Brussels, 29th October 2020
VH/MK

EACB comments on EBA consultation on the Revision of the Guidelines on internal governance under Directive 2013/36/EU

(EBA/CP/2020/20
31/07/2020)

Key messages

The EACB welcomes the opportunity to comment on the EBA consultation on the revision of the Guidelines on internal governance under Directive 2013/36/EU.

Loans to related parties (Title IV, Section 11)

The **EBA goes beyond its mandate** in Article 74(1) and 88(1) CRDV and its powers as set in Article 16(1) of Regulation EU/1093/2010 in providing a very prescriptive framework for granting loans and entering into other transactions with members of the management body and their related parties (e.g. complex framework, limit and approval requirements, voting prohibition, disclosure to shareholders) and extending the rules to "other transactions" which is not in CRDV and possibly to other "related parties" than the ones defined by CRDV. The prescriptions are inappropriate with the organization of cooperative laws. It would become very difficult to find clients who accept to become involved in the management body if their (and those of their related parties) request for loans would have to be limited.

Credit institutions should not have the obligation to make available annually to their shareholders or owners appropriate **aggregated information** on loans and other transactions with members of the management body and their related parties. There might be an issue of confidentiality at the level of a regional bank. Article 88 (1) CRD V does not provide for any disclosure obligations to shareholders. (See our answer to Question 7)

AML

Para. 23, para. 32 of the Guidelines **go beyond the obligations under Directive 2015/849 [AMLD**]. The revised GL (para 23, 32) do not consider the scenarios of the national transposition in all Member States and should be brought in line with Article 46(4) of Directive 2015/849. (see our answer to Question 2)

Formal independence

We would like to question again the requirement of formal independence requested by the EBA Guidelines. It has no Level 1 basis, and it is very difficult to comply with due to the governance structure of cooperative banks as management board members are, by nature and statutory, or imposed by law clients and shareholders. It is also incompatible with the fit and proper requirements such as experience, especially to chair a committee.

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Date of application
The date should be amended taking into account the time for the proper translations and comply or explain process. It should also reflect the Covid crisis context.

Answers to specific questions

Question 1: Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?

- **Date of application (para. 15 of the revised Guidelines)**

The implementation date is set on 26 June 2021. We think that the new rules should not be applied during the business year and therefore suggest 1 January 2022 as the earliest application date.

Further to this, we actually think that possibly the date of application of the GL should not be stated as a precise date. Due to potential problems related to late transposition of the CRD V or IFD by Member states, there should be a delayed translation of the GL and "comply or explain" process from national authorities which could be longer than expected in some Member States.

Also, in the Covid-19 context, as credit institutions are fully mobilized to support the economy and their clients, they should not have to deal with additional constraints and to review their procedures and IT systems because of guidelines. The entry into force should be at least 3 months after the last transposition of CRD V and IFD in the Member states and the finalization of the comply or explain process in all jurisdictions.

- **Scope**

The scope of the revised GL is problematic especially in relation to loans for members of the management body and their related parties: the guidelines should only be applicable to loans and not to other transactions as CRD V considers only loans. Why should there be an excessive suspicion on board members to the extent that there are not decision-makers on the said transactions but controllers on loans and other transactions?

Question 2: Point (d) has been added, throughout the Guidelines references to money laundering and terrorism financing and the institutions obligations have been added, are those references sufficiently clear?

- **AML**

Para. 23, para. 32 of the Guidelines go beyond the obligations under Directive 2015/849 [AMLD]. In fact, Art. 46(4) of Directive 2015/849 only suggests that Member States should "where applicable, oblige entities [to] identify the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Directive". The clause "where applicable" leaves room for Member States to stipulate otherwise. The revised GL (para 23, 32) do not consider the scenarios of the national transposition in all Member States, as some do not allocate such obligation to members of the management board. This is the case, for instance, in France or Spain where the national AML legislation does not require banks to identify a member of the

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management board who is responsible for the implementation of the relevant AML provisions. By conclusion, with these provisions the EBA oversteps the limits set by the legislative framework of Directive 2015/849. The relevant passages should be brought in line with Directive 2015/849.

- **Proportionality (Para. 19)**

The sentence: "*Institutions should note that the size or systemic importance of an institution may not, by itself, be indicative of the extent to which an institution is exposed to risks*", which has been added in the Guidelines on the assessment of the suitability of members of the management body and key function holders the sentence should be added in these guidelines too.

Question 3: Paragraph 24 regarding ESG factors has been added, is it sufficiently clear?

While we understand that the EBA wishes to give a political messages and underline that in the future also ESG risk drivers need to be better reflected, we consider it inappropriate to stress some specific risk factors to such an extent, notwithstanding their materiality. In so far para. 24 could lead to misunderstandings.

Question 4: Paragraph 84 and 86 have been amended to reflect changes to CRD. Are those paragraphs sufficiently clear?

The wording of the Guidelines in those paragraphs should be aligned on the amendments made of the CRD V on this matter:

- The provision of article 109 of CRD5 is specifying that subsidiaries not themselves subject to the Directive should apply their sector specific requirements on an individual basis should be added as well in the Guidelines;
- It would be useful to add a definition of what is meant by "offshore financial centres" as this there is no generally accepted concept for this term.

Question 5: Are Paragraphs 98 and 99 sufficiently clear?

Paragraph 98

Several dispositions of regional national and EU law already provide for obligations to establish no discrimination policies as referred to in para. 98 of the revised GL. The GL should clarify sufficiently that such policies may be sufficient and that no complementary EBA policy needs to be put in place.

Paragraph 99

According to **Para 99** credit institutions policies should be **gender neutral** and credit institutions should implement measures that ensure equal opportunities for all genders, including with regard to career perspectives and to improve the representation of the underrepresented gender in management positions.

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We would like to point out that gender balance may in practice be sometimes difficult to achieve, e.g. in the management board of smaller banks, which may be composed of two directors. Often enough women do not apply. In such cases transparency regarding deviations could be provided.

Moreover, it is unclear to us how "career perspective" should be interpreted.

Question 6: Point (c) of paragraph 101 has been amended to reflect the EBA's work on dividend arbitrage schemes. Is point (c) sufficiently clear?

Paragraph 101 (c)
We consider that this provision is not necessary since it is already taken into account in the assessment of the management body. In addition, the wording is too vague. It should at least be limited to cases where a court decision or a decision from the AML/CFT supervisor has been issued.

Question 7: Section 11 has been added to provide guidelines on loans and transactions with members of the management body and their related parties, reflecting changes to CRD. Is the section appropriate and sufficiently clear?

General comments:
It is key to deeply amend this section in order to be in line with the purpose of CRD V Directive and Article 16 of Regulation (EU) No 1093/2010. It should also be taken into account that national requirements already exist in most countries regarding credit institution's related party transactions. CRD V is very detailed on the scope of related parties but leaves some flexibility with regard to the monitoring framework and approval process with no monetary thresholds. It would be unreasonable to remove this flexibility and the possibility to utilize the existing frameworks by introducing the level of detail in the Guidelines as suggested - and on the other hand leave flexibility with regard to the scope of related parties, which is defined in very detail in the CRD V.

In addition, we do not agree on the details on the loans that should be provided according to the GL. This should be left to entities in accordance with local regulations: the day to day IT management of credits and the associated risks is the core business of banks and the EBA should not interfere in this field. In particular, para. 112 regarding the information that should be documented does not make any difference between type of loans and as such is much too broad. It is important that it is up to the institution to decide how to establish the internal procedure and who should take the lead: each to his own job!

The revised GL aim to provide a very prescriptive framework for loans and transactions granted to members of the management body and their related parties.

Para 107 – 116 impose legal obligations on the treatment of loans and other transactions with members of the management body and their related parties. In line with the revised GL, credit institutions are encouraged to consider additional categories of related parties. In addition, credit institutions should make available annually to their shareholders or owners information on these loans. As pointed out by the Board of Appeal of the European Supervisory Authorities, the Guidelines are supposed to only "help to interpret the scope of the provisions"

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of regulations and directives. It should be emphasized that the debate on CRD V had ruled out and marked strong opposition to an extensive list of related parties. The European Parliament formally rejected some of the proposals regarding granting loans with members of the management body, notably regarding an extensive list of "related parties". The relevant democratic debates and decisions should be respected.

In fact, **Article 88(1) CRD V** only provides for a **documentation and a disclosure requirement** with respect to data on loans to members of the management body and their related parties (as defined therein in point a and b). Such loans shall be properly documented and made available to competent authorities upon request.

EBA goes beyond its mandate in Article 74(1) and 88(1) CRDV when establishing further requirements (e.g. complex framework, limit, and approval requirements, voting prohibition, disclosure to shareholders) and extending the rules to "other transactions".

A potential reference of EBA in the Guidelines to the legal basis of Article 74(1) and (3) CRD according to which institutions shall have robust governance arrangements cannot justify any exceedance of a legally limited mandate.

According to SRD only material related party transactions are subject to approval and disclosure requirements and the SRD provides for several exemptions (e.g. for subsidiaries). Further, the definition of "related party" in Article 88(1) CRD V differs from the definition in Article 9c SRD, in particular by including commercial entities, in which a member of the management body or his or her close family member has a qualifying holding of 10% or more or holds a senior management position.

The provisions for loans and other transaction with members of the management body and their related parties in the EBA draft are stricter than the rules provided for in SRD (see comments to each point below). It is excessive that the draft EBA GL require even stricter limit, framework, and approval requirements for all credit institution **without any legal basis in Article 88 CRD V**.

Moreover, based on the draft Consultation Paper listed credit institutions would be subject to two different and complex regimes for related party transactions, which would result in a complex and confusing governance and unreasonable administrative burden and costs.

Finally, it is crucial to take into account the situation of cooperative credit institutions whose directors are by definition clients as well. It would become very difficult to find clients who accept to become involved in the management body if their (and those of their related parties) request for loans would have to be limited. Any excess of rules imposed on loans or other transactions granted to board members should not discourage the future candidates for the post of board member if the board members suffer from an unequal treatment in comparison with comparable clients.

Specific comments

Paragraph 107

In line with the revised Guidelines (para. 107) the management body should set out a framework for granting loans and entering into other transactions to be (e.g. factoring, leasing, property transactions, etc.) with members of the management body and their related parties.

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On another hand, Article 88 CRD V does not require any framework, limit, or approval procedure for all transactions, but rather only provides for documentation and disclosure obligations with respect to loans.

Further, the CRD does not provide that transactions with members of the management body and their related parties are in any way restricted by "limits". Such limits are neither required nor reasonable for properly managing conflicts of interest (Article 9c SRD does not refer to any limit rules either).

In particular the "limit" and the "framework" requirements are excessive for transactions with commercial entities (corporate banking), which are considered as related parties based on the very broad definition of "related party" in Article 88 (1) CRD (incl. for example companies where a close family member holds a senior management position or has a share of 10%).

A comprehensive framework of limits and special approval requirements would result in disproportionate administrative efforts and costs without a legal basis.

CRD defines commercial entities, in which a member of a management body holds a senior management or management body position, as related parties. Consequently, if a shareholder of the credit institution is represented in the supervisory function of the management body by its managing director or a person with a senior management position, the shareholding company could be regarded as "related party" of the credit institution in the meaning of Article 88 CRD V. The same applies if a management board member holds a supervisory board function in a subsidiary. It seems excessive and inappropriate to apply a complex framework and limit rules to intra-group transactions (especially for transactions with the sole shareholder or with subsidiaries).

Consequently, the EBA Guidelines should clarify, that the rules for loans and other transactions do not apply to shareholders of the credit institution and the companies on which the credit institution exerts control or significant influence. This approach would be in line with point 116 of the draft GL, that states that credit institution may only "consider" applying the rules also to qualified shareholders and subsidiaries.

Paragraph 108

Article 88(1) CRD V does not provide for an approval requirement for material loans or transactions and a prohibition to vote. Consequently, only the respective Members State´s company law and private law determines the approval requirements and voting restrictions.

The EU law requires the approval of related party transactions and provides for voting prohibitions only for listed companies based on Article 9c SRD II. The SRD allows Member States to provide for exemptions (e.g. for intra-group transactions and voting of the shareholder). If such concept is regarded as appropriate for listed companies, which are subject to very strict rules providing adequate protection of minority shareholders, the even stricter rules and the general prohibition to vote provided for in the draft EBA GL (without any legal basis in the CRD) seem excessive.

It is unclear when a person is considered as "personally concerned by a loan to or transaction with a member of the management body or their related parties". It should be clarified that the fact that a loan is granted to a commercial entity, which is a related party to a management

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body member does not automatically result in the qualification of that management body member as "personally concerned" (in its personal interests).

Paragraph 109

It would be difficult and burdensome to ascertain, define and document for each transaction the compliance with "standard conditions" and "normal market terms", especially if there is no clear market value available. Article 9c SRD II requires the assessment of a transaction as based on "market terms" and in "ordinary course of business" **only for material transactions**.

Taking into consideration the broad definition of related parties, which might result in a large number of related commercial entities, the obligation to monitor and evaluate that all transactions have been concluded on standard conditions and on normal market terms may result in a very high administrative burden and costs for the credit institution. **Hence, at least non-material transactions should be excluded here.**

Paragraphs 110 – 114

Please see comments on Para 109 above. At least non-material transactions should be excluded.

Paragraph 115

Pursuant to this provision credit institutions should make available annually to their shareholders or owners appropriate **aggregated information** on loans and other transactions with members of the management body and their related parties.

Article 88 (1) CRD V does not provide for any disclosure obligations to shareholders. Also according to SRD II, even listed banks (which are generally subject to stricter disclosure requirements to their shareholders to protect the minority shareholders) must only disclose material related party transactions (if not exempted according to SRD) to their shareholders, but not any other transactions.

Terms "aggregated information" shall be further clarified and explicitly confirmed that no reference to individual data is required, as such any divulgation of information concerning related parties goes against the banking secret obligation and the GDPR regulation (para.115). Also, it might be a problem for cooperative banks to disclose aggregated information as the management body members might be well known at the regional level. Finally, when small boards are at stake banking secrecy and anonymization of data is not guaranteed.

Paragraph 116

CRDV is very detailed on the scope of related parties. Paragraph 116 is therefore irrelevant and should be deleted. The democratic debate on CRDV and EBA's limited powers should be respected.

Question 8: Paragraph 126 has been added, is it sufficiently clear?

We believe that the documentation even of minor conflicts of interest could lead to a considerable administrative burden. Accordingly, the following amendments are suggested:

106 „ ...If a **notable** conflict of interest is identified ..."

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126 „When mitigating identified **notable** conflicts of interests ...“

Question 9: Paragraph 140 has been added, is it sufficiently clear?

We believe that not for all banks mitigating measures would have to be considered (depending on the business model and complexity) and therefore we suggest the following amendment:

„... and take mitigating measures to reduce those risks as well as, **where relevant**, their operational and reputational risks linked to them. ...“

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