



Paris, 18th July 2012.

EBA consultation paper on draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution

The FBF's response

The French Banking Federation (hereafter referred to as the FBF) is the professional organisation representing the interests of the banking sector in France. It covers all credit institutions authorised as banks that carry on their business in France, amounting to over 450 commercial banks and cooperatives. The FBF's member banks have a total of 40 000 permanent branches in France, 400 000 employees and 60 million customers.

The banking profession takes a particular interest in corporate governance issues and participates in all the debates that take place on the subject, both in France and at the European and international levels. Specifically, it has participated to the full in the public consultations launched by the European Commission on this subject, both those that relate in particular to credit institutions, such as the August 2010 Green Paper on corporate governance in financial institutions and remuneration policies, and, more generally, consultations addressed to all listed companies, such as the July 2011 Green Paper on the EU corporate governance framework. It is also monitoring very closely developments in the proposal for a CRD IV directive on these matters.

The FBF therefore thanks the European Banking Authority (EBA) for offering it the opportunity to express its views on the issues associated with corporate governance in financial institutions, and particularly on the assessment of members of the management body and key function holders in credit institutions. It acknowledges that guidelines such as these may prove useful in clarifying and improving the precision of CRD provisions.

The banking profession would like to stress that issues of governance do not affect financial institutions alone, but apply more generally to all types of company. It is therefore vital to ensure that there is consistency among the rules applicable to all the operators involved.

Key messages

- **The banking profession regrets the fact that this consultation and the drafting of the EBA's guidelines in this sphere are taking place at a time when the forthcoming European legislation on these subjects is still at the stage of debate at the European Parliament and the Council and, therefore, the law on these subjects has not yet reached a stable state.** The EBA itself expressly acknowledges that its guidelines go beyond the current CRD, in terms of the institutions to which they apply, the functions assessed, and the extension of the principle of assessment of suitability of managers, which would no longer be evaluated only at the time of authorisation, but on an ongoing basis. It also acknowledges that its guidelines anticipate legislation that has not yet been definitively agreed. This seems to us open to challenge, and unsatisfactory in terms of legal certainty. It does not seem appropriate for EBA guidelines to lay down various principles that may significantly modify certain governance practices, when the applicable law might cast doubt upon these guidelines in the near future, thus involving a further change for the institutions.

- In addition, the EBA's guidelines seem to us, as they stand, to misinterpret the very principles of corporate governance, particularly in relation to financial institutions. We regret the fact that the EBA did not draw upon the work of and the responses made to the various Green Papers on corporate governance by the European Commission. The banking profession would like to point out that in commercial companies, as in cooperative institutions, **the members of the board of directors are always elected by the general meeting of shareholders** or of members, whichever is applicable, so that the directors, in both types of company, are expected to represent not only the interests of the shareholders or members, but also the company's best interests. **This is a fundamental right of shareholders which cannot be undermined or even restricted by interference by a supervisor.**

As it stands, the text presents difficulties. We do not see how the supervisor's 'right of supervision' could in practice be exercised over the process of appointing directors: would the assessment take place upstream of the shareholders' vote, i.e. would it be carried out on all the applications put forward? **If this is the case, the text does not make provision for the option for a shareholder to be spontaneously nominated from the floor during general meetings.** On the other hand, should the assessment by the supervisor take place after the vote at the general meeting, at the risk of undermining the shareholders' vote, which would in our view be deeply objectionable, since the directors have the duty of representing the company's shareholders?

In addition, it should be stressed that if the supervisor had the task of assessing the application submitted to it, and ratifying it, it could then be held jointly liable with the company should the person subsequently be found deficient in carrying out his duties, which would have serious consequences on the conditions under which it performs its supervisory function.

More generally, it is in the company's interest to choose the most competent people and to take into account a certain level of diversity of skills corresponding to the company's operation, structure and needs. Where they exist, nomination committees, which report to the board, are responsible for the make-up of the governing bodies. These committees have the task of examining and considering the make-up, organisation and operation of the board. Their activities and the duties they have carried out during the year appear in the annual report. **These are fundamental principles of governance. The role of the supervisor ought to be restricted to checking that the procedures for appointing directors that the institutions have put in place comply with the applicable rules, and to ensure that appointments actually are conducted in line with these procedures.**

- For all the reasons set out above, **the banking profession is opposed to interference by the supervisor in the process of appointing members of the board and key function holders in credit institutions.**

On the other hand, it is the supervisor's responsibility to carry out a posteriori checks on the appointment of the institution's senior management, namely persons of the required good repute and appropriate experience to perform sound and prudent management, who are responsible for directing the business of the credit institution, accounting and financial information, internal control and making decisions on regulatory capital, which seems ample. Only an a posteriori check can ensure continuing compliance with the rule laid down by Article 11 of the Banking Directive 2006/48/EC, under which at least two persons must effectively direct the business of the institution.

- In general, we believe it is vital for the EBA's guidelines to take into account the existence of different governance models within the EU (one-tier and two-tier models). The guidelines should therefore be flexible to a certain extent, allowing them to be adapted both by national supervisors and by institutions themselves to specific national circumstances. **Thus, the banking profession is opposed to over-detailed guidelines and criteria being drafted on the assessment of members of the management body of credit institutions.**

Detailed position on the EBA's draft guidelines

Article 2 - Definitions

As we commented by way of introduction, the banking profession proposes that **the supervisor's role should be limited to assessing the suitability solely of an institution's senior management, which should be defined as persons of the required good repute and appropriate experience to perform sound and prudent management, who are responsible for directing the business of the credit institution, accounting and financial information, internal control and making decisions on regulatory capital, which seems ample.** This assessment should be carried out on an a posteriori basis for the reasons set out above.

In addition, it is vital to ensure that the definitions contained in the EBA's guidelines are identical to those laid down by the forthcoming CRD IV. This reinforces the need to wait for the adoption of this legislation before issuing any guidelines on the subject.

In any event, the banking profession is opposed to guidelines with an overly wide scope. As the draft stands, the definition of key function holders of a credit institution seems to us too wide and not precise enough.

Article 3 - Scope and level of application

As we have said above, the scope of the guidelines planned by the EBA goes well beyond what is currently required by the CRD. The latter only refers to assessment at the time of authorisation being issued to the credit institution, and not to ongoing suitability.

In addition, the banking profession would like to point out that it is the duty of the board, following a proposal by its nomination committee, if one exists, and having regard to the balance of its make-up and the institution's characteristics, to decide on the profile of the directors and the experience criteria that correspond to the institution's needs. On that basis, the board proposes to the general meeting that those directors whose profile is most satisfactory should be appointed. Thus, in the case of cooperative societies, the choice of directors involves figures who do not necessarily come from the banking world but who

represent all the members and who are chosen for their professional qualities and their commitment to cooperative values. This involves a judgement which goes beyond the concept of criteria.

The FBF believes that the EBA could set general assessment criteria for directors which credit institutions would have to take into account.

Under no circumstances does it seem necessary or justified for the supervisor to intervene in the process of appointing members of the board.

In addition, it is the board's responsibility to assess its make-up and operation, annually. The board sets out the results of the assessment in the annual report.

Article 4 - Responsibilities

The banking profession wholeheartedly welcomes the statement of the principle that assessing the suitability of members of the management body and key function holders of a credit institution should primarily be the responsibility of the credit institution itself. The nomination committee, where there is one, may give very useful, expert advice on this assessment.

However, the FBF regrets the fact that this principle has not really been taken into account throughout the EBA's guidelines, since it is clear in subsequent articles that the supervisor has the final word on this assessment (see Articles 9 to 12).

Article 5 - General assessment criteria

The banking profession welcomes the recognition of the principle of proportionality in assessment, by the institution, of members of the management body and key function holders. This principle makes it possible, in practice, to take into account the diverse governance models and structures of credit institutions (commercial companies and cooperative societies).

It does not seem necessary at this stage to specify in further detail the criteria to be taken into account in implementing the principle of proportionality. It is for the institution itself to implement this principle, in line with its internal structure and its governance model.

In any event, the FBF would like to point out that the supervisor's role ought to be devoted to the a posteriori assessment of the suitability of the senior management of the credit institution, and these persons alone.

Article 7 - Credit institutions' policies on suitability

The banking profession is opposed to the supervisor becoming involved in the policies laid down by the institutions on the assessment of the suitability of members of the board or key function holders.

Instead, the board ought to be required to assess regularly - for example, annually - its make-up and its operation within the framework of a self-assessment process. This assessment could be carried out in a formal way at least every three years. It could potentially be implemented under the guidance of an independent director, with the assistance of an external consultant. Many listed companies regularly carry out this type of assessment.

Article 9 - Notification

On assessment by the supervisor in general, the banking profession is opposed to such interference in the operations of institutions, involving assessment of members of the board or key function holders. **The supervisor should only act a posteriori, and solely in relation to the assessment of senior management, namely persons responsible for directing the business of the credit institution.** A posteriori notification to the supervisor will make it possible to ensure that the institution is continuously managed by the two persons required by banking regulation.

On the other points, as we have said above, the role of the supervisor ought to be restricted to checking that the procedures for appointing directors that the institutions have put in place comply with the applicable rules, and to ensure that appointments actually are conducted in line with these procedures. The assessment of directors is a matter for the board itself, subject to the scrutiny of the shareholders. In commercial companies and in cooperative institutions, **the members of the board are always elected by the general meeting of shareholders** or of members, whichever is applicable, so that the directors, in both types of company, are expected to represent not only the interests of the shareholders or members, but also the company's best interests. **This is a fundamental right of shareholders which cannot be undermined or even restricted by interference by a supervisor.**

If the supervisor had the task of assessing the application submitted to it, and ratifying it, it could then be held jointly liable with the company should the person subsequently be found deficient in carrying out his duties, which would have serious consequences on the conditions under which it performs its supervisory function.

In addition, we do not see how notification to the supervisor could have an effect in practice on the process of appointing directors: would it take place upstream of the shareholders' vote, and therefore relate to all the applications put forward? In that event, this would preclude the current possibility of having spontaneous nominations from the floor during the general meeting. Or would it take place after the vote at the general meeting, at the risk of undermining the shareholders' vote, which would in our view be deeply objectionable, since the directors have the duty of representing the company's shareholders?

We also wonder about the deadlines within which the supervisor would have to notify the institution of the outcome of its assessments, together with the reasons for them.

Article 10 - Assessment process

Paragraph 1 of this article stipulates that the supervisor should ensure that the process applicable to the assessment of members of the management body is publicly available. We understand that this applies not to the assessment process as carried out on particular candidates, but the procedure adopted by the supervisor in carrying out such an assessment.

Article 14 - Experience criteria

For all the reasons set out above, it should be the responsibility of the board and, where one exists, the nomination committee, to draw up selection criteria for members of the board. The supervisor's role should be limited to the a posteriori assessment solely of the senior management, as defined above.

It should be noted, here, that **in any event, the banking profession is opposed to over-detailed criteria being drafted and to the assessment, by the supervisor, of members of the board or key function holders of credit institutions.**

In addition, paragraph 6 stipulates that the supervisor should take into consideration the person's experience in the banking and financial spheres (financial markets, applicable regulatory framework, managing a credit institution). However, we consider that this criterion is overly restrictive since, depending on the institution's structure, the members of the board may have skills and experience of a different kind, but which is equally vital in the performance of their duties as directors. We should remember that the quality of a board is primarily dependent on its make-up: it is made up of directors, who of course must be honest, competent, must understand how the enterprise operates, must bear in mind the interests of all the shareholders, must be involved to a sufficient degree in deciding upon strategy and in discussions so that they participate properly in its decisions, and who are able to work collectively.

Article 15 - Governance criteria

In paragraph 2, with regard to the statement that the supervisor's assessment of a member's independence involves taking into account the person's relationships with the controlling shareholders of the credit institution, we fear that this might undermine a majority representation of the controlling shareholders on the board. We are opposed to such a move.

Article 16 - Implementation

The six-month deadline for implementation seems to us completely unrealistic for credit institutions, given the changes arising from the EBA's guidelines.

In any event, we would like to point out that the EBA's guidelines in this sphere should not be published before the adoption of CRD IV, which will establish the state of the law in this field.