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EACB comments on

Draft regulatory technical standards on the criteria to define managerial responsibility and control functions, material business unit and significant impact on their risk profile, and other categories of staff whose professional activities have a material impact on the institution risk profile

(EBA/CP/2019/16)

Contact:

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

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General comments

The EACB welcomes the opportunity to comment on the amendments to the RTS on material risk takers, which takes into account the updates brought about by the CRD V finalised in 2019.

We appreciate that the EBA maintains a clear qualitative approach to the definition of material risk takers, however we believe that some further specifications are needed along with some proportionality elements also in order to avoid misleading results.

Answers to specific questions

Question 1: Are the Subject matter, scope and level of application within Article 1 appropriate and sufficiently clear?

We see that, in general, there is sufficient clarity; however, we would like to highlight that the readability of the relevant requirements for conducting the selection of risk takers is poorer compared to the current RTS (No 604/2014). The current RTS contains all relevant rules primarily as a stand-alone source, while the new RTS needs a constant reading in conjunction with other texts (e.g. CRD) to draw a meaningful picture.

Question 2: Are the definitions within Articles 2, 3 and 4 appropriate and sufficiently clear?

Art. 2 – Definition of “managerial responsibility”:

With regard to the current Delegated Regulation (EU) 604/2014 the EBA has clearly stated that the identification of risk takers cannot solely be determined by the organisational/hierarchical position of the function holder. A person without material decision-making powers who is under the direction and responsibility of a member of the management body should not be considered as a risk taker – despite perhaps having the job title “head of function” – as he only administers his function (EBA/RTS/2013/11, 4.1, 19).

This stipulation is also expressed repeatedly in the draft RTS currently under consultation. Paragraphs 3 to 6 of Art. 6 each contain the requirement that a risk taker can only be identified under qualitative criteria, i.e. if he has the authority to take decisions that could have impacts on the institution’s risk profile.

However, this precondition is missing from the definition of managerial responsibility in Art. 2. The case under Art. 2 a. does not make clear that the heading of a business unit or a control function is necessarily linked to responsibilities and decision making powers that in fact can have material impacts on the institution’s risk profile.

That is all the more so in the case under Art. 2 b. for employees who are heading subordinate units or control functions. Overall, the definition of “managerial responsibility” seems too wide and unclear, also going beyond the current RTS, while EBA intends to retain the qualitative criteria which are set out in the current version of the RTS.

A relevant risk taker can only be a person who ultimately decides whether a risk is taken or not. Something else can only apply if the decision maker is unable to assess the risk himself due to lack of understanding of the subject matter or methods. In this case the risk taker might be seen as the member of staff at the next lower level in the hierarchy who votes for the decision and has the necessary knowledge of the matter in question.



As a mandatory prerequisite for the identification of a risk taker the RTS should require that the person has the authority to take, approve or veto decisions that have a material impact on the institution's risk profile. This is not the case if decision making powers remain on a higher hierarchy level (for instance within the management body) and the function holder is only responsible for the correct implementation of such decisions of his superiors.

Moreover, according to Recital 6 of the EBA draft, members of the management body have the ultimate responsibility for the institution, its strategy and activities and therefore are always able to exercise a material impact on the institution's risk profile. We would generally agree with such a presumption; however, it should be noted that for small and non-complex banks as defined in Art. 4(1)(145) CRR II it is generally also true that in these institutions 'only' the two members of the management body have managerial responsibility in the sense of Article 2 and hold control functions according to Article 3 (apart from the internal audit). Indeed, in such banks multi-stage hierarchy levels and material business units (Article 4) generally do not exist.

Hence, Recital 6 should be clarified to reflect that in small and non-complex banks as defined in CRR II 'only' members of the management body are able to exercise a material impact on the institution's risk profile. This should be clarified also in the wording of Article 2 (managerial responsibility), Article 3 (control function) and Article 4 (material business units).

This approach is also in line with the Recital 5 according to which the institution's internal organization and the nature, scope and complexity of its activities should be taken into account in the assessment for identifying staff for the purpose of Article 94 CRD V.

Art. 1 (1) of the draft RTS emphasizes that a material impact on the risk profile is necessary at all times. Such an impact cannot result if a function holder does not have the power to take, approve or veto relevant decisions on his own authority. Pursuant to the background materials to the draft RTS the EBA assumes that the hierarchical position together with reporting lines comes with a certain set of responsibilities (5.1, D. 12, p. 20).

However, this is often not the case in the business practice of many small and non-complex institutions in which all major responsibilities regarding risk relevant decisions remain at the level of the management body. In many cases in small and non-complex institutions, all important decisions, including those involving risk, are being initialized and taken at the Board of Management level exclusively. By identifying division heads in key functions, even in larger institutions members of staff would often be included as risk takers, who are only accountable for implementing the decisions of the management body properly, but not for the underlying decision. In these cases, categorisation as a risk taker would be inappropriate. In this regard, the assessment of the EBA (5.2, 6., p. 26) that, in addition to members of the management body, the senior management and the heads of control functions also bear the necessary responsibilities and authorities to take relevant risks for the institution, is often wrong and therefore misleading. Against this background, the definition of "managerial responsibility" in Art. 2 is therefore too broad in that it merely focuses on a specific organisational position and reporting lines. In addition to the position as function holder, the definition should be supplemented by an additional premise of decision-making authorities. This could be achieved by adding wordings to this effect based on those already included in Art. 6 par. 3 to 6.

Furthermore, the term "subordinated unit" in Art. 2 b. should be defined more closely. It is unclear how many hierarchical levels below the management body could be included by this wording. The



relationship between subordinated unit, business unit and material business unit also needs clarification.

Overall, the draft RTS could entail a considerable broadening of the qualitative criteria compared to current regulatory standards, depending on the interpretation of the definitions.

Until now, according to Art. 3 par. 3 to 8 of Regulation (EU) No 604/2014, heads of material business units and control functions, staff members responsible for risk management within a material business unit and staff members reporting directly to these persons are identified as risk takers. Regarding special functions, only the heads of the units in question have to be identified, Art. 3 par. 9 of Regulation (EU) No 604/2014. Heads of these functions are often members of the management body in its management function or part of senior management (often 1st level below the management body in its management function).

The proposed definition could also be interpreted in a way that, from now on, staff members reporting to senior management (often on the 2nd level below the management body in its management function) and staff members reporting to these persons (often on the 3rd level below the management body in its management function) have to be identified as risk takers. This would at least be the case if these staff members carry out their professional activities in business units, control functions or other functions as described in Art. 2 b. Since the definition of material business units is also broadened in the proposal (see comments on Art. 4), this would generally lead to a considerable increase of identified staff members. However, on a regular basis, there is no significant impact on the institution's risk profile in lower management. A clarification seems necessary.

Summarizing, the new RTS might be interpreted as including persons with B-2-functions (and B-3) in any of the areas listed in Article 6 point (1). This approach would go far beyond the current RTS, which refers only to the heads of those functions. Furthermore, Article 2 point (b) refers to staff members heading a subordinated unit or subordinated control function and reporting to a staff member referred to in point (a). Consequently, we understand that B-2 and B-3 functions (i) in material business units, (ii) control functions and (iii) all functions listed in Article 6 point (1) would be included.

It would be more in accordance with current qualitative criteria to limit the definition to the heads of the stated functions, provided they report to the management body (meaning the deletion of any reference in the proposal to the reporting line to senior management), and potentially for material business units and control functions to the next lower management level.

Art. 4 – Definition of "material business unit":

Regarding Article 4 we would like to come back to our opening comment on readability of the draft RTS, since the additional criterion for identifying material business units ("critical function" or "core business line") requires additional analysis based on another source of regulations (Directive 2014/59/EU and Commission Delegated Regulation (EU) 2016/778 in this case).

The draft RTS do not provide any indication according to which standards or criteria an institution is supposed to consider a business unit as having a material impact on the internal capital requirements of the institution. In case capital is not internally allocated, criteria should be supplemented to facilitate the determination if the relevance of a business unit equals the impact of the 2%-threshold described in alternative 1 of Art. 4 a. of the draft RTS on the institution's risk profile. Insofar as institutions actually allocate internal capital to specific business units, this



constitutes a much clearer criterion. The second alternative of Art. 4 a. should therefore be limited to institutions that do not allocate internal capital.

Art. 4 b. is defined too broadly as it includes business units that provide a core business line as defined in point (36) of paragraph 1 of Art. 2 of Directive 2014/59/EU. This comes to light especially in conjunction with Art. 7 par. 2 a. of the draft RTS which in consequence means that professional activities and authorities in a core business unit prohibit the exemption of an identification under the quantitative criteria laid out in Art. 7 par. 1 of the draft RTS.

Question 3: Are the qualitative criteria within Article 5 appropriate and sufficiently clear? Having in mind that the qualitative criteria are comparable to the ones included in the RTS currently in force, respondents are asked to focus on the amended criteria within points 1 and 6.

The qualitative criteria according to Article 6 are not fully clear. Partly because the definition of managerial responsibility is unclear (see also our comment to Question 2), but because there is a lack of clarity for the individual functions:

Art. 6 par. 1 – Qualitative criteria:

The tasks described in paragraph 1 (a) to (i) can only lead to an identification as risk taker if the person actually has decision-making powers with a material impact on the institution's risk profile. In the accompanying documents EBA makes clear that the hierarchical position within the institution cannot be seen without the entailing responsibilities and reporting lines (5.1, D. 12, p. 20). As described above, the definition of "managerial responsibility" in Art. 2 is therefore too broad if it does not include the necessary authorities as a mandatory prerequisite for the identification as risk taker.

As an alternative to an amendment of the definition in Art. 2 (see above), the criteria contained in Art. 6 par. 1 (a) to (i) could be supplemented by additional conditions regarding the necessary responsibilities/authorities that could justify the identification as a risk taker. This would be in line with the drafting of the other qualitative criteria which already focus on material decision-making powers.

In addition, we would flag the following:

- Point (c): What is meant by "compliance with taxation requirements"? Is this a reference to a compliance function? Or to Head of Tax Management? Theoretically this could also refer to a payroll function since compliance with the tax on wages is also dealt with in that area. We would welcome a clearer wording.
- Point (h): Does security in this regard only refer to IT security?
- Point (i): Which functions are covered here? In our understanding it cannot be Outsourcing Managers who primarily deal with the administration of Service Level Agreements to govern outsourcing arrangements (SLAs).

In general, we have concerns about the appropriateness of the criteria established in Article 6 point (1) - as already mentioned above. Indeed, it would appear that all staff who has managerial responsibility for the areas defined in Art 6 point (1) would be deemed to have a material impact on the institution's risk profile. No waiver regarding the application of the requirement is established.



We believe that the current requirement, as defined in Art 3 point (9) of the current RTS (No 604/2014) is more appropriate. The current criteria would define as Identified Staff only the highest hierarchical level of the unit, responsible for the relevant function.

The proposed text of Art 6 point (1) defines as Identified Staff the employees who have “managerial responsibility” over one of the listed functions. The staff who has managerial responsibility, as defined in Art. 2 from the proposed regulation would include not only the employees on the highest hierarchical level in the respective department (i.e. B-1), but also employees who head a subordinate department (B-2 and B-3). As no waiver from those requirements is set forth, even if according to the findings of an analysis that such staff does not actually have a material impact on the institutions risk profile, the requirements for Identified Staff would still apply. In our opinion this would be unjustified as the heads of the subordinate units (i.e. B-2 and B-3) may not have independent rights to make significant decisions, thus would be obliged to bring the matter to an individual on a higher hierarchical level (i.e. B-1).

In order to take into account the possible cases in which the cited criteria would not be appropriate, we believe that establishing a waiver for the analysed situations would be appropriate.

Article 6 point (2):

Point (2) refers to all members in the respective committees and not “voting” members as in points (3)(b), (4)(b) and (6)(b). It is not clear whether this is an actual differentiation deliberately sought by EBA (i.e. do point (2) and points (3), (4) and (6) intentionally have a different scope when it comes to committee members) or whether there is no such distinction and wording is fictitiously creating one. This requires a clarification.

Question 4: Are the quantitative criteria within Article 6 appropriate and sufficiently clear?

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Question 5: Are the provisions within Article 7 appropriate and sufficiently clear?

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Question 6: Are the provisions within Article 8 appropriate and sufficiently clear?

According to the proposal in Art. 8 para. 1 of the draft RTS the members of the management body in their supervisory function have to be included in the calculation of the average total remuneration of all members of the management body. This is a result of members of the management body in its supervisory function being assessed as risk takers as well, Art. 92 par. 3 a) in conjunction with Art. 3 par. 1 (8) of Directive 2013/36/EU (see also recital 6, p. 9 of the draft RTS). In light of the proportionality principle, small and non-complex institutions should be exempted from this requirement, taking account of the according classification detailed in Art. 4 par. 1 (145) and (146) of CRR 2.

This is particularly relevant in the case of Art. 92 par. 3 c) i) of CRD in conjunction with Art. 8 of the draft RTS.

Commonly in small and non-complex institutions, members of the management body in its supervisory function only receive minor flat-rate attendance fees or compensation for their expenses. If those persons were to be identified as risk takers, their remuneration would have to



be included in the calculation of the average total remuneration of all members of the management body and senior management. The fact that remuneration of activities in the board of supervisors is regularly insignificant in most institutions means that the results of the calculation of the average total remuneration could be biased substantially. As a result, this could lead to the identification of more risk takers than warranted by the institution's risk profile.

Adherence to the proportionality principle is established in the CRD. Recital 66 envisages that remuneration regulations should reflect the differences between the various types of institutions and should take their size and internal organization as well as the nature, scope and complexity of their business into consideration in an appropriate way. Pursuant to recital 92, this principle of proportionality applies to Regulatory Technical Standards as well.

Question 7: Considering that the RTS will apply to all credit institutions, are there specific provisions within the RTS that would not be appropriate to be applied to small and non-complex institutions and should be replaced by different provisions?

Where this is the case, respondents are provided to make concrete examples of issues created and alternative approaches that would ensure that all staff whose professional activities have a material impact on the risk profile of the institution are identified.

We refer to the comments made above pertaining to question 2, 3 and 6.

The assessment depends largely on the interpretation of "managerial responsibility" and consequently on the functions to be selected as Identified Staff.

Moreover, we would highlight that the selection of Identified Staff is in many credit institutions linked to the selection of staff under the Fit & Proper Regime. Consequently, the proposed RTS, especially considering the definition as regards "managerial responsibility" would ultimately also lead to an increase of the efforts related to the "fit & proper" regime.

Question 8: Do respondents with the findings of the impact assessments?

Where respondents have comments on the additional cost and benefits created by the consulted RTS, comments are most helpful if they detail the costs and the responsible drivers as well as the challenges when applying the criteria set out within the RTS.

Where respondents find that the criteria lead to an identification of staff that does not have a material impact on the institutions risk profile, comments are most helpful if they detail the numbers of staff identified under the criteria and the main reasons why those staff members would systematically not have a material impact on the institutions risk profile.

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