



Response to the consultation on “Draft Guidelines on Internal Governance” (EBA/CP/2016/16)

General remarks

On the basis of our experience as non-executive and independent directors, we share the belief that effective internal governance measures are fundamental tools to preserve the sound and prudent management of financial institutions and the ongoing trust in the banking system. We also welcome the introduction in the new Guidelines of provisions aimed at establishing and enhancing a strong risk culture in institutions thus promoting the effective implementation of the rules and values behind such provisions.

Our following remarks concentrate on those aspects which, in our opinion, deserve further attention and clarification.

Q2: Are there any conflicts between the responsibilities assigned by national company law to a specific function of the management body and the responsibilities assigned by the Guidelines, in particular within paragraph 23, to either the management or supervisory function?

Italian “Collegio sindacale”

We see a potential conflict with the Italian rules on *Collegio sindacale*. In the so called *traditional* (and by far most used) Italian corporate governance model, the management and supervisory functions are both vested in the board of directors (although the board can delegate some, but not all, of its functions to one or more executive directors), while a pure control function is assigned to a separate body, also appointed by the shareholders, called *Collegio sindacale*.

The *Collegio sindacale* is not a supervisory board in that it has no competence whatsoever regarding management and strategic matters, but rather verifies that the board of directors acts in compliance with the law and the company by-laws and respects the principles of correct administration. It oversees the adequacy of the organizational, administrative and accounting systems of the company and its actual functioning.

The *Collegio sindacale* has a pure control function and cannot challenge board decisions purely on the merits: if the *Collegio Sindacale* deems a Board decision to be inappropriate or hazardous for the Company, it can take no action if the Board has acted according to law.

Sometimes the Guidelines do not seem to entirely take into account this subtle distinction. For example, the *Collegio sindacale* is vested by law with certain functions that the Guidelines assign to the Audit Committee (“50.d. Audit Committee - review and monitor the independence of the statutory auditors or the

audit firms, and in particular the appropriateness of the provision of non-audit services to the audited institution”).

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

The role of the management body with regard to HR policies

In line with CRD IV, Point 19 e. addresses the responsibility of the management body with respect to remuneration policies.

We strongly believe that the Guidelines should state that boards also take clear responsibility for setting the general principles on the development of human resources (i.e. talent management, succession planning, etc.)

Independence of the chairman of the management body in its supervisory function

As a general principle, the chair of the management body in its supervisory function should be an independent or non-executive member (Point 27b). Discussions have been ongoing for quite a long time in Italy on whether the chairman, being the legal representative of company, can qualify as non-executive and independent. For example, according to the Corporate Governance Code promoted by Borsa Italiana, the chairman, being qualified as “significant representative” of the company, anyhow after the first term of office should not qualify as independent because his/her function is inherently executive. **We suggest clarifying this point.**

In addition, we believe that the chairman, providing independent advice and acting as a liaison between management and board, is an effective facilitator and helps create a board culture both constructive and engaged. As such, **the personal attitudes of the chairman are very relevant and this could be stressed in the Guidelines.**

Role of the board

The Guidelines state that the management body in its management function should constructively challenge and critically review propositions, explanations and information received when exercising its judgement and taking decisions (Point 32). We strongly share the belief that the board’s decision-making process should not be dominated by a member or a small set of members. **However, the Guidelines should clarify how this can be concretely avoided by the board itself.**

The capacity of board members to challenge leading and majority members also depends on their ability to discuss and exchange information with shareholders and especially minorities. This is a critical issue in corporate law, however, where the traditional wisdom is that all directors represent all shareholders and should not represent individual interests. **Could the Guidelines take a position on this point?**

The role of the management body in its supervisory function

With reference to the role of the management body in its supervisory function (Point 33 Box), the Guidelines state that it must oversee and challenge the management body in its management function and provide appropriate advice. We believe that the focus on board monitoring should be balanced by a correspondent

emphasis on the strategic function of the board. In our view, the board has first of all the responsibility of determining the strategic direction of the company in a long-term perspective, taking into consideration the expectations and interests of the different stakeholders. The important role boards have to play in developing the organisation and its strategy must not be forgotten. This also applies to non-executive and independent directors. **This strategic function of the whole board might be enhanced within the Guidelines and set at the same level as monitoring and management supervision.** The board should take a role in encouraging the evaluation of long-term opportunities and in assuming a long-term view in decision-making.

Role of the Risk Committee and the Audit Committee

With regard to the role of the two Committees, in general we agree on the functions listed.

However, the Guidelines might clarify what action should the Risk Committee carry out with respect to the “review of a number of possible scenarios, including stressed scenarios, to assess how the institution’s risk profile reacts to external and internal events” (Point 47 f.). Should it develop extra analysis with respect to those carried out by the risk management function or shall it review and challenge the analysis performed by the internal functions?

Moreover, as stated above, with regard to the Audit Committee, we note that in the case of Italian companies adopting the traditional model of corporate governance (with Board of Directors and Collegio Sindacale), the national transposition of Directive 2006/43/EC gives to the Board of Statutory Auditors (Collegio Sindacale) the tasks listed under Point 50. **In order to avoid duplications, we believe that, in this specific case, the Audit Committee should not carry out the same activities.**

Q4: Are the guidelines in Title II regarding the internal governance policy, risk culture and business conduct appropriate and sufficiently clear?
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Especially in Point 87.c, it seems that the Guidelines suggest some form of discretionary judgment on issues that do not seem susceptible to cost/benefit or discretionary assessments. Taken as a given that compliance with law is not a discretionary matter and cannot be subjected to cost/benefit analysis, **we suggest to revise the wording of Point 87.c in order to avoid any misunderstanding on the issue.**

Milan, January 27th 2017

Nedcommunity is the Italian Association of non executive and independent directors. Founded in 2004 it has more than 500 associates, most of which are directors or members of the board of statutory auditors of listed companies or large non listed companies. It is the official member for Italy of ecoDa, the European Confederation of Directors Associations.

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