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EBF response to Consultation Paper on Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU

General comments:

- No assessment of key function holders should be provided by Guidelines: The inclusion of this group is beyond the mandate provided by CRD IV to EBA (see Article 91.12 of CRD IV). Please refer to point 10 ("Legal basis") as regards the scope of EBA's mandate pursuant to the CRD IV. Article 74 of the CRD IV does not grant any power to EBA to legislate when publishing Guidelines, which would be the case if Guidelines extend the scope of the fit and proper test to other individuals than the members of the management body.

- We accept that the entities should follow the principles established in Directive 2013/36/EU of the European Parliament and of the Council, of 26 June 2013, ("CRD IV") and be guided by some soft criteria. However, the excessive regulation proposed by the draft Guidelines would certainly hinder the entity's capability (and right) to appoint the board members and key-function holders that it deems appropriate according to its current or future business, activities or prospects.

  In this sense, we understand that the new Guidelines constitute a substantial change in the framework of the proceedings and analysis of the suitability of the holders of such positions. Although the general suitability principles set out in CRD IV remain unaltered (knowledge, skills, experience, sufficient time commitment, reputation, independence of mind, collective suitability, etc.) the Guidelines have gone too far in the detail of all of such principles.

  For example, in accordance with the Guidelines, the entity would have to quantify and declare the expected time commitment per director (and even considering factors included in the Guidelines), list and explain all commercial and non-commercial activities of a proposed director, consider all the skills set forth in Annex II of the Guidelines (amongst others, leadership, stress resistance or negotiating or persuasive skills), or complete a matrix for the collective assessment crossing each director with each area of the entity's business, strategy or risk.

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- Moreover, the Guidelines contain quite a few requirements for documentation and journals, see e.g. paragraphs 40, 44, 80, 132, 138, 139, 145,146 and 149. We believe that such specific requirements for documentation should be introduced in level 1 or 2 regulation, rather than in level 3 guidelines.

- The draft of the new Guidelines also provides a clear distinction between the management and the supervisory functions of the board of directors, and requires, for the collective suitability assessment, that exhaustive detail is provided of the relationship of the knowledge, skills and experience of each director with the activities, strategies and risks of the entity. This distinction and assessment are simply not possible in unitary and hybrid boards, and would breach the regulatory framework for the board of directors in unitary and hybrid board jurisdictions.

  In the unitary and hybrid board structures, directors imperatively perform, and are accountable for, all the functions assigned to the board of directors. Classifying the roles of directors within the board, as well as crossing their competences with relation to the activities of the entity, would imply that certain functions of the board are only or mainly performed by some of the directors, and that only such directors would incur in liability in relation to such functions.

  The informational model and the induction and training are offered to directors to enable each one of them to duly participate in the activities of the board and in the adoption of its collegiate decisions. Consequently, the draft Guidelines should be substantially adapted to unitary and hybrid board structures, amending the distinction between management and supervisory functions, as well as the analysis of the relationship of each director with the business of the entity.

- Re-assessment should not be triggered by such a large range of events and it should be made clear it is an individual re-assessment (vs. collective assessment).

- The specific case of entities within a Group should be more taken into account and specified. Duplication of formalities and documentation required at the different levels of a Group organization should be avoided. For subjects handled by the Group, subsidiaries and regional banks should have rules allowing them to benefit from exemptions or at least lighter requirements. As a complement to proportionality principle, adaptations and flexibilities should be granted within a Group: levels of entities concerned, should be distinguished; fully owned subsidiaries should not have all the same requirements to fulfil as heads of Groups or listed entities. This should be specified in the guidelines.

- The independence criteria of the members of the management body should not be introduced in these guidelines and be left to national law or national soft law. Indeed, CRD IV does not require the members of the committees to be independent. Thus, the draft guidelines go beyond the directive on this matter.

It is adequate to align definitions in this Guidelines with definitions in the EBA Guidelines on internal governance.

Furthermore, it is not clear how the ECB draft guide relates to the EBA/ESMA Guidelines on the assessment of the suitability of members of the management body. One set of principles and one uniform assessment process should be established.

Answers to EBA questions and specific comments:

Subject matter, scope and definitions

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?

The definition of the corporate bodies needs to be clarified. Please see our answer to Question 2 of the draft EBA Guidelines on internal governance.

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

Answer:

In the light of the numerous substantial innovations brought by the Guidelines and the fact that each institution will have to provide procedures, policies and ad hoc registers to implement the recommendations of the Guidelines, it seems necessary to state that the Guidelines will apply to appointments made after their entry into force, in order to allow each institution to implement the new set of rules as gradually as is necessary.

Moreover, we believe that:

- "key function holders" concept should not be used. Pursuant to the definition provided in these Guidelines (but also in the 2012 Guidelines) reference to key function holders specifically excludes management body.
  But it is important to bear in mind that CRD IV remains the legal framework of EBA guidelines. Article 91.12 of CRD IV defines the EBA mandate with respect to issuance of guidelines for fit and proper. Per this above mentioned article, only management body is to be assessed (not any other population, i.e. not the key function holders nor the CFO and/or heads of internal control). It is therefore not possible in these Guidelines to provide for any other assessments than those provided in Article 91 of CRD IV, i.e. other than assessment of the management body (in both management and supervisory functions). Please refer to point 10 ("Legal basis") as regards the scope of EBA's mandate pursuant to the CRD IV. Article 74 of the CRD IV does not grant any power to EBA to legislate when publishing Guidelines, which would be the case if Guidelines extend the scope of the fit and proper test to other individuals than the members of the management body.
- In case the supervisory authorities deem it necessary to develop Guidelines for the assessment of suitability of key function holders based on national legislation this topic should be open for consultation on a national level.
- Distinction between the application of the CRD IV rules "on an individual basis" and their application "on a consolidated basis" should be clarified in the Guidelines (please refer to our comment in the Internal Governance Consultation Paper).
- The specific case of entities within a Group should be more taken into account and specified. Duplication of formalities and documentation required at the different levels of a Group organization must be avoided. For subjects handled by the Group, subsidiaries should have rules allowing them to benefit from exemptions or reduced obligations. As a complement to proportionality principle, adaptations and flexibilities should be granted within a Group: different levels of entities concerned should be distinguished; fully owned subsidiaries should not have all the same requirements to fulfil as heads of Groups or listed entities. This should be specified in the guidelines.

Specific comments:

Paragraph 10: we suggest the following text "*CRD-institutions, as defined in these Guidelines, should comply with these Guidelines on an individual, sub-consolidated and*

consolidated basis, ~~including their subsidiaries not subject to Directive 2013/36/EU~~, in accordance with Article 109 of that Directive". We understand that Paragraph 10 overextends Level I. The application on a consolidated basis cannot result in the same level of constraints than the application on an individual basis for subsidiaries already subject to CRD IV.

The Guidelines seem to apply to all subsidiaries (even to some extend to branches – see point 6 of the "Background" page 6 – which is not acceptable due also to the fact branches are not legal entities) of banks, including those that are not subject to CRDIV. We feel that this is not consistent with the proportionality principle. It could also potentially lead to conflicts with (foreign) legislation relating to these specific subsidiaries. Significant banks have many legal entities for various reasons. Some of them regard entities with banking activities and others are of a different nature. We feel that a proportionate approach would be to limit the scope of the GL to subsidiaries in the EU which are under direct supervision.

Title I – Scope of suitability assessments and proportionality

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

Answer:
We understand that institutions shall be free to determine who shall have the responsibility. Additionally, the allocation of responsibility may vary between Member States. The intention of these comments shall not be to place even more burdens upon the institutions that those already placed now in the Guidelines.

As mentioned earlier, CRD IV does not refer to the concept of "key function holders" , it is unclear how it relates to 'senior management' as defined in the CRD IV and particularly, Article 91.12 of CRD IV does not provide for any assessment (nor any re-assessment) of this population. We therefore recommend removing all the references throughout the Guidelines regarding the suitability assessments of key function holders in order to avoid any inconsistency with the "Legal basis" of these Guidelines: please refer to point 10 ("Legal basis") page 7 as regards the scope of EBAs mandate pursuant to the Directive which is referred to in the title of these Guidelines.

In case the supervisory authorities deem it necessary to develop Guidelines for the assessment of suitability of key function holders based on national legislation this topic should be open for consultation on a national level.

Specific comments: Paragraph 21: Even if time commitment does account for both directorships for commercial purposes and directorships for non-commercial purposes, in a case of a re-assessment, the Guidelines should only refer to directorships for commercial purposes in order to avoid an unnecessary heavy monitoring by the Institution and the competent authority.

As an example, the competent authority might be overloaded by the files/letter sent each time any of the board member takes an additional directorship for patrimonial purposes.

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.

Answer:
We agree with the general approach to the proportionality principle foreseen in the Guidelines, once different institutions require different governance arrangements.

However, in practice, it is absolutely not possible to determine what is a relevant qualitative information regarding the complexity of the activities. Therefore, we consider that it is not desirable to include any reference to qualitative information in the Guidelines.

As mentioned in the key points, the specific case of entities within a Group should be more taken into account and specified (proportionality principle). Duplication of formalities and documentation required at the different levels of a Group organization must be avoided. For subjects handled by the Group, subsidiaries should have rules allowing them to benefit from exemptions or reduced obligations.

In addition, as a complement to proportionality principle, rules and obligations should be more adapted and flexible: different levels of entities concerned should be distinguished; fully owned subsidiaries should not have all the same requirements to fulfill, as heads of Groups or listed entities. **This should be specified in the guidelines**. For fully owned subsidiaries of a Group for instance, a proposition could be made to consider as independent, a board member that is a parent company employee, if he does not report to the Business Line of the subsidiary in which he is appointed.

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.

Answer:
The specific case of entities within a Group should be more taken into account and specified. Duplication of formalities and documentation required at the different levels of a Group organization should be avoided. For subjects handled by the Group, subsidiaries and regional banks should have rules allowing them to benefit from exemptions or at least lighter requirements. As a complement to proportionality principle, adaptations and flexibilities should be granted within a Group: levels of entities concerned, should be distinguished; fully owned subsidiaries should not have all the same requirements to fulfil as heads of Groups or listed entities. This should be specified in the guidelines.

Specific comments:

Section 1: The suitability assessment of individual members of the management body

Paragraph 16.b) and i): *"when appointing new members of the management body, including as a result of a direct or indirect acquisition or increase of a qualifying holding in*

an institution"; It is necessary to clarify that the assessment will not affect other members but the new one and the collective as a whole.

Paragraph 21 (see also paragraphs 39.d and 52): Even if time commitment does account for both directorships for commercial purposes and directorships for non-commercial purposes, in a case of a re-assessment Guidelines should only refer to directorships for commercial purposes in order to avoid an unnecessary heavy monitoring.

In addition to that, and as a general comment, a "lighter" version of re-assessment should be provided in some triggering events such as:

- Renewals of members of the management body.
- Changes of functions in the management body in its management function (in case of dual board systems or hybrid board systems),
- Additional directorships.

Section 3: The assessment of the suitability of key function holders by CRD-institutions

Please refer to our comment suggesting the removal of key function holders.
Definition of key function holders provided in both 2012 and these Guidelines specifically excludes management body.
Pursuant to Article 91.12 of CRD IV, which defines the mandate of EBA as regards fit and proper, management body is the only population to be assessed (not any other population, i.e. not the key function holders nor the CFO and/or heads of internal control).
It is therefore not possible in these Guidelines to provide for any other assessments than those provided in Article 91 of CRD IV, i.e. other than assessment of the management body (in the case of dual board structures, in both management and supervisory functions).

Title II – Notions of suitability listed in Article 91(12) of Directive 2013/36/EU

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

Answer:
The Consultation Paper (CP) does not ask any question regarding "sufficient time commitment". We do however find that point j in paragraph 39 should be omitted as the use of benchmarks quickly can turn the benchmark number into a formal requirement. What is considered sufficient time will depend very much on the individual and the number of directors within the board of the supervised entity.

We would appreciate clarification that "the same group" may also be a group of the real economy (and not only groups in the financial sector). Otherwise it would be very difficult, or even impossible to find suitable candidates.

Finally, regarding the calculation of the number of directorships held within the same group as a single directorship, the EBA & ESMA take a restrictive approach to counting. An interpretation more consistent with this text would be to count directorships in qualifying

holdings and executive and non-executive directorships held within the same group as a single directorship. EBA has no mandate to go beyond CRD IV provisions as to the number of directorships..

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

Answer:

With regard to reputation as referred to in para. 9, there are issues concerning both substantive and procedural regulation (par. 135).

On the substantive side, the Guidelines first of all recognise that harmonisation cannot be maximised because of differences in national criminal and administrative law with regard, for example, to the type of offence (criminal or administrative) that affects the possession of the said requirement, the penalty imposed and so on, and that the envisaged regulation applies "without prejudice to the presumption of innocence" (para. 70).

However, despite these agreeable observations, the Guidelines do not leave any room for an application that effectively takes account of the highlighted peculiarities, thereby giving rise to a basic contradiction, all the more delicate because it deals with human rights, which are legally enshrined in the Constitutions of many systems (e.g. in Italy, art. 27 of the Constitution establishes the presumption of innocence, whereby "the accused is not considered guilty until the final sentence ").

Furthermore, in national legal systems where criminal proceedings are obligatory (such as Italy), the launch of the investigation into the suspect is an automatic consequence; in some alleged offences the proceedings go ahead regardless of the actual involvement of the suspect in the disputed facts. In such cases, therefore, a person's reputation might be affected merely as a result of an automatism.

The Guidelines in question, requiring the entity to appraise a very numerous series of insufficiently defined elements, introduce a greater degree of discretion into the reputation assessment of the subject; this, in view of the entity's liability for the presence or absence of the said requirement, can trigger a somewhat delicate debate with the subject.
There is thus a need to more accurately identify the cases relevant to reputation assessment, attributing a greater degree of certainty to the various impacting factors (in particular, reference to investigations in progress should be excluded)

From the procedural point of view, there is too great an imbalance in the time granted respectively to the entity (3 weeks, para. 43) and the Authority (minimum 3 months, maximum 4 months, para. 166) for the performance of suitability assessment. Given the complexity of the assessment process, and the fact that many systems do not allow an ex ante assessment (before the appointment) because of regulatory constraints (election at shareholders' meeting, list vote procedure), it is requested that the term for the entity be extended to 6 weeks and that for the Authority reduced to 6 weeks, with a possible one month extension in the event of further requests for documentation (this extension period currently stands at 6 months).

The entire process of determining the suitability of the director (and the board as a whole) could thus be contained within a reasonable period of time (three and a half months), avoiding ongoing uncertainty about the outcome of the assessment (this uncertainty can

currently last up to 10 months), it being understood that it is certainly in the entity's interest to complete the assessment as soon as possible.

Clarification is also needed regarding para. 166, where there is a lack of definition between "completeness of information" provided and "completeness of documentation" supporting the assessment.

Lastly, as a general comment, the Guidelines advocate for a new standard of suitability assessment of directors and key function holders. In this sense, such persons not only need to be suitable to be appointed as director or key function holder, but also to perform their duties depending on the particular position or role that would be performed within the management body, or the entity. This change of principle, which is not demanded by CRD IV nor by national regulation, poses an extraordinary burden over de entities, and is against the principles of diversity required, the rotation of positions within the board, or the learning curve of directors.

Specific comments:

Section 5: Sufficient time commitment of a member of the management body

This Section includes obligations for the entities that would be very difficult to comply and which usefulness is doubtful, considering the commitment and the responsibility of the members of the management body, such as, for example, the obligation to determine a "buffer" of time for periods of increased activity (paragraph 38) or to monitor the time committed to prepare meetings (paragraph 42). Paragraph 44 even requires the entity to keep records of absolutely all activities exercised by directors, professional and personal, which need to be updated. The Guidelines, instead of requiring the entities to keep duly updated records, should include a reference that all of such (non-recorded) aspects may be considered for the initial and ongoing assessment of the corresponding person to be made by the entity.

Paragraph 38: The buffer of time should be clarified as being a buffer for all directorships held by the individual and not for each directorship: this should be a "buffer envelop". In addition to the above and with respect to the buffer of time only, directorships held for non-commercial purposes should not be included in this "buffer envelop"

Paragraph 39: we believe that this paragraph is not clear enough and goes too far in sub-paragraphs d, e, g and i. It is not clear, what "relevant activities" are or duties that are "necessary to take into account when carrying out the assessment of sufficient time commitment". Should spare time activities really fall under the scope of this paragraph? Moreover, it is not clear to us what kind of meetings are meant under sub-paragraph d.

In our view the sufficient time commitment is a very individual aspect (depending on the skills of the respective person), lays in the primary responsibility of the respective candidate and an institution may only assess the plausibility of the information provided by the candidate.

In addition, pure private mandates or honorary appointments should not be considered in the assessment.

To estimate any necessary meetings to be held, in particular, with competent authorities or other internal or external stakeholders outside the management body´s formal meeting

schedule is impossible and not foreseeable. Intuitions could not monitor whether the member of the management body commit sufficient time for the preparation of meetings.

Section 7: Adequate knowledge, skills and experience

In line with the aforementioned paragraphs, requiring different skills depending on the management or supervisory functions that are exercised by a relevant member of the management body is against the nature of unitary board systems.

On a separate note, the references to the fields detailed in paragraph 60 of the Guidelines should be deleted, as it this is not consistent with the diversity of experience and knowledge indicated in other sections of the Guidelines.

Moreover, in some local regulations, boards of directors of companies which employ a certain number of permanent employees have also to comprise board members that are representatives of employees. These board members are appointed by employees and not selected by the nomination committee. It is therefore not possible to expect the same level of experience from board members that are representatives of employees as other board members. Therefore it should be clearly indicated that these board members are not assessed the same way as other board members – please refer to Article 91.13 of CRD IV with this respect in order to clarify this point and to point 8 page 7 of the "Background" part which clearly mentions the fact that "the Guidelines do not aim to interfere with other legislation as […] labour law […]".

Paragraph 57*:* Annex II shall provide examples of skills to be considered in a suitability assessment, but shall not be a "non-exhaustive list", which would mean that all of the skills of Annex II shall be considered, plus those that the entity may consider appropriate. We understand that each entity should consider and weigh skills at its discretion, and we accept that a list of skills is included in the Guidelines, but only as non-binding recommendation.

Paragraph 62: For dual board structures, in the case of a supervisory board whose seats are filled based on parity (i.e. half shareholder representatives, half employee representatives) the employee representatives are selected taking into account their experience within the institution. Although the term "administrative position" seems to be quite far, we see a risk that this is not in line with paragraph 62.

Section 8: Collective suitability criteria

Paragraph 66: The entity discretionally appoints a management body, according to that factors that it freely deems convenient, which should not be limited to, or include, all of those referred to in section 66. Therefore, the reference "including the following aspects", should be substituted by "such as the following aspects".

Section 9: Reputation, honesty and integrity

Paragraph 73: institutions can only consider factors to which they can receive information - this is not the case regarding the factors laid down in paragraph 73 sub-paragraphs a. and c. Consequently, we request that those paragraphs are deleted.

Section 10: Independence of mind

Paragraph 77 and paragraph 81*:* Please see our comments to point 5 of Annex III. We believe that the definition of conflicts of interest, their treatment within the entity and their disclosure (certainly not to relevant stakeholders such as shareholders, which in most of the cases will not and shall not receive this information) shall be regulated by the corresponding national and EU regulation. Paragraph 77 establishes a series of presumptions that are excessively broad and do not necessarily influence the directors' independence, for example, related to the relationship held with stakeholders or personal relationships with other directors. The correct treatment of the conflicts of interest situations and independence of mind should simply be the one indicated in paragraph 80, which is clear and appropriate with relation to their identification, assessment and mitigating measures of the entity. We therefore suggest these paragraphs are deleted.

Title III – Human and financial resources for training of members of the management body

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?

Regarding training programmes, considering that paragraph 90 of the Guidelines requires that they shall be kept updated considering relevant market or regulatory changes, the Guidelines should not make references to training "policies" or to "proceedings" to identify knowledge needs nor processes to evaluate the training received. As these matters are appropriate and obvious in order to keep training programmes and courses updated, references to policies or procedures approved by the management body should be deleted, needing to be replaced by a reference to the issues of substance, and leaving the entities freedom to organize these matters the way they seem more convenient.

Specific comments:

Section 11: Setting objectives of induction and training

Paragraph 83: the period of one month for the newly appointed members of the management body to receive induction is too short. One month for the newly appointed members to clearly understand the institution's structure, business model, risk profile and governance arrangements is not sufficient. We recommend a longer period of time.

Paragraph 84: It is absolutely not possible to identify the gap with respect to the appropriate induction before the position is taken up because prior to the appointment of the board member by the General Meeting, the board member is not appointed (and it is not clear the board member is identified much in advance of such General Meeting). Therefore, « before the position is effectively taken up » should be deleted from this paragraph.

Paragraph 86: as mentioned above, any reference to benchmarks should be avoided as the determination of the relevant pairs is subjective and difficult – see above for further details.

Section 12: Induction and training policy

The Guidelines provide that the policies related to induction and training, diversity and suitability must be approved and steered by the management body which must, amongst others, oversee their implementation, define objectives and workout activities, and in general, monitor their progress regularly.

We understand and support the accountability of the management body for the policies related to the aforementioned matters. The level of involvement of the management body should however be coherent with the internal governance framework and the nature of the role and responsibilities of the management body of a credit institution. In this regard, it is worth mentioning that, as defined by CRD IV, "the Management Body of an institution is the body empowered to set the institution's strategy, objectives and overall direction, and which oversee and monitor management decision-making".

In accordance with applicable regulation and best practices, the management body of an institution is the corporate body in charge of the supervision and control of the activities of such entity, and will approve its strategic and most relevant decisions and policies. The Senior Management of the entity is in charge of the day-to-day implementation of such strategies and policies, and will define and steer the processes and milestones affecting them. These Guidelines should recognize it and should not require that the management body performs functions of the Senior Management, i.e. day-to-day management.

In this regard, the specific policies related to the induction and training, diversity and suitability of directors and key function holders are part of such policies developed by the senior management of the institution. The concrete approval and steering of such policies by the management body may hinder the appropriate development of the supervisory and control functions of the management body, as it would be obliged to get directly involved in the regular execution of the processes for the development of the policies.

In line with our previous comment, it shall be noted that the entities' policies approved by the management body are substantial corporate documents intended to remain unaltered for a long time. As the induction and training policies shall be dynamic and in constant review in order to be updated to the entity's business and activities and to the specific positions and persons to be covered and appointed, respectively, the policies should qualify as programs or manuals, and shall be approved by the management team and not by the management body. Such documents will indeed provide the objectives for each type of training, the responsibilities and the resources allocated to them, and will be available to the supervisor. Additionally, the general principles of such induction and training are stipulated in the board's regulations, approved by the board itself. Consequently, we suggest adapting this Section 12 in order to make reference to induction and training programs and manuals adopted by the management of the entity, instead of policies approved by the board.

Although we recognize the importance of adequate training, the obligations and procedure as set out in Section 12 are burdensome and will imply additional training and staff costs.

Title IV –Diversity within the management body

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

Answer:

We believe the Guidelines within Title IV regarding diversity are appropriate and sufficiently clear, subject to the comments below.

Specific comments:

Section 13: Diversity policy objectives

Paragraph 93: the diversity policy should at least refer to the following diversity aspects: educational and professional background, gender, ~~age~~ and, in particular for institutions that are active internationally, geographical provenance, unless the inclusion of the aspect of geographical provenance is unlawful under the laws of the Member State. The diversity policy should include for significant institutions a quantitative target for the representation of the underrepresented gender in the management body. Significant institutions should quantify the targeted participation of the underrepresented gender and specify an appropriate timeframe within which the target should be met and how it will be met.

Bearing in mind the different corporate legal systems within Europe that can be synthetized as follows:

- One tier system (ex. UK or Spain): one single collective body performs both Executive and Supervisory Functions;
- Two tier system (ex. German or France for system with supervisory board and management board): one collective body is in charge of the Executive Function and one other separate collective body is in charge of Supervisory Function;
- Hybrid system (ex. France for system with board of directors and CEO/COO): one collective body is in charge of the Supervisory Function and also of the determination of the institution's strategy, whereas the Executive Function is ensured by one or more physical persons. In such system, the CEO/COO can be allowed to be member of the board ensuring Supervisory Functions but when acting as such, they do not conduct executive missions (they act as every other board member).
    - The target should be defined for the management body collectively, but, in case of dual board structures, may be broken down into the management and supervisory function where a sufficiently large management body exists. In all other institutions, with dual board structures, in particular with a management body of less than five members, the target may be expressed in a qualitative way.
    - In hybrid system, it is not possible to have any Diversity policy in place with respect to the Management body in its management function as CEO/COO are not a "body" in itself and is comprised of 2 individuals. It is therefore crucial to have an exemption with this respect.

Paragraph 97: The diversity policy for staff corresponds to a wider scope and should not be directly focus or circumscribe to the assessment of the suitability of the management body. This paragraph should be deleted.

Title V – Suitability policy and governance arrangements

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

Answer:

Regarding paragraph 113, CRD IV does not mention that if the nomination committee is not established then the management body is responsible for the tasks provided in Article 88(2) of the CRD IV. Thus, we consider that this paragraph goes beyond Level 1 text and should be deleted.

Specific comments:

Section 14: Suitability Policy

In accordance with CRR, the entities are obliged to approve and publish an appointments policy for directors. Including now an obligation regarding a suitability policy to perform the suitability assessment, taking into consideration the already exhaustive regulation and recommendations, does not seem necessary nor useful. We believe, that any specific requirements on such a policy can only be included in the guidelines if the level 1 or 2 rules entails a specific requirement to have such a policy. Article 88 of the CRD IV does not have a specific requirement to have such a specific policy.

Paragraph 98: We agree that most institutions probably will have suitability policies in place. We do however think, that any specific requirements on such a policy can only be included in the Guidelines if the level 1 or 2 rules entails a specific requirement to have such a policy. Article 88 of the CRD IV does not have a specific requirement to have such a specific policy.

Paragraph 102: It is difficult to understand the functions that this paragraph attributes to the internal control functions for the purposes of reviewing the suitability policy. In this regard, this issue should be left to the entities to organize it in the way they seem more convenient, in accordance with their internal regulation-compliance proceedings.

Paragraph 103: We consider that sub-paragraph d. should be deleted. Policies should be generic, so it may indicate an area responsible or a similar generic approach, but not 'the person in charge'.

The Guidelines should acknowledge that some credit entities already have suitability and diversity policies in place, which have been approved in different documents and by different levels of the entity (some by the board of directors and some by the management, in line with the principles included in our two previous comments), which are clear, well documented and transparent. Such documentation has been made available to the supervisor when required, and will be amended by the corresponding body or area of the entity if substantial changes are to be made to them due to the Guidelines or to the regulation that may derive from them.

Section 15 – Suitability policy in a group context
Paragraph 106: We suggest to delete ", including those not subject to Directive 2013/36/EU" as this would otherwise be an overextension of level 1. Please also refer to the remarks made in relation to paragraph 10.

Paragraph 109: As mentioned above, this provision seems to require the setting up / application of policies on an individual basis. But as these entities are not European entities, they should definitely be treated on a consolidated basis. An application on a consolidated basis (to entities not subject to CRD IV) cannot be as extensive as an

application on an individual basis (to entities subject to CRD IV). Please also refer to the remarks made in relation to paragraph 10.

Only entities subject to CRD IV should apply CRD IV rules on an individual basis, i.e. apply all rules directly within the entity. Entities, not subject to CRD IV but which are parts of the consolidated perimeter of an entity subject to CRD IV, should only apply CRD IV rules on a consolidated basis, i.e. as if the consolidated group is an entity.

Section 17: Composition of the management body and the appointment and succession of its members:

Paragraphs 118 and 161: The Guidelines already provide for a thorough assessment of the suitability upon appointment, as well as an ongoing updated assessment, on an individual and on a collective basis. This section 118 requires another individual assessment by the institution in case of re-appointments, and section 161 poses doubts as to whether in such cases an individual and collective suitability assessment shall also be made by the competent authorities. If this were the case, we understand that the requirement is excessive, and is redundant with a duly updated ongoing assessment made by the entity (which already sets out the suitability of the director to be re-appointed when such re-appointment shall take place, or shortly before that).
Additionally, it would not make sense that due to a new suitability process for a re-appointment such position is held vacant until the supervisor finishes its suitability assessment. We hence suggest that the suitability assessment by the competent authorities is deleted.

Section 18: Independent members of a CRD-institution's management body in its supervisory function

Regarding the independency of the members of the management body required by the Guidelines, we would like to recall that the EBA has no mandate to introduce a new criteria not provided for by CRD IV. Point 18 of the Guidelines adds a new requirement to level 1 provisions which is not acceptable. CRD IV only requires the independence of mind of the members of the management body. EBA shall not go beyond such provisions.

Paragraphs 123 & 124: Concerning the "sufficient number of independent members" that "are not employed by any entity within the scope of consolidation and are not under any other undue influence or conflicts of interest…" the guideline is too restrictive. The independence criteria of members should rely on national legislation or rules.

In our view, the independence of members of the management body requirements are too binding to apply to all regulated entities of a Group, especially for non-listed entities or entities exclusively controlled by a Group. If the notion is maintained in the guidelines, only significant heads of Groups, whose shares are listed on a regulated market, should be concerned.

The notion of independence should be adapted for fully owned subsidiaries: an independent member could be a parent company employee, who does not report to the Business Line of the subsidiary in which he is appointed.

Paragraph 123: It is not clear, what a "sufficient" number of fully independent members means, especially, in case of dual board structures, in the context of supervisory boards

whose seats are filled based on parity (i.e. half shareholder representatives, half employee representatives).

The independence criteria in the GL for a supervisory board are problematic in terms of group structures. Our concern relates to the formal independence criteria. In member states, for example, it is quite common to appoint representatives from the parent company to the supervisory board of subsidiaries. When the parent company is also supervised by the NCA, it considers these supervisory board members formally independent. Naturally, these members should be independent 'in mind' and 'in appearance' at all times. The assessment thereof is included in their suitability assessment. This practice is considered 'good governance' in those member states.

The GL do not consider these members as formally independent. This feels uncomfortable, because this would potentially undermine the capacity of the management bodies on group level to supervise all of their operations and also to secure compliance with regulations and supervisory requirements on a group level. It would also give rise to significant practical issues given the number of subsidiaries Dutch banks have. Especially if it is not clarified that certain subsidiaries are excluded from the scope of the GL, as set forth above in relation to paragraph 10. We suggest to amend the GL to the effect that representatives from the parent company that are appointed to supervisory boards of subsidiaries, are considered formally independent.

Paragraph 124: The national regulation already provides a definition of independent directors, which in the case of some Member States regulation does not coincide with the one set out in paragraph 124. We believe that including in this section a definition of independent director goes far beyond the subject matter of the Guidelines. We therefore suggest deleting this paragraph, or at least subject it to any such provisions included in the national regulation.

Title VI – The assessment of suitability by institutions

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

Specific comments:

Section 19: Common requirements for the assessment of the individual and collective suitability of members of the management body

Paragraph 127 and paragraph 128: All the newly required assessment of the suitability of directors set out throughout the Guidelines cannot be disclosed to the shareholders before such directors are appointed. On the one hand, the disclosure required would have to be regulated in any case in the national regulation regarding shareholders' rights.

It must be noted that, with respect to some Member States, shareholders already have available a report of the management body for the appointment and re-appointment of independent and non-independent directors, plus a report of the nominations committee in this latter case. In such reports, the relevant directors analyse the suitability of the directors according to the regulation in light of his/her competence, experience and merits. Additionally, in the annual corporate governance reports a description is made on matters

such as the composition of the board, remuneration, training, conflicts of interest or positions held in other companies.

On the other hand, the disclosure of all the personal and professional details required for the directors could damage the directors' privacy. The reports of the nomination committee can only be shared to the competent authority to the extent the privacy data regarding the employees will not be provided, the information can only be shared to the extent possible under privacy legislation.

Section 20: The assessment of the suitability of individual members of the management body

Paragraph 136: It is unclear how the institution should assess a subjective/ inside aspect such as the independence of mind of the management body, the past behaviour in other institutions or professions. Therefore, these paragraphs, as well as the others included in Section 20, must be adapted to have the institution consider only those aspects that could reasonably be known by such institution and in an objective way. It is already doubtful wherefrom information relating to the independence of mind should come (in particular relating to past behaviour in other institutions or professions).

Also, regarding point d, requesting information to candidates regarding conflicts of interest with the entity should be limited to those matters referred to structural conflicts of interest, or those that are sufficiently relevant per se that disqualify him/her for the position (i.e. unlawful conflicts of interest that cannot be managed by the entity).

Paragraph 138: Requiring a specific evaluation methodology is excessive considering that most of the assessment criteria are subjective, and that a global assessment would be made in which the impressions derived from personal interviews are included.

Also, the following reference should be deleted "~~*including the role and responsibilities of that position within the institution*~~", as such roles and responsibilities are already regulated in the applicable laws and in the bylaws and/or board regulations.

Section 22: On-going monitoring and re-assessment of the individual and collective suitability of the members of the management body

Paragraphs 145-149: We understand that ongoing assessments of individual and collective suitability shall only be informed to the competent authority in case they have suffered substantial changes and to the extent the privacy of the members are protected. An annual or even more recurring notice to the authority is unnecessary if relevant changes have not occurred, and would impose a new burden for the notifying entity.

In addition, we understand that what the supervisor should expect to receive from the entity are the results of the collective suitability assessment made by the entity, but not the specific tool used by the entity to monitor the assessment (i.e. the suitability matrix of Annex I or their own methodology). The development of an appropriate tool should remain the sole responsibility of the entity, which would in any case be bound to comply with the criteria set out in the Guidelines and deriving regulation (i.e. not needing validation or disclosure to the supervisor). Furthermore, it should be clarified that a re-assessment of suitability will not require a complete new set of information which is

required for the initial assessment. Otherwise this would lead to an inappropriate administrative burden for the board members and the institution.

We therefore suggest substituting this section 149 by the following: "Institutions should inform the competent authority upon the occurrence of substantial changes to the collective suitability made, including their outcome and any measures taken as a result of the reassessment."

It is also worth mentioning that, in any case, we find that ongoing reporting requirements such as introduced in para 149 should not be included in level 3 Guidelines but rather at level 1 or 2 (see also General Comments).

Re-assessments are internal processes. Without any impact to the conclusion of the assessment of members of the management body or key function holders the information should not be provided to the competent authority in order to protect privacy data regarding the employees.

Title VII – Suitability assessment by competent authorities

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

Answer:
We believe that it is crucial to maintain a neutral approach leaving the competent authorities the choice of implementing ex-ante or ex-post assessment processes.

As regards ex-ante approach, it is to be noted that pursuant to some local regulations, listed institutions shall publish resolutions of the annual general meeting ("AGM") 3 month prior to the AGM. An ex-ante approach would therefore not be compliant with these regulations. We support the neutral approach of the ECB and we would like to ensure local regulators will decide which of the ex-ante or ex-post approach is used in the relevant Member State.

Paragraph 166: we suggest a clarification on what is supposed to be considered necessary documentation and information to complete the competent authority's assessment.

Even though there is a limited time frame for the regulator to revert, the whole point is what is considered to be a complete documentation or information. The starting point is not clear at all. A solution could be to limit the number of emails requiring information or additional documentation by the regulator and/or to consider the time for the regulator to revert started when sending the file when the question/additional information by the regulator is irrelevant.

Concerning the same paragraph, the numbering is not consistent (*e.g. "3 months and not exceed four months*").

Specific comments:
An ex-ante approach for the assessments made by the competent authority is not possible and often not compliant with all regulations and we should therefore clearly mention the fact it is only applicable where the national law imperatively requires to do so or allows for

this. In some member states, shareholders are those who appoint the directors and it is therefore not possible to assess management body prior to the appointment.

In addition to the above, dealing with an ex ante approach may give rise to:

- issues as regards confidentiality of the discussions within the board of directors and confidentiality;
- personal data protection issues.

We would therefore strongly prefer an ex post assessment.

Lastly, an ex-ante approach regarding the supervisor's suitability assessment for the appointment of Management Body is by no means practical for the entities, and is not consistent with the dynamics of the banking business. When a vacancy occurs in one of such relevant positions, the entities need to fill it as soon as they can. Such entities cannot wait 3-6 months (the time available to the supervisor to complete its assessment). We therefore suggest having an ex-post assessment or a neutral approach with relation to the supervisor's suitability assessment. In addition, at least in exceptional cases quicker decisions of the competent authorities must be possible.

See also remarks sub Q7 regarding the procedural aspects and the long term available to the Authority for the performance of the suitability assessment.

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

Answer:

It should be taken into consideration that in some cases, candidates with high level of knowledge, expertise and experience may be engaged in more than one recruitment process and if the institution is under an *ex-ante* assessment by the competent authority it may cause the loss of some promising candidates.

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

Answer:
Please see our answer to Q12 above.

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

Answer:
Please see our answer to Q12 above.

Moreover, given the sensitive nature of assessments, a written decision should be taken and sent to the candidate and the institution at all times.

Annex I – Template for a matrix to assess the collective competence of members of the management body

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

As indicated above, we understand that what the supervisor should expect to receive from the entity are the results of the collective suitability assessment made by the entity, but not the specific tool used by the entity to monitor the assessment, such as the matrix included as Annex I. The development of an appropriate tool should remain the sole responsibility of the entity, which would in any case be bound to comply with the criteria set out in the Guidelines and deriving regulation (i.e. not needing validation or disclosure to the supervisor).

Annex II – Skills

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

Answer:
Considering the functions that are performed by the management bodies of entities (such as approving the budget, the strategic plan or the risk appetite framework), some of the skills indicated in Annex II are clearly not justifiable, such as "Customer and quality oriented", "Persuasive" (which does not make sense considering the collegiate character of the management body, that tends to reach a consensus in their decisions), or other such as "Teamwork", "Strategic acumen", "Stress resistance", "Loyalty" or "Chairing Meetings", that are extremely difficult to assess in an appointment and selection proceedings.

Additionally, skills should be non-binding (and should be provided only as a recommendation).

Annex III – Documentation requirements for initial appointments

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

Answer:
Firstly, there appears to be a typo on the beginning of paragraph 1.1 of Annex III, which should read "*Personal individual details*". Similarly, there is a typo in paragraph 5.2, which should read "*If **a** material conflict* […]" and in paragraph 7.2, which should read "[…] *management body as a **whole*** […]".
We understand that the requirement set forth in paragraph 7.2 whereby the institution should include a statement as to how the individual is to be situated in the overall suitability of the management body not only is unnecessary, but also could potentially instigate some discomfort between the various members of the board. Overall, if the skills and remaining requirements for initial appointments of the members of the management body are met, this comparison exercise appears to be pointless.
This section shall be integrated into section "Paragraph 47 and paragraph 133 which refer to Annex III-Documentation requirements for initial appointments: above, or vice versa, in order to be consistent..

Point 1

Paragraph 1.2.a: We consider the need to provide these documents as excessive, as all of the relevant information included in these documents is already made available to the shareholders (remuneration, responsibilities, term of office, golden parachutes, non-compete clauses, etc.). Moreover, such documents, where appropriate, may include other personal information which we understand shall not be disclosed.

Paragraph 1.3: please include a specific term (such as three years, as set out in 2012's Guidelines), and include a reference for the provision of this information to be conditioned upon to the compliance of the corresponding data protection regulation.
Also, substitute the sentence "[…] in the banking or financial sector, including: […]" by "[…] in the banking or financial sector, including, *to the extent possible or permitted by the reference persons*: […]".

Paragraph 4.2: This paragraph should be amended in order to reflect that, with respect to legal proceedings involving legal entities, solely legal proceedings based on facts that occurred at the time the appointee was a member of a management body of such entity have to be accounted for.

Point 5

The applicable regulation related to accounting, financial reporting, capital markets and corporate enterprises already provides detailed definitions of conflicts of interest and related parties. Such regulation also regulates the treatment of conflicts of interest within the entity and their disclosure (certainly not to relevant stakeholders such as shareholders, which in most of the cases will not and shall not receive this information). Consequently, the definition of conflicts of interest, as well as their treatment and disclosure should not be included in the Guidelines, as such matters are already exhaustively covered by the applicable regulation. Pursuant to Article 88.1 of CRD IV.

Member States shall ensure that the management body defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of an institution, including the segregation of duties in the organization and the prevention of conflicts of interest. It is clear it is not the purpose of the guidelines to provide rules on conflicts of interest. This should remain at a local regulation level (in order to also not be in breach of the local regulation regarding information to be provided by listed companies).

Moreover, it should be noted that the conflict of interest is not an issue that generally disqualifies the affected person from holding positions nor does it prevent him/her from doing transactions. Rather, it is required that situations that can potentially cause conflicts of interest are adequately managed and where decisions are made over them in accordance with a proceeding that guarantees the objectivity of the decision-making. Consequently, we consider it is not appropriate to include in the Guidelines in a broad manner the conflicts of interest that a person that is to be considered or appointed as member of the management body may incur. Only those structural or substantial conflict of interest situations, which cannot be managed by the entity by any means, may be considered by the Guidelines. In this regard, at least the following comments shall be considered.

Paragraph 5.1: Replacement of "All financial and non-financial interests that could create potential conflicts of interest, should be disclosed, including but not limited to: […]", by "*All financial and non-financial interests that could create potential conflicts of interest (excluding such ordinary commercial relations held by the affected person and his/her close relatives and closely connected companies with the entity that are offered in similar market conditions by the entity to groups of clients), should be disclosed, including but not limited to*: […]".

Paragraph 5.1 d: Replacement of "whether or not the individual is being proposed on behalf of any one substantial shareholder" by "*whether or not the individual is being proposed on behalf of any one significant shareholder (as this term is defined in the regulation applicable to capital markets)".*

Paragraph 5.1 f: Replacement of "any positions of political influence (nationally or locally) held over the past 2 years" by "*any positions of significant political influence over the entities' businesses or activities (nationally or locally) held over the past 2 years*".

The applicable regulation on corporate enterprises already provides the directors' fiduciary duties *vis–à–vis* the entity, considering the nature of the directors' position and the functions attributed to them, and ensures that they have sufficient dedication.

Point 6

The applicable regulation on corporate enterprises already provides the directors' fiduciary duties vis–à–vis the entity, considering the nature of the directors' position and the functions attributed to them, and ensures that they have sufficient dedication.

This is complemented in the case of credit entities' regulation with detailed provisions on the sufficient time commitment of the directors and on the limitation of positions. The applicable regulation thus already provides the framework of the time to be committed by directors, by mixing the due directors' compliance with their fiduciary duties (reflected in a commitment made by the director to the entity) plus an objective limitation of positions set out in the credit entities' regulation. Other provisions included in the Guidelines regarding specific time to be committed, evaluation of non-commercial commitments, the size of entities and number of meetings in each mandate, exceeds the requirements and scope of the regulation, and will provide a too simple, objective and possibly wrong view of the time that the proposed director may commit to the entity.

Point 7

As mentioned earlier: For national regulations that require certain directors to be representatives of employees, it is not possible to expect the same level of experience from such board members. Therefore it should be clearly indicated that these board members are not assessed the same way as other board members – please refer to Article 91.13 of CRD IV with this respect in order to clarify this point.

Paragraph 7.1: The roles and functions of each director in unitary board systems are included in the applicable regulation and in the entity's bylaws and/or board regulations. We therefore suggest this section is deleted, or adapted for unitary board structures.

Accompanying documents

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.

Answer:
No comments

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