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| To the European Banking Authority (EBA) | **Division Bank and Insurance**  Austrian Federal Economic Chamber  Wiedner Hauptstraße 63 | P.O. Box 320  1045 Vienna  T +43 (0)5 90 900-DW | F +43 (0)5 90 900-272  E bsbv@wko.at  W http://wko.at/bsbv |

Your ref., Your message of Our ref., person in charge Extension Date

BSBV 115/Egger 3137 25 January 2017

**EBA Consultation on Fit & Proper Guidelines**

(Please exchange the comments we submitted on 24. January with the comments attached. We have made minor changes. Please consider the comments from 24. January as void. We beg your pardon for any inconvenience.)

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representative of the entire Austrian banking industry, appreciates the possibility to comment on the above cited consultation document and would like to submit the following position:

1. **General comments and most critical points**

There are massive concerns that these new requirements, in particular with regards to independence are tightened to such an extent that in future it will be difficult to find an adequate number of supervisory board members and – even more critical – that it will not be possible anymore for the majority shareholder to have an adequate say in the credit institution.

Also with regards to the steering of subsidiaries within a group there are concerns that this could be hampered by the Guidelines, especially with the requirements stipulated in the Internal Governance Guidelines together with the independence criteria in point 18 and its effects on the composition of supervisory board committees.

Moreover, the general concept behind independence and conflicts of interests and the distinction between these two concepts in the EBA Fit & Proper Draft Guidelines and the ECB Fit & Proper Draft Guide but also in the Internal Governance Draft Guidelines is not sufficiently clear.

The criteria established in point 18 of the draft Guidelines are far too severe. They will restrain significantly the area of selection for supervisory board members and do not take sufficiently into consideration the quality of supervisory board members.

According to the EBA Draft Guidelines an institution’s management body in its supervisory function should include a “sufficient number“ of fully independent members. For the sake of legal clarity we urge the EBA to state explicitly the percentage of how many members of the managemement body in its supervisory function should be independent. We ask for setting the threshold not too high (i.e. not more than 15%) and to provide for appropriate additional rules for member states with employee representatives on the supervisory board. They should count also as somehow independent, because the whole idea of having employee representatives on the supervisory board is very similar to EBA’s concept of independence. Both concepts should make sure that not only capital interests are represented on the supervisory board, but also other stakeholders and thereby management’s decisions are challenged more intensively.

**Majority Shareholder**

Especially for supervisory boards in Austria - where it is mandatory that one third of the supervisory board members are employee representatives – it must be furtheron possible that the majority shareholder can effectively reach a decision which adequately reflects his influence in the institution. This is all the more important with regards to an effective steering of subsidiaries within a group. The majority shareholder must have a sufficient majority of supervisory board members in order to get a decision approved against the will of employee representatives and fully independent members. Otherwise this would most probably constitute a breach of the right of ownership stipulated in the European Convention on Human Rights.

Therefore, in order to limit the broad scope of lit. a („substantial shareholder“) we suggest to change the wording „substantial shareholder“ into „controlling shareholder“.

**Committees of the Supervisory Board**

We believe that the wording of the criteria for independence could be detrimental to an effective steering of subsidiaries within a group via managers of the mother institution in the supervisory boards of the subsidiaries. If for every committee an indepentend chair is required, who can only hold one chair position (whereas the chairmanship shall occasionally rotate according to para 44 of the Draft Internal Governance Guidelines), and the majority of the members of the risk committee (para 42 of the Draft Internal Governance Guidelines) and of the audit committee (para 45 of the Draft Internal Governance Guidelines) should be independent, the supervisory board must be extremely large in order to guarantee an effective company steering. A supervisory board which comprises so many members might not be able to work efficiently. So in fact even if the criteria in point 18 remain unchanged in the final guidelines, there must be an exemption rule in order to make sure that these issues can be taken into consideration appropriately.

**12 years as absolute criterion**

The 12 year membership within the management body of a group entity as proof of the lack of independence is inappropriate considering that experienced members with good knowledge of the group structure have the ability to constructively challenge the management actions and decisions while maintaining the necessary independence. Therefore, we propose extending the time period to 15 years (which is also the rule provided by the Austrian Corporate Governance Code) and make the rule applicable only for mandates within the CRD-institution and not within the group. In addition we suggest to add a cooling-off period of two years. So in fact a member would be considered as not fully independent if it served as member of the management body within the CRD-institution for 15 years, but after a certain period it should be possible to consider him as fully independent.

**Healing of criteria stipulated in point 18**

As a general rule and in order to guarantee an appropriate application of the independence criteria laid down in point 18 we would suggest to provide a rebuttable presumption. If one criteria is fulfilled it should still be possible for the bank concerned to disprove the impression.

**Proportionality and ex ante assessment**

We think the guidelines should be applied in a proportionate way with regards to the seize of credit institutions. Otherwise this would contradict the recently published proposals of the EU-Commission within the context of the CRR-Review.

Especially with regards to the planned ex ante assessment for management board members and members of the supervisory board it would be appropriate to think about a threshold of total assets below which an ex post assessment should still be possible, in particular with regards to supervisory board members.

Also for reappointments a strict ex ante assessment would be too bureaucratic.

In general, we consider the ex-ante appointments as too burdensome for both the institution and competent authorities. This procedure would lead to a disproportionate financial and organisational burden, e.g. if a candidate is finally not appointed. Additionally, the process of appointment would be complicated and deferred. An ex-ante-assessment would cause a lack of practicability, legal uncertainty and increased costs due to following reasons:

There would be an extreme long assessment period by the competent authority (three to four months, possibly six in case of additional requirements). It must be considered that the internal assessments by institutions also require a sufficient time for preparation. It is absolutely impracticable and inefficient to have a period of time of four (possibly six) months before the appointment by the supervisory board. It should be considered that in case of candidates for the supervisory board the final step is according to the Austrian Stock Corporation Act their election by the shareholders meeting. All these legally binding steps result overall in an internal extremely tight preparation time for appointments which would be overburdened in case that the ex-ante assessment proposed by the Fit & Proper Draft Guidelines comes into force.

This extreme long assessment period by the competent authority leads to a high degree of legal uncertainty for the institutions and the candidates to the management body and involves not least high costs, particularly for smaller institutions.

Finally, in case that appointed members of the management board cease to be members (withdrawal or death) it is necessary and of major significance (in order to ensure the ability of the institution to act) to have a replacement as soon as possible which is impossible if the replacing member has to go through the entire assessment procedures (internally and by the competent authorities) in the timeframe proposed by the Fit & Proper Draft Guidelines before the appointment.

We therefore recommend maintaining the current ex-post assessment or at least, restricting the ex-ante assessment to first appointments (not include re-appointments, not include small institutions regardless of whether they stand alone or are part of a banking group) and considering a significant shorter period of time for the assessment by competent authorities

1. **Questions**

***Q1: 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 to either the management or supervisory function?***

Ad paragraph 124 (independent members):

The requirement of being not employed by any entity within the scope of consolidation contradicts with the national law regarding employee representatives and should therefore be deleted. In this light it is necessary to point out that in Austria employee representatives are subject to an extensive dismissal protection, which is the reason why these persons are the most difficult ones to be quitted within the whole institution. Therefore, they should explicitly be considered as being independent or be exempted from the independence requirements.

***Q2: Are the subject matter, scope and definitions sufficiently clear?***

The guidelines are in principle addressed to credit institutions, mixed financial holding companies, financial holding companies and investment firms. Article 10 states that CRD-institutions should comply with these guidelines on an individual, sub-consolidated and consolidated basis, including their subsidiaries not subject to Directive 2013/36/EU.

It has to be clarified how subsidiaries are defined in this respect and if the guidelines refer to subsidiaries being credit institutions, (mixed) financial holding companies and investment firms only or to any subsidiary irrespective of its business focus (also taking into account the group context - subsidiaries within the scope of prudential consolidation).

***Q3: Is the scope of assessments of key function holders by CRD-institutions appropriate and sufficiently clear?***

Suitability assessment of key function holders: This should not be the same as for management body members. A differentiation according to specific tasks related to their responsibilities is necessary.

***Q4: Do you agree with this approach to the proportionality principle and consider that it will help in the practical implementation of the guidelines? Which aspects are not practical and the reasons why? Institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.***

***Q5: Do you consider that a more proportionate application of the guidelines regarding any aspect of the guidelines could be introduced? When providing your answer please specify which aspects and the reasons why. In this respect, institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.***

It should be clarified that the principle of proportionality should be considered in terms of quality and quantity regarding the suitability assessment, diversity issues, training and induction. If an institution just offers simple products it should be sufficient for the members of the management body to have the knowledge, skills and experience regarding these products. We believe that for the avoidance of doubt it could be helpful to add a non-exhaustive list of fit and proper related issues which could be subject to the principle of proportionality. This clarification could take place within paragraph 34, as well as paragraph 18. Paragraph 18 clarifies that the required level and nature of sufficient knowledge, skills, experience and time commitment of the management body in its management function may differ from that of a member of the management body in its supervisory function. In the same vein it could be added that such a differentiation can also occur in the application of the principle of proportionality.

***Q6: Are the guidelines with respect to the calculation of the number of directorships appropriate and sufficiently clear?***

**Calculation of the number of directorships in qualifying holdings (Para 49)**

According to para 49 directorships in undertakings in which the institution has a qualifying holding and directorships within the group of undertakings shall be counted separately.

The consultative document does not give any explanation for this kind of calculation. In the simultaneously published ECB consultative document this is called a “restrictive approach to counting”. This is also no explanation. The goal of interpretation should not be to take a strict or a less strict approach but to take an approach which meets the meaning of the regulation interpreted. So what is the meaning of Art 91 (4) CRD IV?

As the Recital 58 gives no reasoning for the exemptions in Art 91 (4) CRD IV it may be helpful to watch out where this kind of exemption comes from and if it stems from the legislation of a certain Member State to take into account, how it is understood in this Member State. The exemptions in Art 91 CRD IV were not part of the original proposal of the Commission. They were entered into the discussion especially by Austria and by Austrian MEPs. There are similar exemptions in the German Public Limited Company Act for directorships in the same group but the combination of exemptions for directorships in the same group and for directorships in undertakings in which the institution has qualifying holdings only exists in the Austrian Public Limited Company Act.

The reason given in the Austrian legislation is simple: It is part of the job and a central responsibility of an executive director of the parent undertaking to control the subsidiaries and the undertakings, in which the parent undertaking holds a qualifying holding. There is no risk that directorships in the supervisory boards of these undertakings are handled with negligence. In fact the whole staff of the parent undertaking delivers input for those members of the supervisory board that the parent undertaking has sent into these undertakings. There is no difference made whether the parent undertaking holds 51% or 49% of the shares. Therefore, in the Austrian legislation all these mandates are in the same bucket when it comes to the calculation of the maximum number of mandates. A separate counting would not be reasonable in any way.

The same is true for the European version of mandate-calculation:

As it is part of one and the same job as an executive director of a credit institution to become member of the supervisory board of another undertaking, in which the credit institution owns a qualifying holding, the two directorships must be counted as one.

The separate counting as proposed in para 49 of the consultative document leads to strange distortions. An executive director of the parent undertaking would have to withdraw from a directorship he rightfully held in a former subsidiary only because the parent undertaking sells some shares and loses the majority in another undertaking.

If there are more than one other undertakings, in which the credit institution owns a qualifying holding, and the executive director of the credit institution is non-executive director in all these undertakings even according to para 49 these directorships together would count as one single directorship. The strange thing is that the linking directorship in the credit institution above is not even part of the picture as seen by para 49. This is not convincing.

**Number of directorships – predominantly commercial objectives (Para 53)**

It needs to be clarified that the list of entities which do not pursue predominantly commercial objectives is a non-exhaustive enumeration.

We suggest the following wording:

*“53. Entities which do not pursue predominantly commercial objectives include* ***for example****:”*

**Paragraph 37 to 44 (Sufficient time commitment of a member of the management body)**

In periods of particularly increased activity the management body itself and the whole institutions’ staff invests more time for business reasons. The introduction of a “buffer of time” as mentioned in paragraph 38 is not necessary since the members of the management body distribute the available time appropriately and spend more time on necessary issues in busy times. Regarding the assessment of sufficient time-commitment we consider it as necessary to take into account synergies within an Art 10 CRR model. Therefore, lit a of paragraph 39 and paragraph 51 should be explicitly extended to Art 10 CRR models.

Additionally, the requirement of paragraph 44 to keep records of relevant activities is far too broad, requires additional time for the members of the management body for documentary reasons and should therefore be deleted.

***Q7: Are the guidelines within Title II regarding the notions of suitability appropriate and sufficiently clear?***

Regarding paragraph 61 and 66 lit i (“managerial skills and experience”) we would like to point out that it is necessary to distinguish between “normal” non-executive members and those which are employee representatives. They are mandatory due to certain national regulations and are usually no employees with managerial positions. They should be clearly exempted from these requirements.

Paragraph 69 stipulates that any relevant criminal and administrative records should be taken into account for the assessment of good repute, honesty and integrity. We believe that the consideration of administrative records would go too far. E.g. in some member states it is easier to get a speeding ticket than in others. Since there are many differences between national jurisdictions and therefore no harmonisation can be achieved “administrative records and procedures” (Para 69 and 71) should be deleted.

**Independence of mind (para 74 subsequent)**

According to para 77 of the draft guidelines members of an institution’s management body should not have conflicts of interest that cannot be managed that impede their ability to perform their duties independently and objectively.

1. **Economic interests**

Para 77 point e) states that (other) economic interests owned by the member (e.g. loans granted by the institution to a company owned by a member of a management body) can create considerable conflicts of interests. Thus a mere granting of a loan to a member of the management body may create a conflict of interest.

At least this requirement must not apply for all performing loans no matter if they are secured or unsecured. In cases of an excellent creditworthiness of the borrower it is not always required to reserve collaterals. People with excellent creditworthiness would have no problem at all to switch over to another bank. Therefore, in these cases there is no danger of losing independence of mind and of getting under economic pressure because of an unsecured loan.

Apart from that it is inherent to the nature and the business model of (small) cooperative banks as self-help-organisations that their clients can also be their members and that their boards of supervisors are composed by their members.

2. **Political influence or relationships**

It cannot be EBA’s intention to consider every local politician (e.g. mayor, member of the municipal council), public employee (e.g. civil servants in ministries or other authorities) or state representatives as not independent. They do not have any material influence with regard to the legislative process for banking regulation on the European level.

It needs to be clarified that politicians, public employees and state representatives are generally considered as independent notwithstanding the possibility of singular conflicts of interest in certain questions that easily can be managed for example by not taking part in decisions regarding the local authority.

Beyond that, fulfilling the requirements laid down in para 77 point e) and f) also leads to pointless additional administrative burden for the institutions. A separate written justification has to be formulated and documented for every relevant borrower or politician.

Paragraph 78 recognises that holding of shares in any entity within the prudential consolidation of the institution is not considered as a situation of conflict of interest. We welcome this provision and call for extending the wording into: “shares and other own funds instruments and items (eligible as own funds according to CRR or not)”. This extension is necessary for variable remunerations.

We believe that it is furthermore necessary to stipulate a cooling-off period for situations referred to in paragraph 77 c. It should be possible to consider a member of the management body as independent if an appropriate period of e.g. 10 years has passed by.

***Q8: Are the guidelines within Title III regarding the Human and financial resources for training of members of the management body appropriate and sufficiently clear?***

n.a.

***Q9: Are the guidelines within Title IV regarding diversity appropriate and sufficiently clear?***

n.a.

***Q10: Are the guidelines within Title V regarding the suitability policy and governance arrangements appropriate and sufficiently clear?***

Please see our comments above under General Comments. In addition, we would like to point out the following:

The requirements in point 18 (paragraph 124) are too excessive and difficult to fulfil, especially in smaller countries where the access to suitable candidates for such positions is limited.

One of the key instruments of **group steering** is the right of the parent company to nominate members of the management board in its supervisory function of the subsidiaries. Most of the proposed independence criteria are formulated in a very restrictive manner that will make impossible the use of this basic principle and right of parent companies towards its subsidiaries within a group structure. Besides, the Internal Governance Draft Guidelines require that in a group structure the consolidating institution should ensure that governance arrangements, processes and mechanisms are consistent and well integrated group-wide (Section 8, para. 75). How should consolidating institutions ensure that these arrangements, processes and mechanisms are implemented group-wide in the absence of one of their key instruments of group steering?

In this context it should be mentioned with regard to stock corporations that the only way in which the group steering by the parent company can be exercised is through its representatives in the management body in its supervisory function of the subsidiaries, since according to the provisions of the Austrian Stock Corporation Act (§ 70 para. 1) the management body in its management function of the subsidiary is not bound by the instructions of the parent company. Furthermore, the Austrian Banking Act lays down certain supervisory requirements which consolidating institutions have to comply with on a consolidated basis and for the fulfillment of which they are responsible (§ 30 para. 6). For this purpose, the subsidiaries are legally required to provide the consolidating institutions with the necessary information and documents (§ 30 para. 8). The application of supervisory requirements on a consolidated basis and the legal obligations related thereto within group structures are also laid down by Art. 11 (1) CRR. All the above mentioned provisions represent legal instruments for the parent companies to exercise their group steering which are significantly undermined by the proposed Fit & Proper Draft Guidelines.

**Independence as a matter of national self-regulation**

The SSM supervisory statement on governance stated in June 2016: “’Formal’ independence should be based on national criteria defined in national legislation or by national competent authorities (NCAs), since there are no formal independence criteria in the CRD IV.” In this sense the Basel Committee also explicitly states that “the members of the board should exercise their duty of care and duty of loyalty to the bank under applicable national laws and supervisory standards[[1]](#footnote-1).”

ESMA and EBA have no special mandate to create a definition of formal independence. The definition of independence is a classical matter of self-regulation because only by the means of self-regulation the national specificities and the specificities of each enterprise can be met in a satisfying manner. Therefore, the guidelines should abstain from the essay of giving such a definition. If not, the guidelines have to take into account at least national specificities appropriately.

**Employees**

For exampel the independence of employees is not explicitly addressed, but, as a board member is not considered independent in case of “significant fees or other benefits from the CRD-institution” (para 124 lit e), it seems that employees are generally not considered independent.

This would be completely unacceptable for member states with obligatory representation of employees in the supervisory board.

Europe had a similar discussion in 2005 regarding the criteria of independence in Annex II of the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC). The result of the discussion was an exemption, which read:

*“1. It is not possible to list comprehensively all threats to directors’ independence; the relationships or circumstances which may appear relevant to its determination may vary to a certain extent across Member States and companies, and best practices in this respect may evolve over time. However, a number of situations are frequently recognised as relevant in helping the (supervisory) board to determine whether a non-executive or supervisory director may be regarded as independent, even though it is widely understood that assessment of the independence of any particular director should be based on substance rather than form. In this context, a number of criteria, to be used by the (supervisory) board, should be adopted at national level. Such criteria, which should be tailored to the national context, should be based on due consideration of at least the following situations:*

*(b) not to be an employee of the company or an associated company, and not having been in such a position for the previous three years, except when the non-executive or supervisory director does not belong to senior management and has been elected to the (supervisory) board in the context of a system of workers’ representation recognised by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment.“*

**Independence of shareholders and their representatives**

To consider each “substantial shareholder” or each officer of a substantial shareholder as not independent (see para 124 lit a) is also in no way acceptable, although it is at least stated, that shares received as part of remuneration should not be taken into account.

It is also very dangerous to suspect everyone having a “personal, professional or economic relationship with the owner of a qualifying holding” of potentially acting without independence of mind (para 77). As independence of mind is required of each member of the management board, this suspicion stands in an obvious conflict with the necessity to take care for qualifying holdings and subsidiaries. The management board of the parent institution is legally obliged to look after those qualifying holdings and subsidiaries. How should this be done in the future, if everybody coming from the qualifying shareholder or the parent undertaking is under suspicion?

Moreover, it is unclear, what “substantial” in para 124 should mean in the given context. Is it more or less than the qualifying holding required in para 77?

Whatever may be meant by the word “substantial”, the rule is much too strict, as it even goes far beyond the Commission Recommendation (2005/162/EC) mentioned above. According to that Recommendation only the controlling shareholder was considered not to be formally independent:

See: “d) not to be or to represent in any way the controlling shareholder(s) (control being determined by reference to the cases mentioned in Article 1(1) of Council Directive 83/349/EEC (1));”

Besides also the Thematic review on risk management, provided by the Financial Stability Board (FSB) and cited in BCBS Guidelines on Corporate governance principles for banks is only referring to the “controlling shareholder”: “According to FSB the key characteristic of independence is the ability to exercise objective, independent judgment after fair consideration of all relevant information and views without undue influence from executives, controlling shareholders, or other external or third parties”[[2]](#footnote-2).

The Commission never went so far, as to suspect a lack of independence of mind in these cases. So there was no thought about an interdiction of persons representing a controlling shareholder to become member of the management body of the subsidiary. There only was a recommendation to have a sufficient number of independent members as well.

Nevertheless, already the Commission Recommendation was rather strict in that respect. In some Member States formal independence is understood only as independence from executive directors and the company itself.

The background of these understandings is that there are two conditions for good supervision. A person supposed to serve as supervisor must be fearless and motivated. A representative of a shareholder fulfils these conditions in the best way. He has no reason at all to feel afraid or timid towards the executive directors. In fact he gives them their mandate which puts him in the natural position to exercise control. A representative of a shareholder moreover will always be highly motivated to have effective supervision. It is part of his job as an officer of the shareholder to make sure that the enterprise works well because in the long run that is the best way to create shareholder value.

Moreover, a controlling shareholder must have the possibility to exercise his influence through the supervisory board. Otherwise the necessity to prepare consolidated accounts, when an enterprise has the right to elect the majority of supervisory board members (see Art 22 (1) b Directive 2013/34/EU), would not be appropriate. Therefore, without representatives of a shareholder as supervisory board members an institution cannot be managed or controlled in an effective manner.

This is why for example the Austrian Working Group for Corporate Governance decided to define formal independence focused on the relationship to the executive directors and to the company itself whereas a relationship to a controlling shareholder is not even mentioned[[3]](#footnote-3).

Following this understanding the relationship towards one shareholder may cause problems for the independence of mind in specific cases, where there is an individual conflict of interests that has to be mitigated appropriately, but not generally for formal independence.

For cooperative networks the situation is similar to a group structure: In an IPS according to Art 113 CRR it is an organizational necessity of corporate governance that the credit institutions are represented in the supervisory board of the central credit institution. A Guideline considering all the representatives of local or regional cooperatives in the supervisory board of the central credit institution as not independent (because of a substantial amount of shares held) would jeopardize the foundations of cooperation in these networks. It has also to be taken into account that these mandates are privileged when the maximum number of mandates is calculated.

The cooling-off rules in the Austrian legal framework refer mainly to previous mandates as members of the management body in the management function in the institution itself (and not in group entities). We therefore propose removing the reference to members being previously employed in positions at the highest hierarchical level (which is in our understanding the senior management) and to group entities in para. 124b.

With regards to lit. d (material supplier or customer) we would like to point to the fact, that credit institutions with a material market share in their market consequently have business relationships with significant companies in their catchment area. By the restraint in lit. d it will be almost impossible to have more diversity on the supervisory board. Therefore, a limit with regards to the turn-over (turn-over with the bank concerned in relation to the entire turn-over of the company, i.e. up to 15%) seems to be sensible.

For these reasons we suggest the following wording:

*“123. In order to facilitate constructive challenge and discussion, a CRD-institution’s management body in its supervisory function should include a sufficient number of fully independent members* ***(at least two, whereby representatives of the employees´council should be considered as independent in any case)******~~that do not have a mandate as a member of the management body in its management function within the scope of prudential consolidation, are not employed by any entity within the scope of consolidation~~*** *and are not under any* ***~~other~~*** *undue influence or conflict of interest, internal or external, political or economic that would impede their objective judgment, including as a result of close family relationships to other members of the management body.”*

*“124. In the following situations, a member of a CRD-institution’s management body in its supervisory function should as a general principle not be considered independent:*

*“a. the member is a* ***~~substantial~~ controlling*** *shareholder of the CRD-institution, has a material financial connection with the CRD-institution, is an officer of, or is otherwise associated with a substantial shareholder of the CRD-institution. For this purpose shares received as part of remuneration should not be taken into account;”*

*b. the member* ***~~has previously been employed in a position at the highest hierarchical level, being only directly accountable to the management body, or~~*** *has been a member of the management body in its management function of the CRD-institution* ***~~or another group entity~~****, and there has not been a period of at least* ***two ~~three~~*** *years, between ceasing such employment and serving on the management body;*

*d. the member is or has been, within the last year, a material supplier or customer of the CRD-institution or another group entity or had another material business relationship* ***(more than 15% of its turnover result from this business relationship)****, or is an officer of or is otherwise associated diretly or indirectly with a material supplier, customer or entity that has a material business relationship;*

*e. the member receives in addition to remuneration for his or her role significant fees or other benefits from the CRD-institution* ***or the member is an employee of the company or an associated company, except when the non-executive or supervisory director does not belong to senior management and has been elected to the (supervisory) board in the context of a system of workers’ representation recognised by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment;****”*

While we understand that a close family relationship of a member or candidate member to another member of the management body of the CRD-institution or another group entity may affect the independence of the respective member or candidate, we are of the opinion that including family relationships to the persons referred to under para 124 lit a to f into the same category is exaggerated. We therefore propose removing the above mentioned reference from the text of the Draft Guidelines.

*g. the member is a close family member of a member of the management body in the management function of the CRD-institution or another group entity* ***~~or a person referred to under points (a) to (f).~~***

Besides similar to the assessment of the independence of mind the institution should be given the possibility to prove the independence of a member and/or take mitigating measures to resolve conflicts of interests. Therefore, we propose the following new paragraph:

***“h. where the member is not considered independent, the institutions can prove the independence of a member and/or decide on measures to mitigate possible conflicts of interests so that the member is independent afterwards. For example, the member should abstain from voting on any matter where a conflict of interest exists. This process and decisions should be documented.”***

**Formal independence – Cooling off period (para 124b)**

According to para 124 point b) a period of at least three years must elapse between the termination of the employment in the management body in its management function of the CRD-institution or another group entity and the beginning of the activity as a member of the management body in its supervisory function. Due to this cooling-off period the precious experience and profound expertise of the former member of the management body gets lost for the institute for a long time. Therefore, a cooling-off period of only two years would be more balanced and appropriate. Furthermore, we do not understand why a cooling-off period should be generally needed for functions in other group entities.

***Q 11: Are the guidelines within Title VI regarding the assessment of suitability by institutions appropriate and sufficiently clear?***

We consider the requirement of providing shareholders with full access to information about members of the management body as defined in paragraph 128 as too excessive. This requirement should be limited to very restricted situations and to a restricted extent.

**Para. 141 (matrix in Annex I)**

The matrix proposed in Annex I is in our view designed on a granularity level which is definitely overshooting for smaller institutions (regardless of whether they stand alone or are part of a banking group). Thus, it is our understanding that for these institutions the collective suitability needs to be assessed in a way that is proportionate with the risk profile, business model and complexity of the respective institution. We therefore further propose to specify that for small institutions (for example as defined in the revised CRR II project: “institutions the value of the assets of which is on average equal to or less than EUR 1.5 billion over the four-year period immediately preceding the current annual disclosure period”) the suitability matrix should not be applicable at all. Therefore, we propose the following wording:

*141. Institutions should perform an assessment of the collective suitability of the management body using one of the following:*

*a. the suitability matrix included in Annex I. Institutions may adapt this matrix taking into account the criteria described in Section 4 [proportionality];* ***for small institutions\* (regardless of whether they stand alone or are part of a banking group) the suitability matrix is not applicable.***

*b. their own appropriate methodology in line with the criteria set out in these guidelines* ***(including the proportionality requirements under Section 4)*** *and required by competent authorities*

*\*reference is made to small institutions as defined under Art. 430a para.4 CRR (as proposed in the CRR II under revision).*

***Q12: Are the guidelines with regard to the timing (ex-ante) of the competent authority’s assessment process appropriate and sufficiently clear?***

***Q13: Which other costs or impediments and benefits would be caused by an ex-ante assessment by the competent authority?***

***Q14: Which other costs or impediments and benefits would be caused by an ex-post assessment by the competent authority?***

The guidelines stipulate an ex-ante assessment of the competent authorities for members of the management body. It is normal that prior to an appointment an internal assessment of the candidates takes place. So the internal process will always be an ex ante process. The opposite is true for the supervisory assessment made by the competent authority.

The administrative burden both for the credit institution and for the competent authorities is heavily increased by the proposed requirement of an ex-ante supervisory assessment of each appointment or reappointment of a member of the management body. An ex-ante assessment also leads to legal uncertainty. Even more as the timeframe for an assessment by the competent authorities can take up to 6 months. We cannot see what the value added by that administrative burden should be.

It must be taken into consideration by EBA that the internal assessments by institutions also require a sufficient preparation time. From this perspective it is absolutely impracticable and inefficient to have time periods of four (possibly six) months before the appointment of candidates by the management body in its supervisory function. In addition, it should be considered that in case of candidates for the management body in its supervisory function the final step for their appointment according to the Austrian Stock Corporation Act is their election by the Shareholders` Meeting. Such long assessment periods could especially cause serious problems for listed companies as the shareholders´ meetings for these companies are extremely expensive and take several months to prepare. For this reason, listed companies normally have just one shareholders´ meeting per year, also under the application of the current ex post-assessment regime. The preparation time for a shareholders´ meeting with the agenda item “Election of Supervisory Board members” will amount to at least 9 months taking into account the proposed ex-ante assessment process of up to six months, keeping in mind that after the positive assessment of the supervisory authority also a decision by the management body in its supervisory function has to be taken and finally considering that the convocation of the Shareholders’ Meeting has to be published one month prior to the meeting. In case that a member of the management body in its supervisory function resigns from his/her function (for whatever reason) e.g. at the beginning of the year the aforementioned duration of the assessment process would make it impossible to appoint a new member in the ordinary Shareholders’ Meeting of the same year (which normally takes place between April and June of the respective year).

All the above mentioned legally binding steps result overall in an extremely tight internal preparation schedule for appointments which would become even more complex in case that the ex-ante assessment and the extremely long assessment period by the competent authorities as proposed by the Fit & Proper Draft Guidelines comes into force.

Furthermore, it should be considered that in case that appointed members of the management body in its management function cease to be members (resignation or death) it is absolutely necessary and of major significance (in order to safeguard the institution´s ability to operate effectively) to have a replacement as soon as possible which is impossible if the new member has to go through the entire assessment procedures (internal and by the competent authorities) within such a tight timeframe as proposed by the Fit & Proper Draft Guidelines.

We therefore propose to reduce the assessment period by competent authorities as indicated in the text proposal below.

In the past the real problem with some members of management bodies has not been a deficit in formal qualification but a deficit of character. This tends to show up later. By no means it will be possible to make an efficient supervisory ex ante assessment of character. As long as somebody has not misbehaved we have to assume, that he or she has a character sufficiently good to become member of the management body of a bank.

Accepting that and taking into account that there are member states where the competent authorities have to supervise hundreds of small and smallest banks each of which having its own management body we should not try to make the procedures of the supervisory assessment too complicated. It would be better regulation to abstain from the fruitless effort to control every appointment or reappointment in advance. Also the human resources of the competent authorities could be used much more efficiently when the competent authorities just get the data ex post and have to interfere only where they estimate it is necessary.

Furthermore, Article 91 (4) CRD IV does not stipulate any ex ante assessment powers of the competent authorities as it is for example provided in Article 8 CRD IV with regards to obtaining the required authorization from the supervisory authority before institutions can commence their activities.

At least a proportionality approach is needed in this respect. In this context the ECB considers only institutions with a balance sheet above € 5 billion as significant[[4]](#footnote-4). Moreover, also with significant institutions reappointments should not require an ex-ante assessment by the competent authority, as there has nothing changed in the overwhelming majority of cases.

Moreover, the assessment of suitability - in case EBA sticks to the ex-ante assessment - should not in any case exceed three months.

Taking this into account we suggest at least the following revised wording:

*“161.* ***For significant institutions with a balance sheet above EUR 5 billion ~~T~~t****he procedures should ensure that all individuals newly appointed* ***~~or re-appointed~~*** *for such positions and, where applicable, the management body as a collective body, are assessed by the competent authority in order to determine their suitability before their appointment.”* ***For non-significant institutions and i~~I~~****n duly justified cases,* ***such as the existence of legally binding corporate law provisions****, the assessment of suitability by competent authorities may be performed after the appointment.”*

*166. Competent authorities should set out a maximum time period for their assessment of suitability which should not* ***exceed******~~be less than~~*** *3 months* ***~~and not exceed four months~~*** *from the point of time the assessment application or notification is provided by the institution or, where the competent authority establishes that the documentation and information is not complete, from the moment of receipt of the complete documentation or information.* ***~~The period may be suspended from the point in time when the competent authority requests additional documentation and information that is necessary to complete the assessment, until the receipt of that documentation and information. The decision of the competent authority should be taken within the maximum period, or if the period has been suspended within a maximum period of six month after the starting of that period.~~*** *In accordance with Article 15 of Directive 2013/36/EU, where the assessment of suitability is performed in the context of an authorisation to take up the business, the maximum period must not exceed six months after receipt of the application or, where the application is incomplete, six months after receipt of the complete information required for the decision. In these cases, a decision to grant or refuse authorisation must, in any event, be taken within 12 months of the receipt of the application.*

***Q15: Are the guidelines within Title VII regarding the suitability assessment by competent authorities appropriate and sufficiently clear?***

We believe that it is necessary to inform institutions anyway of any results of the suitability assessment. Such information should not be limited to cases where a negative decision was taken (see paragraph 174). Otherwise in case the authority has taken a positive decision within for example six weeks the bank would have to wait for another six weeks in order to be on the safe side.

***Q16: Is the template for a matrix to assess the collective competence of members of the management body appropriate and sufficiently clear?***

Please see our remarks to question 11.

The matrix proposed by the Fit & Proper Draft Guidelines is designed on a granularity level which is definitely overshooting for smaller institutions (regardless of whether they stand alone or are part of a banking group). It is our understanding that for these institutions the collective suitability needs to be applied in a way that is proportionate with the risk profile, business model and complexity of the respective institution.

***Q17: Are the descriptions of skills appropriate and sufficiently clear?***

The defined skills are not always consistent (persuasive versus teamwork) and cannot be assessed easily and objectively. We believe that such requirements could significantly discourage potential candidates from applying for such positions and therefore the catalogue should be removed.

***Q18: Are the documentation requirements for initial appointments appropriate and sufficiently clear?***

n.a.

***Q19: What level of resource (financial and other) would be required to implement and comply with the Guidelines (IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? If possible please specify the respective costs/resources separately for the assessment of suitability and related policies and procedures, the implementation of a diversity policy and the guidelines regarding induction and training. When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.***

n.a.

**Cost-benefit analysis (page 78 subsequent)**

Given the increased requirements particularly related to only manage the process documentation and coordination it can be assumed that at least one additional full-time equivalent (FTE) will be required for a significant, directly by the ECB supervised institution.

We ask you to give our remarks due consideration.

Yours faithfully,

Dr. Franz Rudorfer

Managing Director

Division Bank and Insurance

1. Cf. *BCBS*, Corporate governance principles for banks (2015), page 8. [↑](#footnote-ref-1)
2. Cf. *FSB*, Thematic review on risk governance (2013), page 10. [↑](#footnote-ref-2)
3. See Annex 1 of the Austrian Codex “***Guidelines for Independence***

   A member of the supervisory board shall be deemed as independent if said member does not have any business or personal relations with the company or its management board that constitute a material conflict of interests and is therefore suited to influence the behaviour of the member.

   The supervisory board shall also follow the guidelines below when defining the criteria for the assessment of the independence of a member of the supervisory board:

   • The supervisory board member shall not have served as member of the management board or as a management-level staff of the company or one of its subsidiaries in the past five years.

   • The supervisory board member shall not maintain or have maintained in the past year any business relations with the company or one of its subsidiaries to an extent of significance for the member of the supervisory board. This shall also apply to relationships with companies in which a member of the supervisory board has a considerable economic interest, but not for exercising functions in the bodies of the group. The approval of individual transactions by the supervisory board pursuant to L-Rule 48 does not automatically mean the person is qualified as not independent.

   • The supervisory board member shall not have acted as auditor of the company or have owned a share in the auditing company or have worked there as an employee in the past three years.

   • The supervisory board member shall not be a member of the management board of another company in which a member of the management board of the company is a supervisory board member.

   • A supervisory board member may not remain on the supervisory board for more than 15 years. This shall not apply to supervisory board members who are shareholders with a direct investment in the company or who represent the interests of such a shareholder.

   • The supervisory board member shall not be a closely related (direct offspring, spouses, life partners, parents, uncles, aunts, sisters, nieces, nephews) of a member of the management board or of persons having one of the aforementioned relations.; [↑](#footnote-ref-3)
4. Cf. *ECB*, Guide on options and discretions available in Union law (2016), page 35. [↑](#footnote-ref-4)