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EACB Position Paper
CRD IV: Corporate Governance, Remuneration and Sanctions

The voice of 4.000 local and retail banks, 50 million members, 176 million customers

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I. Governance Structure

A. Acknowledgment two-tier and multi tier systems

The envisaged corporate governance rules do not adequately take account of the two tier governance structures existing in EU Member States. It is necessary to follow a differentiated approach which takes account of differences in company law regimes (cf. Commission recommendation 2005/162/EEC). The requirements should not be geared to specificities of unitary board systems only. We suggest taking up an explanation in the Recitals setting out the distinction between the one tier and the two tier system.

We consider that it should be based on Paragraph 12 of the Basel Principles for Enhancing Corporate Governance Principles of October 2010¹.

Suggestion for wording –Multi Tier Systems
Proposal for a Directive
Recital 44 (a) new

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
	<p>44 (a) new <i>Where this Directive refers to management body, it refers to both the executive and supervisory functions. It is recognised that there are significant differences in the legislative and regulatory frameworks across countries regarding these functions. Some countries use a one-tier structure in which the board performs the management task . Other countries, by contrast, have a two-tier structure, where the supervisory function of the board is performed by a separate entity known as a supervisory board, which has no executive functions; and where the executive function is performed by a separate entity known as the management board, which is responsible and accountable for the day-to-day management of the institution. Owing to these differences, the term management body is used in this document not to identify legal constructs, but rather to refer both to the oversight function and the management function. It shall be specified which tasks are assigned to the different functions of the management body, recognising that different structural approaches to corporate governance exist across countries. The Directive encourages practices that can strengthen checks and balances and sound corporate governance under diverse structures.</i></p>

¹ <http://www.bis.org/publ/bcbs176.pdf>



B. Proportionality principle for separation functions Chairman of management body and CEO

Secondly, the corporate governance provisions in the CRD IV do not take complete account of the division of responsibilities in a two-tier or multi-tier system particularly given the use of the term 'management body'. It is true that the proposal tries to differentiate between executive and non executive function. However, the distinctions made are not automatically suitable for two-tier systems.

In addition, the proposed requirements are targeting deficiencies inherent to one tier systems only. It should be indicated that certain situations - cf. Art. 86(1)(c) need for separation of functions of chairman of the management body and CEO - will just not occur in two tier or multi tier systems due to the personal and functional divisions. The separation of the function of the chairman of the management body and CEO, in a two tier system is not problematic. The chairman of management board exercises the functions of CEO within the same institution based on the fact that two tier boards have a separate supervisory board and a management board. The chairman of the management board is the CEO, while the chairman of the supervisory board is not part of the management board. In exercising the function of CEO, the chairman of the management board would be a kind of bridge between the strategic supervisory function and the executive one. In particular in small institutions, the coexistence of functions of chairman of the management body and CEO could enhance the organizational structure in terms of reducing the concentration of power of the management board and being informed on the management board activity. As such the proposed requirements cannot be applied to credit institutions with a dual or multi board system.

Therefore, Art. 86(1)(c) should be amended in order to fit governance models prevailing in several EU Member States. We suggest that the proportionality principle shall be explicitly mentioned in this provision.

Suggestion for wording – Separation functions Chairman of management body and CEO
Proposal for a Directive
Article 86 (1)(c)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
(c) the chairman of the management body of an institution shall not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified and authorised by competent authorities.	(c) the chairman of the management body of an institution shall not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified and authorized by competent authorities. <i>For such an exercise the competent authorities shall take into account the size, internal organization and the nature, the scope and the complexity of the activities of institutions.</i>



II. Management body composition and diversity requirements

A. Diversity requirements and representation of population

We share the idea that diversity in all its forms is a source of enrichment. We like to underline that cooperative entities are to a large extent the social and cultural examples in this respect. The strength of cooperative banks lies in the fact that their Boards are composed of individuals with different backgrounds. Most cooperatives have a democratic elective system to appoint directors. In many cooperative banks, the General Assembly selects among its members the persons for the supervisory board; and the supervisory board nominates the directors for the management board. Thus cooperative banks have a pragmatic approach that ensures adequate skills and a diversified board. There is thus an inherent dedication in cooperative systems to promote diversity.

The idea of diversity is dependent on differing circumstances within Member States and over time. For instance in some Member States, corporate or labour law prescribes that a part of the supervisory board is composed of representatives of the employees. As such the board does not have powers to interfere in the process of selection.

Moreover, we consider that competent authorities should therefore keep such a diversity requirement in mind within an extended fit and properness assessment. The predominant factor for the eligibility of a person is his or her qualifications.

B. EBA Mandate

Furthermore, the proposed requirement to have a recruitment policy that **shall** promote gender, age, geographical, educational and professional diversity for the management body is however problematic. These diversity criteria are qualitative criteria and as such subject to interpretation and difficult to define. It should be avoided that these parameters are taken as hard criteria through EBA binding technical standards.

In addition, it should be mentioned that it is contradictory for EBA to draft specific binding technical standards – which will be issued in the form of a Commission Regulation as a complement to a Directive-which has the feature that it is flexible enough to take into account the different situations and laws existing in some member state. Therefore, we consider that EBA should rather issue Guidelines instead of drafting binding technical standards.

**Suggestion for wording – Change EBA Mandate for BTS diversity
Proposal for a Directive
Article 87(5)**

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
EBA shall develop draft regulatory technical standards to specify the following: (e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 3	EBA shall develop guidelines to specify the following: (e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 3. Those guidelines shall be adopted in accordance with Article 16 of Regulation (EU) No 1093/2010.



C. Commission assessment on diversity practices deadline

In general, the Commission's horizontal initiative to encourage the financial sector to increase the representation of women on boards is appreciated. The EACB acknowledges that it is necessary to enlarge the pool of suitable candidates for board membership and improve expertise. However, an assessment by the Commission by 31 December 2016 with a possibility to issue a legislative proposal is too stringent. It will take more time to implement the diversity requirements in some institutions than others. It is more realistic to extend the deadline to 31 December 2018.

Suggestion for wording – horizontal initiative assessment deadline
Proposal for a Directive
Article 150(4)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
By 31 December 2016 , the Commission shall review and report on the results achieved under Article 87(4), including the appropriateness of benchmarking diversity practices, and, shall submit this report to the European Parliament and the Council, and, if appropriate, a legislative proposal.	By 31 December 2018 , the Commission shall review and report on the results achieved under Article 87(4), including the appropriateness of benchmarking diversity practices, and, shall submit this report to the European Parliament and the Council, and, if appropriate, a legislative proposal.



III. Time commitment and maximum combined mandates

We understand that the purpose of the maximum number of combined mandates is to ensure that members of the board dedicate sufficient time to their mandates. While this purpose is in principle valid, the limitation of the number of mandates as proposed should be revised. We think it is necessary to specify which kind of mandates should be limited. Moreover, it is necessary that the exemption clause to count directorships within the same group as one single directorship is extended to non-consolidated groups and qualified holdings. Furthermore, we consider that EBA's mandate to issue binding technical standards should be changed into a mandate to issue guidelines.

A. Specification of mandates

Firstly, mandates taken up by directors differ depending on the level and the weight that can be attributed to the activity in question. It should be noted that the mandates of local bank directors in other local enterprises were not called into question during the crisis. As such, it does not seem appropriate to consider mandates of a director at the local bank/daughter company level similar to a mandate at the central bank/mother company level. It is necessary to take account of these differences. We acknowledge and appreciate the introduction of principle of proportionality. Nevertheless, we suggest to specify to which kind of mandates the requirement is applicable by setting a limit based on the European definition of SMEs².

Suggestion for wording for Specification of mandates
Proposal for a Directive
Article 87(1)(a) subparagraph 3a new

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
	<i>new The directorship referred to paragraph (i) and (ii) shall mean the memberships of management bodies of limited liability companies and foundations which meet two of the following requirements:</i> <i>(i) balance sheet total of more than €43,000,000,</i> <i>(ii) net turnover is more than € 50,000,000 or</i> <i>(iii) more than 250 employees</i>

B. Extension of single membership exemption

In the second place, we appreciate that mandates within a group only counts as one mandate. The reference to the notion of group might however indicate that it is only applied at the consolidated level. There are however non-consolidated cooperative groups scheme. It should be specified that the exemption is also applicable to these non-consolidated groups which are part of the same institutional protection scheme as recognised under Art. 108(7) CRR I and co-operative groups on a consolidated basis which are non categorised as IPS but linked by relations under Art.108(6).

² http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm



In addition, the concept of group could be even more broadened. There are cases institutions which have established links according to Art. 108(7) which excludes the parent undertakings of the institutions and any other subsidiaries which are however subject to supervision on a consolidated basis. In addition, it should also be broadened in the situation where the credit institution may own a qualified holding but that company is not part of the credit institution (holdings in non-financial institutions). Nevertheless, these holdings are part of the institution's common services e.g. central banks, data processing etc. The link is not lesser in these cases than in the case of mother daughter relationship. We think the same rationale for the exemption should be applied to these companies within the group. Therefore, we suggest widening the notion of group to also take account of these situations.

Suggestion for wording for Exemption one mandate in non-consolidated groups
Proposal for a Directive
Article 87(1)(a) subparagraph 4

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
<p>Executive or non-executive directorships held within the same group shall count as one single directorship.</p>	<p>Executive or non-executive directorships held (i) within the same group or (ii) are members of the same institutional protection scheme if the conditions of Article 108 paragraph 7 are fulfilled or (iia)(new) have established links according to Art. 108 paragraph 6 or (iii) within undertakings (including non-financial institutions) where the institutions owns a qualifying holding shall count as one single directorship.</p> <p>For paragraph a subparagraph (iii) this includes:</p> <ul style="list-style-type: none"> (i) undertakings and non financial entities <ul style="list-style-type: none"> a) in which there is a qualified holding according to Art. 4(21) of Regulation [inserted by OP], b) in which there are participations according to Art. 4(49) of Regulation [inserted by OP] or c) which have close ties as according to Art. 4(72) of Regulation [inserted by OP] to certain non-financial institutions. (ii) parent financial holding company according to Art. 4(65)(66) and (67) controlling a central or regional credit institution adhering to an IPS scheme.



C. EBA Mandates

Finally we consider that the mandate for EBA to specify the notion of 'sufficient time commitment' of a member of the management board to allow for the exception to combine more directorships than permitted defeats the purpose of the exception clause. This exception should allow for a Member States' discretion to determine what is considered by sufficient time commitment on a case-by case basis taking into account the different. If EBA and the Commission are to set binding technical standards, it does not leave room for principle of proportionality and it will make a hard criterion of 'sufficient time commitment' as it will be issued as a Commission Regulation. We therefore suggest amending the EBA mandate to issue guidelines.

**Suggestion for wording – Change EBA Mandate for BTS 'sufficient time commitment
Proposal for a Directive
Article 87(5)(a)**

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
EBA shall develop <i>draft regulatory technical standards</i> to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the institution which competent authorities must take into account when they authorise a member of the management body of an institution to combine more directorships than permitted as referred to in paragraph 1(a)	EBA shall develop <i>guidelines</i> to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the institution which competent authorities must take into account when they authorise a member of the management body of an institution to combine more directorships than permitted as referred to in paragraph 1(a). <i>Those guidelines shall be adopted in accordance with Article 16 of Regulation (EU) No 1093/2010.</i>



IV. Collective Knowledge, training and human and financial resources

We appreciate the introduction of the concept of collective knowledge and agree that the members of the management body shall have adequate knowledge and skills; and act with honesty, integrity and independence; and institutions shall devote adequate collective knowledge' and 'sufficient human and financial resources' for the members of the management body. However, we consider that it should not be any further specification of these notions by means of technical standards.

A. EBA mandates

It seems inappropriate and contradictory that EBA can draft binding technical standards given the choice of a directive rather than a regulation. A directive implies that the EU legislators leave discretion to Member States to decide how best to achieve the directive's objective when transposing the legislation into national law. Furthermore, many of the issues defined by the Commission as "technical standards" are in reality substantial matters of fundamental importance, which should not be left to the Commission alone to decide. Further, in our view the requirements for a permissible delegation according to Art 290 TFEU are not met.

Article 290 states:

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain **non-essential** elements of the legislative act.

Therefore we consider that the EBA mandates for binding technical standards should be changed into mandates for guidelines.

Suggestion for wording – Change EBA Mandates general Proposal for a Directive Article 87(5)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
EBA shall develop draft regulatory technical standards to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the institution which competent authorities must take into account when they authorise a member of the management body of an institution to combine more directorships than permitted as referred to in paragraph 1(a) (b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in paragraph 1(b);	EBA shall develop guidelines to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the institution which competent authorities must take into account when they authorise a member of the management body of an institution to combine more directorships than permitted as referred to in paragraph 1(a); (b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in paragraph 1(b);



(c) the notions of honesty, integrity and independence of mind of a member of the management body as referred to in paragraph 1(c);
(d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body as referred to in paragraph 2;
(e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 3

(c) the notions of honesty, integrity and independence of mind of a member of the management body as referred to in paragraph 1(c);
(d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body as referred to in paragraph 2;
(e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 3. ***Those guidelines shall be adopted in accordance with Article 16 of Regulation (EU) No 1093/2010.***



V. Risk Committee and CRO

We appreciate that there is not be a strict obligation to require a separate risk committee by introducing the principle of proportionality in subparagraph 3 of Art, 75(3).

A. Establishment of Risk Committee

Nevertheless, it should be taken into account that the in dual structures, the risk committee can be established within the management board or supervisory board. Accordingly, the two specific governance arrangements should be possible. In general, in the course of regular reporting, the management board reports to the supervisory board on the risk situation (risk capacity and risk rate). In addition, the supervisory board oversees the risk management system. It is thus necessary to take into account the different structure existing, to keep the provisions for an optional Risk Committee as neutral as possible in order to prevent an indication where the risk committee should be established. We therefore consider it necessary to amend Art. 75(3) by only making a reference to the 'management body' without any reference in which function i.e. executive or supervisory function.

B. Chief Risk Officer

As regards the risk management function or so-called Chief Risk officer (CRO), it should be taken into account that in two tier systems either the supervisory body or management body can be in charge of the nomination and removal of the CRO. In addition, we do not agree with the direct access of the risk management function to the management body. We therefore suggest to change Art. 75(5) subparagraph 5 accordingly.

Suggestion for wording – Risk Committee in supervisory board (1) Proposal for a Directive Article 75(3)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
Competent authorities shall ensure that institutions establish a risk committee composed of members of the management <i>body who do not perform any executive function in the institution concerned.</i> Members of the risk committee shall have appropriate knowledge, skills and expertise to fully understand and monitor the risk strategy and the risk appetite of the institution	Competent authorities shall ensure that institutions establish a risk committee composed of members of the management body. Members of the risk committee shall have appropriate knowledge, skills and expertise to fully understand and monitor the risk strategy and the risk appetite of the institution

Suggestion for wording – Risk Committee in supervisory board (2) Proposal for a Directive Article 75(3) sub paragraph 2

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
The risk committee shall advise the management	The risk committee shall advise the management



body <i>in its supervisory function</i> on the institution's overall current and future risk appetite and strategy and assist the management body in its supervisory function in overseeing the implementation of that strategy.	body on the institution's overall current and future risk appetite and strategy and assist the management body in its supervisory function in overseeing the implementation of that strategy.
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Suggestion for wording –Direct access Risk Committee function in management board (1)
Proposal for a Directive
Article 75(5) subparagraph 3

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
The risk management function shall be able to report <i>directly</i> to the management body in its supervisory function when necessary, <i>independent from senior management</i> .	The risk management function shall be able to report to the management body in its supervisory function when necessary,-

Suggestion for wording –Direct access Risk Committee function in management board (2)
Proposal for a Directive
Article 75(5) subparagraph 5

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
The head of the risk management function shall not be removed without prior approval of the management body in <i>its supervisory function</i> and shall be able to have <i>direct</i> access to the management body in its supervisory function when necessary.	The head of the risk management function shall not be removed without prior approval of the management body in its supervisory function and shall be able to have access to the management body in its supervisory function when necessary.



VI. Nomination Committee

In similar vein, we also appreciate that there is not be a strict obligation to require a separate nomination committee by introducing the principle of proportionality in subparagraph 4 of Art, 86(2) especially as regards small credit institutions.

However, the tasks mentioned for the nomination committee may be vested in a committee of the supervisory board or management body in dual structures. Notably, such committee is not necessarily located in the management board, since there could be serious conflicts of interests. The supervisory board, which is composed of (exclusively) non executive directors, appoints the executive directors, but has no competence in the process of appointment of its own non-executive members. It is therefore our understanding that the tasks of the nomination committee according to Art 86 para 2 (a) to (d) should be as neutral as possible in order to prevent an indication by which directors this should be performed.

Suggestion for wording – Nomination Committee
Proposal for a Directive
Article 86(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
Competent authorities shall ensure that institutions establish a nomination committee composed of members of the management body <i>who do not perform any executive function in the institution concerned.</i>	Competent authorities shall ensure that institutions establish a nomination committee composed of members of the management body

Suggestion for wording – Nomination Committee tasks
Proposal for a Directive
Article 86(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
The nomination committee shall carry out the following: (a) identify and recommend, for the approval of the management body <i>in its supervisory function</i> candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body, prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected; (b) periodically assess the structure, size, composition and performance of the management body, and make recommendations to the management body in its supervisory function with regard to any changes;	The nomination committee shall carry out the following: (a) identify and recommend, for the approval of the management body candidates to fill management body vacancies for the approval of the management body in its supervisory function. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body, prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected; (b) periodically assess the structure, size, composition and performance of the management body, and make recommendations to the management body in its supervisory function



(c) periodically assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report this to the management body in its supervisory function;
(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.

with regard to any changes;
(c) periodically assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report this to the management body in its supervisory function;
(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body



VII. Remuneration

We welcome that the provisions on remuneration in this CRD IV proposal have been directly taken from the CRD III text as adopted by the European Parliament and Council on 11 October 2010 Art. However we consider The new element on remuneration introduced by the CRD IV: a mandate conferred to EBA to adopt draft regulatory standards should be based on the CEBS Guidelines on Remuneration Practices and Policies of December 2010. It should be specifically mentioned that these Guidelines should be the basis of any draft standards. Moreover, for the remuneration aspects the principle of proportionality should be more emphasised.

It should be mentioned that for EBA mandate to set the ratio between the fixed and variable component of the total remuneration that many member state have set their own ratios. The introduction of binding technical standards may jeopardise this. Moreover, it is also proposed that EBA shall develop draft regulatory technical standards to specify the classes of instruments that can be eligible as instruments that adequately reflect the credit quality of the institutions within the meaning. It should be mentioned that the EACB has provided for specific suggestion during the consultation on CEBS Guidelines on Remuneration policies and Practices. The proposals indicates that additional rules will be established to specify further possible eligible instruments in this respect, which seems to be a repetitive exercise and redundant. It is necessary to ensure legal certainty especially as regards labour agreements. Therefore, given that most Member States have already implemented their remuneration policy on the basis of the CEBS Guidelines, it should be a reference that EBA should not deviate from these guidelines.

Suggestion for wording – Reference to CEBS Guidelines
Proposal for a Directive
Article 90(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
EBA shall develop draft regulatory technical standards with respect to the criteria to determine the appropriate ratios between fixed and the variable component of the total remuneration referred to in point (e) and to specifying the classes of instruments that satisfy the conditions laid down point (j)(ii).	EBA shall develop draft regulatory technical standards with respect to the criteria to determine the appropriate ratios between fixed and the variable component of the total remuneration referred to in point (e) and to specifying the classes of instruments that satisfy the conditions laid down point (j)(ii). <i>The draft regulatory technical standards shall take into account the remuneration guidelines as set out in the CEBS Guidelines on Remuneration Policies and Practices of 10 December 2010 .</i>

An explicit reference to the proportionality principle is desirable for remuneration aspects as these are lacking.

Suggestion for wording – Proportionality principle in remuneration provisions
Proposal for a Directive
Article 90(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
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For variable elements of remunerations, the following principles shall apply in addition to those set out in Article 88(2):

(a) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit concerned and of the overall results of the institution and when assessing individual performance, financial and non-financial criteria are taken into account;

(b) (...)

1. For variable elements of remunerations, the following principles shall apply in addition to those set out in Article 88(2) ***and in a way and to the extent that is appropriate to the size, internal organisation and the nature, the scope and the complexity of the activities of institutions:***

(a) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit concerned and of the overall results of the institution and when assessing individual performance, financial and non-financial criteria are taken into account;

(b) (...).



VIII. Sanctions

The EACB is in favor of a consistent application of CRD IV rules and the capacity of national competent authorities to impose sanctions with a deterrent effect. Therefore, it supports the Commission's initiative to establish a common sanctions' regime at EU level. Indeed, in the case of a breach, sanctions should be uniformly applied, regardless of the Member State where the entity is registered: this would guarantee legal certainty as well as a level-playing field for credit institutions operating in the European Union.

We particularly welcome the general principles underlying the proposed sanctions' regime: administrative sanctions should be effective, proportionate and dissuasive. It also supports the Commission's proposed clarification of the factors that must be taken into account when determining sanctions, such as the gravity and duration of the breach or the level of cooperation with the competent authority.

However, the EACB has various concerns with the current proposal. In particular, the new sanction regime does not meet two essential principles of the EU Treaty, namely subsidiarity and proportionality (Art. 5.3 of TFEU):

A. Subsidiarity

In our view, there is no reason for the EU to have the powers to define – via EBA guidelines – the level of administrative pecuniary sanctions. It is a fundamental principle that the courts are free to set pecuniary sanctions, within the framework of national law and according to case law. Such provisions should therefore be left to national authorities and courts. Furthermore, we note that EBA is mainly composed of national supervisory authorities acting without superior political guidance and control.

B. Proportionality

In accordance with the principle of proportionality, the European Court of Justice has consistently held that the acts adopted by EU institutions must not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question. The proposal to impose an administrative pecuniary sanction of up to 10% of the total turnover of the legal person in the preceding business year seems totally disproportionate and it exceeds what is appropriate and necessary in order to attain the objectives.

Indeed, in France the maximum amount of pecuniary sanctions for a legal person has been set at EUR 100 million. The proposed ceiling would represent for large banks a significant increase of the sanction's amount (about 25 times more), even though that EUR 100 million maximum amount is already the highest amount in the EU.

On this issue, it is worth noting that the US SEC is expected to request an increase of sanctions' amount to reach USD 1 million for natural persons and USD 10 million for legal persons. These maximum levels would remain sensibly lower than the amount applicable in France. Finally, linking the level of pecuniary sanction to the total turnover is sensible for competition law infringements, as those breaches directly impact the generated turnover.



Against this background, we consider that there is a lack of justification by the Commission as to why such high level of sanction would be necessary and why this amount specifically. We think that CRD IV provisions on sanctions should remain policy principles. As an alternative, we believe that the maximum sanction's amount should not go beyond EUR 100 million, as set in France, which currently is by far the highest sanction level in place across the EU and in the US.

In any event, it is essential to ensure consistency across the different EU initiatives touching upon administrative sanctions, so as to achieve legal certainty. As MIFID 2, Transparency and MAD2 all contain provisions aiming at harmonizing sanctions regimes across the EU and across sectors, CRD VI rules should therefore be strictly aligned with the requirements provided in those legislative texts. National legislations should also be taken into account.

C. Scope of application and legal certainty

In case of a breach as defined in Articles 65, 66 and 67 of the Directive, the sanctions should only be applied to persons who under national law are responsible for the breach. Member States should determine who the responsible natural or legal persons are.

Nevertheless, it is worth noting that those breaches relate to very sensitive matters, linked to prudential and strategic issues that are usually under the full responsibility of the senior management.

Suggestion for wording Proposal for a Directive Article 65(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
2. Member States shall ensure that where obligations apply to institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies, in case of a breach sanctions can be applied to the members of the management body , and to any other individuals who under national law are responsible for the breach.	2. Member States shall ensure that where obligations apply to institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies, in case of a breach sanctions can be applied <u>to the members of the management body, and</u> to any <u>other</u> individuals who under national law <u>are is</u> responsible for the breach.

In order to ensure legal certainty and a uniform application of the sanction regime throughout the European Union, the list of sanctions and measures available to the competent authorities should be limited and harmonized.

Suggestion for wording Proposal for a Directive Article 66(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied	2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied



include *at least* the following:

include *at least* the following:

Suggestion for wording
Proposal for a Directive
Article 67(2)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include <i>at least</i> the following:	2. Member States shall ensure that in the cases referred to in paragraph 1, the administrative sanctions and measures that can be applied include <u><i>at least</i></u> the following:

Furthermore, in order to ensure legal certainty and a uniform application of the sanction regime throughout the European Union, the list of relevant circumstances to be assessed in order to determine the applicable sanction should be limited and harmonized.

Suggestion for wording
Proposal for a Directive
Article 69(1)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
1. Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, <i>including</i> :	1. Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, <u><i>including</i></u> :

D. Absolute ceiling of amount pecuniary sanctions

We believe that the proposal to impose an administrative pecuniary sanction of up to 10% of the total turnover of the of the undertaking for the sanction applied in the case of a breach by a legal person seems totally disproportionate and it exceeds what is appropriate and necessary in order to attain the legitimate objectives of the legislation.

In fact, currently in France, the country with the European strictest sanctions' regime, competent authorities cannot impose pecuniary sanctions higher than 100 Million EUR. Moreover, this ceiling is considerably higher than in the other Member States: Sweden and Ireland, which immediately follow France in the ranking of the most restrictive sanctions' regimes, apply a ceiling of 5 Million EUR.³

Furthermore, the reference to the consolidated turnover of the group as a basis for establishing the amount of the sanctions applicable to subsidiaries of a parent undertaking is likely to be particularly disproportionate and penalizing for groups. It should therefore be limited to the cases where the infringement is the result of an order of the parent undertaking. Moreover, according to Article 69, the financial strength of the

³ According to the CEBS report, *Mapping of supervisory objectives and powers, including early intervention measures and sanctioning powers*, March 2009.



responsible person is already taken into account in order to determine the level of administrative pecuniary sanctions.

Finally, it should be noted that the term of “turnover” does not constitute an accounting concept, in accordance with international standards (IFRS). Therefore, this notion could potentially create uncertainty as to the concrete accounting reference that should be used when determining the sanction. Anyhow, linking the level of pecuniary sanction to some form of reference to the income of the undertaking is sensible for competition law infringements, as those breaches directly impact the generated income.

Therefore, in addition we support the introduction of an absolute ceiling of 100 Million EUR, which currently is by far the highest sanction level in place across the EU and in the US, and which is, in our opinion, an amount sufficiently important to be effectively dissuasive.

Therefore we suggest to modify Article 66(2)(c) and Article 67(2)(c)

Suggestion for wording
Proposal for a Directive
Article 66(2)(c)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
(c) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of the undertaking in the preceding business year; where the undertaking is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;	(c) in case of a legal person, administrative pecuniary sanctions of up to the lowest amount between: i. <u>10 % of the total annual turnover of the undertaking in the preceding business year; where the undertaking is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;</u> and ii. EUR 100 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of adoption of this Directive;

Suggestion for wording
Proposal for a Directive
Article 67(2)(e)

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
(c) in case of a legal person, administrative pecuniary sanctions of up to 10 % of the total annual turnover of the undertaking in the preceding business year; where the undertaking is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual	(c) in case of a legal person, administrative pecuniary sanctions of up to the lowest amount between: i. <u>10 % of the total annual turnover of the undertaking in the preceding business year; where the undertaking is a subsidiary of a</u>



turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;	<p><u>parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year; and</u></p> <p>ii. EUR 100 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on the date of adoption of this Directive;</p>
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In order to ensure legal certainty, it is necessary to clarify that the absolute ceilings defined in paragraphs (c) and (d) of Article 66 also apply in the case where the pecuniary sanction is imposed under the modalities defined by paragraph (e); and similarly that the ceilings in paragraphs (e) and (f) of Article 67 also apply under the modalities of paragraph (g).

**Suggestion for wording
Proposal for a Directive
Article 66(2)(e)**

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
(e) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the breach where that benefit can be determined,.	(e) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the breach where that benefit can be determined, <i>except where that benefit exceed the level of administrative pecuniary sanctions provided for in accordance with (c) and (d).</i>

**Suggestion for wording
Proposal for a Directive
Article 67(2)(g)**

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
(g) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the breach where that benefit can be determined,.	(g) administrative pecuniary sanctions of up to twice the amount of the benefit derived from the breach where that benefit can be determined, <i>except where that benefit exceed the level of administrative pecuniary sanctions provided for in accordance with (e) and (f).</i>

E. EBA Guidelines on the type and level of administrative pecuniary sanctions

In our view, there is no reason for the EU to have the powers to define –via EBA guidelines- the level of administrative pecuniary sanctions. It is a fundamental principle that the courts are free to set pecuniary sanctions, within the framework of national law



and according to case law. Such provisions should therefore be left to national authorities and courts. Furthermore, we note that EBA is mainly composed of national supervisory authorities acting without superior political guidance and control.

**Suggestion for wording
Proposal for a Directive
Article 69(2)**

<i>Text proposed by the European Commission</i>	<i>EACB Suggestion for wording</i>
<i>2. EBA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions.</i>	<i>deleted</i>