**10 June 2021**

Position of the Division Bank and Insurance of the Austrian Federal Economic Chamber

 on the consultation for EBA GLs on common assessment methodology for granting the authorization as credit institution (EBA/CP/2021/07)

**General concerns**

The consultation paper further extends the threshold of requirements to be able to apply for an authorization as a credit institution. From a credit institutions perspective this may be overly burdensome and therefore not proportionate to the goal. Furthermore, the proposed approach is in certain aspects contradicting the existing legal requirements. This is very worrisome as the mandate of the EBA with regards to Guidelines as outlined in Art 16 of the Reg. 1093/2014 is to ensure common, uniform and consistent application of Union law. Any extension or even contradiction of Union law can never be covered by Guidelines. Therefore, in order to ensure a consistent application of European Union law and most of all legal certainty, we recommend to reduce the scope of these Guidelines to the legal requirements as laid down in the CRD.

Furthermore, we would like to highlight that the consideration of proportionality is appreciated. However, regarding license applications there is a strong need to consider whether the applicant is already providing financial services to the market. This is driven by the general principle of proportionality that any action of the EU (and therefore all its institutions) shall be limited to what is necessary to achieve the objectives of the Treaties as laid down in Art 5 TFEU.

Therefore, in case an existing credit institution has a business or legal need to provide certain services within a distinct legal entity and applies for an additional application, the common assessment methodology should consider this. A proportionate approach would be to provide a fast-track approach for existing credit institutions applying only for an additional license. New market entrants having no experience in providing financial services and compliance with regulatory requirements, should be put under adequate scrutiny. This would enable a proportionate approach towards granting authorization as a credit institution.

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

Yes, the subject matter, scope and definitions are sufficiently clear. Whether the scope is appropriate, however, is open for further analysis as the draft guidelines are extending the requirements for an authorization beyond the ones foreseen in the legal texts to a material extent. This is further outlined below.

**Question 2: The Guidelines clarify that competent authorities should cooperate with AML supervisors when granting the authorisation. They also expressly specify that ML/TF risk is part of the risks to be assessed by the competent authorities, and expressly refer to ML/TF throughout the text. Are these references sufficiently clear?**

The references seem sufficiently clear. However, there is no legal requirement known for an authorization to be assessed with regards to any AML/TF risks. Therefore, we do not see the legal mandate to incorporate any additional requirements into the EBA-Guidelines in this regard.

**Question 3: Are the requirements and limits to impose conditions precedents, obligations subsequent and restrictions sufficiently clear?**

Although the requirements seem clear, there is no clear catalogue on when and which requirements can and shall be imposed. Form a legal perspective, the secondary law does not foresee any conditional authorizations and neither foresees restrictions. This results in a high legal uncertainty as any requirements imposed based on the GLs at hand may not be legally binding when challenged in front of a court. Therefore, we would recommend not to implement any additional mechanisms not foreseen in the existing law.

**Question 4: To ensure the sound and prudent management of the credit institution, all activities likely to impact on the prudential treatment of the applicant credit institution should be assessed by the competent authority. Is this concept sufficiently clear with regard to applicants carrying on activities in addition to banking and financial activities?**

There is no clear legal requirement that within the application process already all prudential requirements must be fulfilled. This holds even more true for activities which are themselves not part of the prudential framework as they are in addition to any banking and financial activities. Therefore, from a conceptual perspective this seems to be overstepping the mandate granted to the EBA.

From a material perspective the scope of any activities in addition to banking and financial activities is not sufficiently precise. There is a multitude of activities which are themselves not part of the prudential framework and therefore, generally speaking not subject to banking supervision in the narrow sense. To require that all these activities are to be potentially assessed in the course of an application for authorization seems to be too extensive.

According to para 35-41 of the Draft Guidelines, the EBA indicates that in case of a merger of two or more credit institutions the newly established credit institution should be subject to the prior granting of authorisation by the competent authority (para 35). Furthermore, an authorisation would be needed where a credit institution changes its legal form (para 41).

We believe that the EBA mandate in Art 8 (5) CRD V tasks the EBA to specify a common assessment methodology for granting authorisations, not to prescribe additional authorisation situations.

In our opinion, the merger of credit institutions which were granted authorisations as credit institutions should not lead to a new authorisation as the credit institutions merged transfer their assets by means of universal succession. The same applies in case a credit institution changes its legal form, where the authorisation does not expire as the credit institution is still the same.

We agree with the reference to the “applicable national law” made by EBA and would like to point out that in addition to the fact that point 4.3 is not in line with the mandate given to EBA and too restrictive, it contradicts current applicable national law.

For example § 7 (1) No 6 BWG (AUSTRIAN BANKING ACT, *Bankwesengesetz*) which stipulates that the license is considered to lapse upon the entry of a merger or demerger of credit institutions in the Commercial Register for the transferring credit institution(s), or upon the entry of a universal successor in the Commercial Register on the basis of a request in accordance with § 92 due to the existence of double or multiple licences at one institution.

In light of the abovementioned, a requirement for a new authorisation contradicts applicable national law and is not covered by the mandate given to EBA.

**Question 5: Is the approach towards the assessment of the application submitted by undertakings meeting one of the conditions in n. (i)-(iii) of letter 1(b) of Article 4(1) of the CRR appropriate and sufficiently clear?**

To our best knowledge, Art 4 (1) Letter 1(b) does not exist within the CRR in its current or previous version. However, if we interpret the question correctly, it is regarding the assessment approach for an application as credit institution. As outlined on multiple answers within this document, we are of the opinion that the assessment approach as proposed within these draft GLs are either not covered or even contradicting existing secondary law and are therefore, of the opinion that they are not appropriate.

**Question 6: Are the main focus areas, the level of granularity and the specific technical aspects of the business plan assessment appropriate and sufficiently clear?**

The information foreseen to be requested with regards to business plan analysis is very broad and seems to be overstepping the requirements given in Art 8 (2) (a) CRD. Namely the information to be provided shall include a programme of operations, structural organisation and governance arrangements. Art 10 (1) CRD further specifies that the programme of operations shall be setting out the types of business envisaged and the structure of the organisation.

However, the draft GLs at hand (as well as the [RTS on information to be provided in the application](https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1907331/de9abe89-7be5-4fea-aaf8-43bd4e67d71e/Draft%20RTS%20and%20ITS%20on%20Authorisation%20of%20Credit%20Institutions%20%28EBA-RTS-2017-08%20EBA-ITS-2017-05%29.pdf?retry=1)) go well beyond this rather narrow definition of requirements for the programme of operations. While chapter 7.2.1 on the business strategy (considering the types of activities, geographical distribution and overall strategy) seems to be fulfilling the first component of the programme of operations, i.e. the types of busines envisaged, the other parts of chapter 7.2 are not covered by the legal definition. Especially worrisome is the fact that the GLs require the credit institution to evaluate the potential future success of the applicant given the business model: *“Competent authorities should undertake an analysis of qualitative features of the applicant credit institution’s envisaged business model to understand its success drivers and key dependencies”* (Rec. 90). Similarly, the purpose of the financial forecasts is to *“assess the credibility of the underlying assumptions …, of the viability and sustainability of the applicant’s business model”* (Rec. 94).

This is not only going beyond the scope of programme of operations acc. to Art 10 (1) CRD but also is contradicting the CRD. Whether or not the business model is viable and sustainable is an assessment of the market need for certain services. However, the assessment of economic needs of the market is explicitly excluded from the application procedure acc. to Art 11 CRD.

**Question 7: Are the elements for the determination of capital at authorisation and the determination of the amount to be paid-up at the moment of the authorisation sufficiently clear?**

While the proposed GLs require credit institutions to comply with own funds and other prudential requirements, the CRD foresees only a static minimum capital requirement. Art 12 CRD requires applying credit institutions to hold separate own funds and an initial capital of at least 5 m EUR. This can even be decreased by the member state acc. to Art 12 (4) CRD to 1 m EUR.

Therefore, the requirement to ex ante comply with any prudential capital requirements is exceeding the legal requirements laid out in the CRD. Additionally, also from a practical perspective the specific risk profile of the future portfolio is not known at the point of application, rendering it impossible to give precise information on minimum capital requirements.

**Question 8: The approach taken by these Guidelines as regards the CAM for the internal governance is to directly indicate the minimum main elements and aspects required for the assessment based on the requirements laid out in relevant EU regulatory acts. This selective approach, however, is without prejudice to the application by the competent authorities of additional parts of the various EBA Guidelines which may be relevant for the assessment of the applicant’s internal governance. Is this approach sufficiently clear?**

As outlined above, we do not see the legal requirement to assess compliance with all regulatory requirements in the moment of application for authorization. Therefore, we also do not agree that any additional requirements laid down in unspecified EBA Guidelines may be part of the assessment. We, therefore, strongly advice that the EBA reconsiders its approach towards assessing general compliance with specified and unspecified requirements in the moment of application for authorization. The going concern supervision is explicitly regulated within the European legal framework, however, it is not part of the assessment for authorization.