

In particular, in a cooperative banking group that comprise an institutional protection scheme or a group as provided by Art 10 of the Capital Requirements Regulation (Reg. 575/2013) it is an organizational necessity of group governance that the member banks are well represented in the management body of the central credit institution. A Guideline considering the representatives of member banks in the management body of the central institution as not having sufficient independence of mind (because of a substantial amount of shares held or due to other economic relationships) would jeopardize the operations of both central institution and even the entire banking group to the detriment of an efficient and consistent supervision.

Therefore, EACB suggests that parent entity's management body members and other representatives (including its employees and senior management) are allowed to be appointed to the subsidiary entities' management bodies. Also, co-operative banking groups' member banks' right to be represented in the central institution's management body must be expressly recognized (exemptions from the applications of paragraphs 77a and d should be provided for co-operative banks affiliated to a central body).

Independence of mind assessment criteria stated in para. 77 should also be adjusted in order to allow the directors and other representatives of the parent entity to be nominated to the subsidiaries' and qualified holding entities' management bodies. The management body of the parent institution is obligated to monitor also qualifying holdings and subsidiaries. Too strict interpretation of independence of mind would lead to an obvious conflict with the necessity to take care for qualifying holdings and subsidiaries.

Independence of mind, requirement on 'fully independent members' and conflicts of interests as separate concepts create overlaps and vagueness.

The combination of such three categories as introduced by EBA-ESMA Guidelines and also ECB Draft guide to fit and proper assessments are overlapping and also very difficult to understand. Many EACB members have indicated that the possible impacts of such guidance are therefore almost impossible to determine in advance. This creates a situation where the practical applicability of the Guidelines are mostly dependent on the competent authorities' interpretations. Such three concepts should be completely revised and simplified in a clear manner.

Conflicts of interests (as a part of independence of mind) should be allowed to be mitigated through various means.

Paragraph 35 on the application of the proportionality principle gives an impression that proportionality principle would not apply to independence of mind requirements. As conflicts of interests are included into the 'independence of mind' according to the Guidelines, this creates an impression that conflicts of interests would not be allowed to be cured through mitigating measures.

At the same time the independence of mind assessment criteria is very detailed. EACB understands the EBA's concern that all members of the management bodies represent courage, conviction and strength to effectively assess and challenge the proposed decisions. However, proportionality is needed taken into account the proper functioning of the institution and mitigating measures.

EACB suggests that independence of mind criteria should be adjusted in a way that the entire context of governance arrangements should be taken into consideration. Moreover, mitigating measures, such as laws or internal conflicts of interest policies requiring abstaining from taking part in decision-making process should be considered. If such adjustments will not be made EACB members believe that independence of mind criteria are too strict and therefore dismiss the core governance arrangements. Moreover, they might inappropriately limit the pool of potential knowledgeable candidates for the management bodies in particular in the local and regional level, and hamper the member banks' representation in the central institution's management.

Holding of cooperative shares should not be seen as hampering independence of mind

EACB welcomes paragraph 78 according to which holding shares in the institution or an entity within the scope of prudential consolidation is not considered by itself to give rise to a situation

of conflict of interest impacting the independence of mind of a member of the management body. Beyond this, we would like to point out that the cooperative law of some member states explicitly establishes the principle that only the members of the cooperative can be board members or managers of the cooperative ("Selbstorganschaft", § 9(2) GenG[D] (German Cooperative Law); §§ 15,24 GenG[Ö] (Austrian Cooperative Law)).. Therefore, being a member and (then necessarily) shareholder of a cooperative should not be considered as an indicator at all, when assessing the independence of mind of a manager or board member.

However, EACB suggests that the wording should be amended as follows: "*Holding shares, other own funds instruments (CRR eligible or not), or a membership in the institution or any entity within the scope of prudential consolidation…*". Co-operative banks' equity instruments are in many co-operative banking groups quite a common instrument and their acquisition usually a precondition for membership for which reason the paragraph should be slightly adjusted. Very often the invested capital is low. The member also usually has very limited voting rights and his prospects for profit are much more limited.

Use of banking services (including loans) should not give a reason for lack of independence of mind.

As noted from the ECB Draft guide to fit and proper assessments (Nov. 2016), particularly loans should be taken into consideration in conflicts of interests (independence of mind) assessment. From the co-operative banks' perspective it should be recognized that the purpose of a co-operative bank, as well as co-operative business model overall, is to provide services to its members. Members' ability and willingness to contribute to the management of the co-operative bank's distinguishes co-operative banks from its commercial bank peers. The users of such services often have important insights that should be well represented in the management bodies as well. If such key feature could not be taken into account it might severely damage the entire co-operative business model and its purpose.

In many countries, most directors of a bank of cooperative banks have subscribed a personal or professional loan which do not give rise as such to any conflict of interest. The said loans correspond for directors of cooperative banks which are also top managers of SME to day to day management transactions concluded under normal market conditions. Such loans are also subject to a granting process through advice of committees and/or authorisations from the management body of the institution. Such loans are also subject to a prevention of conflict of interest procedure and are consequently highly controlled prior to the lending at the level of the regional institution and at the central body's level.

Moreover, it should be noted that the loan market is highly competitive and that any director who wish to subscribe a personal or a professional loan is free to contact competitors of the relevant institution.

For these reasons, we suggest that the EBA would clarify the guidelines regarding paragraph 77 subparagraphs (a), (d) and (e) to address that economic interests are material only if the institution could be influenced by the economic situation of the management body member and if no mitigating measures can be put in place. For example, the use of ordinary banking services (including mortgages and other loans) should not be considered by itself to give a rise to a situation of conflict of interest impacting the independence of mind. Independence of mind should not be questioned merely based on loans, if the loans are performing and the overall circumstances do not give reasons that such management body member would be under economic pressure that could inappropriately reflect to the decision-making.

Transparency criteria should be clarified.

Paragraph 81 of the draft Guidelines on Fit & Proper Assessments according to which identified conflicts of interest should be subject to appropriate transparency, both within the institution and to relevant stakeholders should be clarified.

"Past or present positions held" (paragraph 77c) should be further defined.

EACB finds that the current reference to the past and present positions is too vague. Therefore, EACB suggests that paragraph 77c would be amended by limiting past positions to directorships and positions in the senior management level. Positions held within the last three years before the appointment would be appropriate time frame in independence of mind assessment.

"Political influence or political relationships" (para. 77f) criterion is too categorical. Only such political mandates or influence should be taken into consideration when the political mandate or other activity has an impact on or is related to the institution itself.

Without further detail, paragraph 77f lays down that political influence or political relationships might give a reason for lack of independence of mind. This may cause remarkable governance obstacles for local co-operative banks (also savings banks).

Especially in the local level many highly-skilled and knowledgeable people have some affiliations in the local municipalities. Putting too much emphasis on the political mandates itself constitutes a situation where the pool of potential candidates for management becomes narrower. The cooperative banks carry out their banking activities in the same territorial area so that having local elected officials as board members is common. For example, In France, there are approximately 36.000 municipalities and more than 500.000 local and regional elected representatives. There is a very strong emphasis on the public sector in local and democratic life.

All political affiliations do not constitute a situation where such person's independence should be questioned. In fact, some external mandates provide to the members of management bodies opportunities in obtaining information and knowledge, for example, on local economy, which is important in order to successfully take part in the local bank's management.

Moreover, the current wording regarding political influence or political relationships may lead to interpretation that political influence would cause a material conflict of interests, even if the political mandate would not have an impact on the bank, its business or risk management.

In the light of proportionality, political factors should be adjusted in order that the political power should be taken into consideration only, if the political mandate or political activity has an impact on or is related to the bank (institution) itself. Otherwise possible conflicts of interests can be managed by abstaining from voting and decision-making. Significant political mandates, such in the national level, should be treated differently from local and regional political activities, as the latter ones likely do not have significant impact on the institution itself.

Furthermore, in some Member States the national company laws require a presence of representatives directly elected by local or regional authorities or public bodies. Therefore, the Guidelines should clearly provide that it does not prevent to comply with such national requirements.

Beyond that, fulfilling the requirements laid down in paragraphs 77e– f also lead to pointless additional administrative burden for the institutions. A separate written justification has to be formulated and documented for every relevant borrower or politician.

In addition to the prevention of conflicts of interest procedures applicable at the level of institution, the mission of the said local politicians is governed by a robust public governance to avoid any conflict of interest issue: anti-corruption framework, prudent and strict lending policy (spreading of credit risk, debt load, authorization of the relevant council, etc.), protection and alarm device for the whistleblowers, specific criminal charges against the local elected officials (such as offence of favoritism or unlawful taking of interest).

Therefore, there are already a battery of rules in force applicable at the national level to the local representatives which prevent the risk of conflicts of interest resulting from strict public governance rules.

Other interests

Paragraph 77h should be restricted to "family interests linked to the institution, that may create conflicts of interest". The catch-all drafting is not understandable and should be reviewed objectively as a matter of clarity.

Reputation, honesty and integrity

Reputation, honesty and integrity criteria as set out in paragraphs 70 et. seq. are clear and sufficient, for which reason paragraph 69 should be deleted.

EACB shares the EBA's goal that management bodies' members should represent good reputation, honesty and integrity. As the explanatory note after the paragraph 69 describes, the level of harmonization would be limited, due to the differences of member states' national legislation regarding criminal and administrative records. Therefore, the EBA Guidelines do not have much room for further guidance to this matter.

The assessment of the reputation set out the para 70 and 71 on the basis of on-going prosecutions, investigations and findings addresses a highly difficult and sensitive issue. On one side and especially from the point of view of a person concerned, as fundamental rights and legal principles, such as the res judicata of a court decision, the rights of defense, the confidentiality of investigations have to be respected to a maximum. On the other hand and especially from the perspective of the bank, ongoing prosecutions could lead to very quickly lead to harmful consequences and may make the quick and easy removal of a director highly desirable. Finally, a removal that later turns out to be unjustified could also be very harmful, also for the reputation of an institution. The EACB members believe that the EBA should therefore ensure that supervisors have to carefully weigh, in a given cases, the accusations (which could be false or faked), the available facts and the potential damage to the bank, as well as the wishes of the bank itself before coming to a solution to remove a director.

In particular, requirement on obtaining administrative records is problematic. In this matter there are remarkable differences between the member states' legislations. This makes it difficult to evaluate which particular records would be needed for the suitability assessment. EACB finds that paragraphs 70 et. seq. provide sufficient guidance for the institutions in the application of reputation, honesty and integrity requirements.

Clarification is needed regarding legal proceedings against legal entities.

In paragraphs 70 and 71, it should be clarified that legal proceedings involving legal entities should only be taken into consideration if they are based on facts that occurred at the time when the appointee had an actual role regarding alleged misconduct in such entity.

Question 8:

Are the guidelines within Title III regarding the Human and financial resources for training of members of the management body appropriate and sufficiently clear?

Based on paragraph 91, it is unclear which criteria should be adopted for 'effectiveness' of 'induction and training policy' and it seems not reasonable to create such evaluation process. Therefore, EACB suggests to delete the entire paragraph 91.

Paragraph 84 provides that a member of the financial institution's management body should fulfill all knowledge and skills requirements not later than 6 months after taking up the position. EACB suggests that this time period should be extended up to 1 year.

Question 9:

Are the guidelines within Title IV regarding diversity appropriate and sufficiently clear?

Paragraphs on diversity (92–97) should be clarified in order to better reflect how

- it can be appropriately applied in a different context (e.g. central bank level versus local bank level). Benchmarks for diversity policies as under Nr. 95 should be sufficiently wide in order not to create recruitmend difficulties, especially at local cooperative bank level.
- the diversity requirement should be applied when there are employee representatives in the management body. Please also see our answer to Question 1 regarding employee representatives.

EACB finds the requirement on relevant benchmarking (paragraph 95) not relevant. Even though benchmarking could provide some information on the common practices in the financial sector, it still does not take into account the special features of each institution. Therefore, EACB suggests to delete paragraph 95.

Question 10:

Are the guidelines within Title V regarding the suitability policy and governance arrangements appropriate and sufficiently clear?

Formal independence (requirement on 'sufficient number of independent directors')

Primary Position:

EACB members have identified three issues in the formal independency requirement: 1) Conflicts with the well-established corporate law principles and common practices of the member states, 2) Likely negative impacts on effective group governance, and

3) Ambiguity and confusion with the independence of mind (including conflicts of interests) requirement. For these reasons, EBA and ESMA should not give any guidance on formal independency requirement. We rather would like to seeparagraphs 123 and 124 deleted as the easiest way to overcome potential problems.

1) Requirement is in conflict with well-established corporate law principles and common practices of the member states

EACB members believe that such guidance likely is in conflict with well-established corporate law principles and rules of member states. In some member states, such principles and common practice generally allow the owners or their representatives to be appointed to the management body, without any independency concerns[1].

Independency requirements should not conflict with the members states' legislation. Such legislation contains not only particular and specific provisions, but also well-established principles and traditions. SSM has already given preference to national legislation in terms of 'formal independence' in its supervisory statement on governance (June 2016): "*'Formal' independence should be based on national criteria defined in national legislation or by national competent authorities (NCAs), since there are no formal independence criteria in the CRD IV*." The ECB Draft Guide to fit and proper assessments (November 2016) also seems to recognize that formal independence is a national matter as it states "If national substantive law, in addition, includes specific formal independence criteria for certain members of the management body ("independent directors"), these criteria also need to be observed." EACB supports SSM's approach on the matter.

It should be also noted that Basel Committee also explicitly states that "*the members of the board should exercise their duty of care and duty of loyalty to the bank under applicable national laws and supervisory standards* " (BCBS Corporate governance principles for banks, 2015, p. 8).

The CRD IV or other level 1 legislation does not give a mandate to ESMA or EBA to give further guidance on formal independence of management body members. In addition, neither CRD IV nor national company laws in the Member States require a sufficient number (or a majority) of independent directors according to various criteria set out by EBA in its Guidelines. Therefore, the Guidelines should not give further guidance on 'formal independence'.

Moreover, it seems that employees are generally not considered independent. This would be unacceptable for Member States with obligatory representation of employees in the supervisory board.

Europe had a similar discussion in 2005 regarding the criteria of independence in Annex II of the Commission recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC). The result of the discussion was an exemption, which states:

"1. It is not possible to list comprehensively all threats to directors' independence; the relationships or circumstances which may appear relevant to its determination may vary to a certain extent across Member States and companies, and best practices in this respect may

[1] For example: the criteria which is related to personal, professional or economic relationships with the owners of qualifying holdings in the institutions with the institution's or any subsidiaries are in direct conflict with national provisions (e.g. Article L.512-106 of the French Monetary and Financial Code).

evolve over time. However, a number of situations are frequently recognised as relevant in helping the (supervisory) board to determine whether a non-executive or supervisory director may be regarded as independent, even though it is widely understood that assessment of the independence of any particular director should be based on substance rather than form. In this context, a number of criteria, to be used by the (supervisory) board, should be adopted at national level. Such criteria, which should be tailored to the national context, should be based on due consideration of at least the following situations:

> *(b) not to be an employee of the company or an associated company, and not having been in such a position for the previous three years, except when the non-executive or supervisory director does not belong to senior management and has been elected to the (supervisory) board in the context of a system of workers' representation recognised by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment. "*

2) Likely negative impacts on effective group governance

As EACB has noted in its answers to previous questions, the draft Guidelines unfortunately lack of practical guidance on how the Guidelines should be applied in a group context.

EACB is fully aware that the draft Guidelines does require only 'sufficient amount' of 'fully independent members' – not that all members should be 'fully independent'. However, taken into consideration that the Guidelines provide 'fully independent member' requirements for each specialized committee, EACB finds that these requirements together would require 'fully independent members' to the extent that it potentially causes harm and obstacles for effective group-wide governance, especially in co-operative banking groups.

Sufficient participation of member banks' (that are the owners of their respective central institutions) representatives are crucial for the proper functioning of both the entire group and the entities belonging into the group and for the proper implementation in the network of laws and regulations and also internal control policies and solidarity mechanisms. This ensures that the management body members have the motivation and skills to effectively monitor and manage the central institution. Participation of associated member banks' in the core functions of the banking groups ensure that the decisions are properly taken considering the entire banking group.

As we have noted in our answer to Question 7 (regarding independence of mind), too strict interpretation of independence of mind requirement would hamper the proper use of ownership interests both regarding the co-operative banks' central institution, but also in terms of subsidiary companies. The same concern arises regarding the requirement on 'fully independent members'. Should the current version of the Guidelines be adopted, this would give rise to very significant practical issues given the number of subsidiaries and other entities that belong into the various types of banking groups.

Formal independence criteria in the draft Guidelines are problematic in terms of parent entity-subsidiary governance as well. It is a common practice to appoint representatives from the parent company to the management bodies of subsidiaries and between the central body and the affiliated cooperative banks. These members should be independent 'in mind' and 'in appearance' at all times. The assessment thereof is included in their suitability assessment.

The Guidelines seems do not consider these members as formally independent (see for instance para. 124a). This would likely make it significantly more difficult and inefficient for the

management bodies on group level to supervise all of their operations and also to secure compliance with regulations and supervisory requirements at the group level. It would also give rise to significant practical issues given the number of subsidiaries financial institutions usually have. Especially if it is not clarified that certain subsidiaries are excluded from the scope of the GL, as set forth above in relation to paragraph 10. EACB suggests to amend the GL to the effect that representatives from the parent company that are appointed to management bodies of subsidiaries, are considered formally independent.

3) Ambiguity and confusion with the independence of mind requirement

There are significant overlaps and ambiguity between the' independence of mind' and formal independence ('fully independent members') requirements. For example, there is no substantial difference between paragraphs 77d and e and 124a except the drafting and the details. EACB finds that independence of mind criteria as set out in paragraph 77 is sufficient, and there is no need for guidance as set out in paragraphs 123 and 124. As for our comments regarding paragraph 77, please see EACB's answer to Question 7.

Alternative Position:

Should the formal independence requirements be retained we believe that they should be adjusted to better reflect a number of aspects, such as group-wide governance arrangements and binding national principles of law. In particular co-operative banks' representatives in the respective central institution's management body should be explicitly allowed. Same treatment should be given to parent entity's representatives in its subsidiaries' management bodies.

The members of the EACB see the danger of conflicts with the principle of formal independence and the particularities of cooperative banks. Therefore, we suggest the following amendments and clarifications:

- ESMA and EBA introduces clear guidance on how the requirements should be applied in order to ensure effective governance arrangements in a group context. Especially it should be clarified that independency requirements do not prevent member banks' representatives' presence in the central institution's management body and formal independence requirements should solely be applied on the top entity level and not be applied to subsidiaries.
- Members of the management body in its supervisory function that have been elected to the management body in the context of employees' representation recognised by law shall be considered independent in any case. This would be in line with in Annex II of the Commission recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC).
- Ownership interest in any case would not be considered as a factor that would itself make a member of a management body non-independent. In this context, we would like to point out that the cooperative law of some member states explicitly establishes the principle that only the members of the cooperative can be board members or managers of the cooperative ("Selbstorganschaft", § 9(2) GenG[D] (German Cooperative Law); §§ 15,24 GenG[Ö] (Austrian Cooperative Law)). In Finland, there are no explicit statutes in the Act on Cooperatives, but the co-operative membership as a prerequisite for becoming a management body member is a widely spread practice and included in the bylaws/charters of co-operatives. This approach has been taken in the model bylaws of OP Financial Group's local co-operative banks. Therefore, being a member and (then necessarily) shareholder of

a cooperative should not be considered as an indicator at all, when assessing formal independence mind of a manager or board member.

- The Guidelines should clearly recognize the shareholders' right to take predominant influence in the management body. Requirements on 'sufficient amount of fully independent members and the independent members in the specialized committees (according to the EBA Guidelines on Internal Governance) should not hamper this principle and lead to situation where the institutions should be obligated to nominate significant number of independent members. This would inappropriately interfere with the members' and shareholders' rights. The number of independent members should be reasonably sufficient, taking into consideration the overall situation and the members' and shareholders' rights.
- Instead of 'substantial' shareholder, the Guidelines should introduce a definition of 'controlling shareholder'. This would be in line with the Basel Committee Guidelines on Corporate governance principles for banks (2013): "According to FSB the key characteristic of independence is the ability to exercise objective, independent judgment after fair consideration of all relevant information and views without undue influence from executives, controlling shareholders, or other external or third parties" (see page 10).
- 'Prudential consolidation' as mentioned in para. 123' is also very problematic. It should be deleted or changed in order not to hamper the proper functioning of the co-operative banks' central institutions and other group entities.

Also, as on page 25 of the ESMA's technical advice to the European Commission on delegated acts required by the UCITS V (ESMA/2014/14/17) where the independence between the investment company and the depositary – if they belong to the same company group – shall be guaranteed if two members of the management body in its supervisory function of the investment company are considered independent. Therefore, the EBA should be consistent in this sense.

Besides similar to the assessment of the independence of mind the institution should be given the possibility to prove the independence of a member and/or take mitigating measures to resolve conflicts of interests:

> *Suggested new paragraph: "h. where the member is not considered independent, the institutions can prove the independence of a member and/or decide on measures to mitigate possible conflicts of interests so that the member is independent afterwards. For example, the member should abstain from voting on any matter where a conflict of interest exists. This process and decisions should be documented."*

Cooling off period

According to Paragraph 124 (b) a period of at least three years must elapse between the termination of the employment in the management body in its management function of the CRD-institution or another group entity and the beginning of the activity as a member of the management body in its supervisory function. Due to this cooling-off period the experience and profound expertise of the former member of the management body gets lost for the institute for a long time. Therefore a cooling-off period of only two years would be more balanced and appropriate. Furthermore we do not understand, why a cooling-off period should be generally needed for functions in other group entities or subsidiaries for that matter.

Long experience from management body membership

Paragraph 124f provides that a member of the institution's management body in its supervisory function should as a general principle not be considered independent if he or she has served as member of the management body within the group for 12 years or longer whatever the entity concerned.

First, the scope of such criteria is excessive when it applies beyond the institution where the member of management body exercise his mandate (an entity by entity analysis would have been more appropriate).

Cross-directorships within the affiliated cooperative banks, the central body and other subsidiaries is the preferred means to check the consistency of the network and the proper implementation by all the institutions affiliated to the central body of the laws and regulations and all other internal control policies. Cross-mandates is a pledge of an homogeneous control between the central level and the local level within a cooperative banking group.

For instance in France, the national supervisor requires at least, as a condition precedent for the approval of a director in a regional bank of a cooperative group, a seniority in office of at 3 years or longer corresponding to the duration of one mandate in a local bank. In this example, according to para. 124f as such, the director would be authorized to stay no more than 6 or maximum 9 years in the collegial management body at the regional bank level (given its seniority in office of 3 or 6 years in the local bank).

EACB members find that such requirement is contradictory to the necessary knowledge, skills and experience additional requirement recommended by EBA on an individual basis. Especially in the local co-operative bank level the management body membership is also a way how to gain experience and knowledge from the financial sector. According to many EACB member organizations' experience, to ensure the proper continuity, knowledge and expertise of the management body of a bank, particularly in the local level, long experience is a significant asset for the institution. However, at the same time the EACB members acknowledge the need for sufficient turnover of the management body members, in order to maintain the critical thinking and ability to challenge the senior management.

Therefore, for these reasons, the EACB suggests that paragraph 124(f) should be amended in a way that the entire composition of the board should be taken into consideration, instead of using such assessment criteria on individual basis for each member of the management body. In fact, we find that such requirement would be more suitable as a part of the collective suitability criteria as introduced in chapter 8.

Other suggestions for amendments

The word "effectiveness" should be deleted from the paragraph 105. It is unclear which criteria should be adopted for 'effectiveness' of suitability policy and it seems not reasonable to create such.

Question 11:

Are the guidelines within Title VI regarding the assessment of suitability by institutions appropriate and sufficiently clear?

Proportionality

Proportionality is needed especially in cases where local cooperative banks must follow the risk guidelines set out by the central institution, and the risk management as well as audit is organized efficiently in the consolidated level. In these circumstances assessment requirements should be simplified in the local member bank level. Otherwise both the competent authorities as well as the banks would be required to handle even thousands of very detailed fit and proper assessment forms, without obtaining notable benefits. This would actually lead to significant backlog both in the authorities, local banks and the central institution, regardless whether the assessments should be conducted on *ex ante* or *ex post* basis. The time required would be necessary to be taken, for example, from other risk monitoring and business operations.

EACB proposes that in co-operative banking groups, where the central institution has a significant role in monitoring the risks of the entire consolidation group (in particular in CRR Article 10 banking groups), the full assessment process should be only limited to the central institution level, whereas member cooperative banks should be allowed for simplifications of such procedures. EACB members view is that such clarification would give more useful guidance on how to apply the principle of proportionality to the suitability assessment procedure.

Assessment frequency

Paragraphs 16 and 25 suggest that "Institutions should monitor on an ongoing basis the suitability of the members of the management body". EACB believes that this is going too far. Paragraphs 25 and 26 already stipulate a number of "specific situations", which trigger a suitability assessment. On the other hand, Article 88(2) CRR only requires an assessment on an ongoing basis only for significant institutions and explicitly leaves it with a periodical assessment for other institutions. The draft guidelines thus do not comply with the clear provisions of the CRD.

EACB suggests that for LSIs there should only be one collective suitability assessment per year regardless of the number of individual assessments or reassessments. EACB finds that more frequent collective suitability assessments would not give added value to robust governance arrangements, as management body members are often appointed annually. Moreover, the triggers for such reassessments should be reviewed and objectively restricted to a significant renewal of the members of the management body, significant changes of positions within the management body and additional mandates having a significant impact on the management body.

Member institutions that are a part of co-operative network (such as CRR Art. 10 banking group) should be subject to lighter requirements.

Access to information

Paragraph 128 of draft Guidelines provide that "shareholders should have full access to relevant and practical information about the obligation that the members and management body collectively must at all times be suitable". In order to provide more practical and useful guidance for the authorities and the institutions, EACB suggests a clarification to this paragraph

128. In particular, it should be clarified that such information should be available only for nomination purposes, and not accessible for all shareholders at any time or without any particular reason. As the suitability assessment may contain very detailed and even confidential information, there should not be a broad obligation to disclose such information.

Simplification of assessment procedures

As EACB has noted above (see "Proportionality"), simplification of the assessment process is needed especially in the local co-operative bank level.

One EACB member organization have an observation that the competent authorities have been somewhat reluctant in accepting technical simplifications on the assessment processes. For example, competent authorities have expressly required official reports from the national authorities for the basis of the assessment procedures. However, in some member states commercial databases exist that provide consolidated reports on the information included in several public/state records. Use of such consolidated reports make the information immediately available for the institutions and have also significant impacts on reducing the administrative costs. Therefore, EACB suggests that ESMA and EBA would expressly accept the use of such consolidated reports.

Other comments

In terms of paragraph 142, words "what added value the individual brings to the collective suitability" should be deleted. It is unclear which criteria should be adopted for 'added value' of collective suitability and it seems not reasonable to retain such recommendation.

Question 12:

Are the guidelines with regard to the timing (ex-ante) of the competent authority's assessment process appropriate and sufficiently clear?

CRD IV, which is a minimum harmonization directive, does not include a requirements on ex ante assessments. Therefore, it leaves the various State Members the choice between the ex-ante and the ex-post supervisory approval procedure in the context of the implementation of such supervisory procedure in national laws. EACB finds that EBA and ESMA should not introduce ex ante assessment obligation, as it would de facto lead to higher level of harmonization than required by the level 1 legislation. Moreover, the competent authorities (including national authorities) likely do not have sufficient resources for ex ante assessments.

As the explanatory note (after paragraph 127) well describes, the differences between the member states' national corporate laws limit the level of harmonization on this matter. Moreover, the CRD IV or CRR does not require ex ante assessments. In turn, the proper assessment procedures have been left at the discretion of national legislators, when the specific features of each members states' banking sector and corporate laws can be taken into

consideration. Thus the national legislation in many Member State does not allow an ex-ante assessment process[2]

Ex ante assessment procedures would cause excessive administrative burden for both institutions and authorities. This is obvious in particular for co-operative banks, which are of individual independent bank entities. If all institutions - regardless their size, nature, and other similar factors - would be subject to burdensome assessment procedures, this would cause a backlog in the authorities and institutions. Most cases the annual general meetings, or other assemblies, where the management body members are nominated, usually take place in the beginning of the year. Therefore, we have a strong doubt that the authorities cannot handle a massive amount of suitability assessments procedures in a short time frame.

Above all, EACB members are not aware that there would have been significant problems in the current supervisory practices in the member states where ex post assessment is allowed. From this perspective, the EBA should not overregulate areas where notable issues have not been recognized.

Due to that level 1 legislation gives no authority on harmonization, the specificities of each member states' supervisory practices, and the significant burden imposed on both institutions and authorities we suggest that EBA should refrain from introducing ex ante assessment procedure. Instead, national laws and well-established supervisory practices should be maintained.

Should the ex ante assessment obligation be retained, the we suggest the following amendments:

1) Assessment obligation should be only limited to initial appointments. This should be clearly expressed, for example, in paragraph 161.

2) The time limit for the assessment procedure by the competent authorities as set out on paragraph 166, must be clarified. It provides that the time limit (3–4 months) starts when the competent authority establishes that a 'complete' documentation or information has been submitted to the authority. EACB finds that EBA and ESMA should provide clearer guidance and practical tools in order that the supervised entities would determine (a) a frequency limit for the national supervisor to ask for further information to complete the file (only once just as in Germany), and (b) on this basis, a deadline for the final decision of the competent authority (approval or not of the appointee). Otherwise this creates major uncertainties for the supervised entities relating to the duration of assessment procedure. Also, the number of requests of clarification or additional information should be limited.

[2] Example: According to the provision of the French Monetary and Financial Code (Article L521.90), every 6 years, for all savings banks at the same time, the whole management body (in its supervisory function i.e. Conseil de Surveillance) is totally renewed by a general process of election including 5 different processes set up by the French law.

Question 13:

Which other costs or impediments and benefits would be caused by an ex-ante assessment by the competent authority?

It is normal that prior to an appointment an internal assessment of the applicants takes place. So the internal process will always be an ex ante process. The opposite is true for the supervisory assessment made by the competent authority.

The administrative burden both for the credit institution and for the competent authorities is heavily increased by the proposed requirement of an ex-ante supervisory assessment of each appointment or reappointment of a member of the management body. An ex-ante assessment also leads to legal uncertainty, in particular as the timeframe for an assessment by the competent authorities can take up to 6 months or even more.

In the past the real problem with some members of management bodies has not been a deficit in formal qualification but a deficit of character. This tends to show up later. By no means it will be possible to make an efficient supervisory ex ante assessment of character. As long as somebody has not misbehaved we have to assume, that he or she has a character sufficiently good to become member of the management body of a bank.

Accepting that and taking into account that there are member states where the competent authorities have to supervise hundreds of small and smallest banks each of which having its own management body we should not try to make the procedures of the supervisory assessment too complicated. It would be better regulation to abstain from the fruitless effort to control every appointment or reappointment in advance. Also the human resources of the competent authorities could be used much more efficiently when the competent authorities just get the data ex post and have to interfere only where they consider it necessary.

Furthermore Article 91 (4) CRD IV does not stipulate any ex ante assessment powers of the competent authorities as it is for example provided in Article 8 CRD IV with regard to obtain the required authorization from the supervisory authority before institutions can commence their activities.

At least a proportionality approach is needed in this respect. In this context the ECB considers only institutions with a balance sheet above € 5 billion as significant. Moreover also with significant institutions re-appointments should not require an ex-ante assessment by the competent authority, as there has nothing changed in the overwhelming majority of cases.

Taking this into account we suggest at least the following revised wording:

*"161. **For significant institutions with a balance sheet above EUR 5 billion** ~~T~~t**he** procedures should ensure that all individuals newly appointed ~~or re-appointed~~ for such positions and, where applicable, the management body as a collective body, are assessed by the competent authority in order to determine their suitability before their appointment." **For non-significant institutions and i**~~I~~**n** duly justified cases, **such as the existence of legally binding corporate law provisions,** the assessment of suitability by competent authorities may be performed after the appointment."*

Question 14:

Which other costs or impediments and benefits would be caused by an ex-post assessment by the competent authority?

Please see our answer to question 13.

Question 15:

Are the guidelines within Title VII regarding the suitability assessment by competent authorities appropriate and sufficiently clear?

Initial appointments and re-appointments (para. 161)

Only initial appointments should be subject to competent authorities' assessment procedures. Regarding re-appointments, notification to the competent authority should be considered sufficient.

Time limit for the competent authorities' decision-making

In some jurisdictions the law provides the maximum decision time of the competent authority in terms of the suitability assessments. It should be clarified in the Guidelines whether and to what extent such time limits apply.

The frequency of further information required by the competent supervisor with the institution should be limited (once during the 3 months period of assessment) to avoid the reactivation of the assessment time period at the sole discretion of the national supervisor. Otherwise, in the event that the national supervisor is overloaded with work, it may require additional information (which could be superfluous) just before the expiry of the time period for an approval file to relaunch another time period and be in a position to deal with the file.

Informing the institutions on the competent authority's decision

According to the paragraph 174, the Guidelines do not give clear obligation to the competent authorities to inform the institutions on the decisions regarding suitability assessments. In any case, especially if ex ante assessment will be introduced in the final guidelines, the EACB members find it important that the competent authorities would always be required to inform on their decisions.

Institution's failure in compliance and its impacts on the suitability assessments

Paragraph 175 provides that formal violations of the institution (by not submitting the suitability assessment information to the competent authorities) would be a basis of authority's objection to the appointment of such person. EACB finds that the institution's failure in complying with its duties can not be an adequate reason for objection of the appointment a nominee, if such delinquency is not caused by such nominee. At least such nominee should be the right to submit the required information directly to the competent authority in cases if the institution fails to comply with its duties.

Question 16:

Is the template for a matrix to assess the collective competence of members of the management body appropriate and sufficiently clear?

[N/A]

Question 17:

Are the descriptions of skills appropriate and sufficiently clear?

EACB finds that Annex II sets too specific requirements for skills. Such list of 16 different items significantly increases the documentation and other administrative burden in particular in the local co-operative bank level. Such minimum criteria of skills is not pertinent and hinder the role of the nomination committee. There should not be a standard and pre-formatted profile of applicant. In the light of proportionality, EACB suggests that Annex II should be deleted, or at least the local banks should be subject to lighter assessment process in this sense. EACB consider that the description of the expected skills is sufficient in the core of the Guidelines.

Question 18:

Are the documentation requirements for initial appointments appropriate and sufficiently clear?

EBA and ESMA should provide clarification on what documentation is considered appropriate and sufficient. Guidelines should support streamlined documentation and reporting techniques. One EACB member organization has an observation that the competent authorities have been somewhat reluctant in accepting technical simplifications on the assessment processes. For example, competent authorities have expressly required official reports from the national authorities for the basis of the assessment procedures. However, in some member states commercial databases exist that provide consolidated reports on the information included in several public/state records. Use of such consolidated reports make the information immediately available for the institutions and have also significant impacts on reducing the administrative costs. Therefore, EACB suggests that ESMA and EBA would expressly accept the use of such consolidated reports.

Based on the draft guidelines it seems unclear whether the competent authorities are allowed apply presumptions in some cases (see page 16 of the ECB Guide to fit and proper assessments, Nov. 2016) while the EBA draft Guideline can be interpreted that it in fact requires a longer list of information in all cases (see Annex III para. 6.1).

Question 19:

What level of resource (financial and other) would be required to implement and comply with the Guidelines (IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? If possible please specify the respective costs/resources separately for the assessment of suitability and related policies and procedures, the implementation of a diversity policy and the guidelines regarding induction and training. When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

Given the increased requirements particularly related to only manage the process documentation and coordination it can be assumed that at least one additional Full-time equivalent (FTE) will be required for a significant, directly by the ECB supervised institution.

Contact:

The EACB trusts that its comments will be taken into account.

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