ESBG feedback on the EBA-ESMA Draft Guidelines on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2020/19)

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**General comments**

As with the previous guidelines, the amendments to the present consultation paper go beyond the requirements of CRD V, so that we must call for a proportional implementation in line with the guidelines once again.

Numerous amendments have been introduced with a view to preventing money laundering and combating terrorism. These changes address various concerns. In principle, every institution is obliged to employ a money laundering officer. This officer reports directly to the management board (management body in its executive function). In addition, according to the existing legal situation, a member of the management board to be appointed is already responsible for risk management and for compliance with money laundering regulations. The money laundering officers receive regular training. They have the accumulated knowledge on all issues relating to money laundering and combating terrorism. The money laundering officer must regularly report to the management board on his work and key work results (such as the preparation of risk analysis, ad hoc reports, etc.). Compliance with these reporting obligations is verified by the audit office. Information on money laundering and counter-terrorism is thus provided internally via the money laundering officer. The management board itself does not therefore need to have specific knowledge of these topics for its work.

Definitions

On one side, the term “relevant institutions” has been introduced in the Fit & Proper GL and makes difficult to further differentiate between the categories of institutions that are now in scope (there are overall 6 categories: “institutions”, “CRD-institutions”, “relevant institutions”, “significant CRD-institutions”, “listed relevant institutions and listed institutions”, “consolidating credit institutions”); on the other side, the Internal Governance GL operates with the terms “significant credit institutions” and “listed CRD credit institutions”). We recommend reviewing the definitions and operate with one set of definitions for both GLs.

1. **Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?**

**Paragraphs 7 et seq. (draft guidelines):** Even subsidiaries that are not ruled by the fit and proper regime should be required to apply the guidelines if the parent company has to apply them. On this side, the paragraph is understood to apply only to subsidiaries that are themselves financial holding companies or mixed financial holding companies. Other subsidiaries are not covered. This should be clarified.

**Paragraph 18 (transitional provisions)** Title VIII should not apply to persons appointed before date of application of the new guidelines. So reference to date 30 June 2018 should be deleted and substituted by the following sentence “before the date of application of these Guidelines”.

***23. and 30. Executive Summary* and 194. Guideline:** Is the assumption correct, that Art 16 (2) lit (m) of the SSM Regulation is the legal basis for these points?

***Paragraph 30 (background)*:** In our opinion the amendment opens for the possibility for supervisory authorities to remove individual members solely due to e.g. matters of the collective gender equality in the management body, whereas article 91(12)(e) of Directive 2013/36/EU specifically refers to the notion of diversity to be taken into account for the selection of members of the management body. Nor does article 9 of Directive 2014/65/EU provide for competent authorities to remove members of management bodies on such grounds. We propose that the amendment is removed or, alternatively, that an appropriate reference is added.

***Paragraph 45 (background)*:** The paragraph makes an assumption that there is an unbalanced composition. Should consider to rephrase:

*Institutions should respect the principle of equal opportunities for any gender and, if [alternatively: where] there is an imbalanced composition of staff in management positions, the institution shall take measures to reduce that imbalance in order to ensure […].*

***Paragraph 51 (background)*:** “Attempted” ML/TF should be removed from the paragraph as attempted ML/TF is too common to constitute a meaningful or appropriate trigger for re-assessment of suitability. Please also see our comments to paragraph 27 c, 32 c and 37.

***Paragraph 53 (background)*:** In some Member States law, the person responsible for the implementing the AML/CTF-framework does not necessarily have to be a member of the management body. References to “the member of the management body who is responsible for […] identifying, managing and mitigating money laundering and financing of terrorism risk” should be removed; and any other sections of the guideline contingent on such person being on the management body should be reworked as this is not sufficiently harmonised within the EU.

1. **Are the changes made in Title II appropriate and sufficiently clear?**

***Paragraph 27 c, 32 c and 37*:** These paragraphs provide for a re-assessment of suitability where there are reasonable grounds to suspect that money laundering or terrorist financing has been committed or attempted. This should be the case in particular where:

* the institution has been used for money laundering or terrorist financing
* - the institution has breached anti-money laundering or anti-terrorism financing rules, or
* - has changed its business model in a way that indicates that exposure to money laundering/terrorism financing risk has increased significantly.

These requirements cannot be implemented in the current version. For example, it is inherent in money laundering that credit institutions are used for this purpose, because without the use of payment services incriminated funds cannot be channelled into the legal money circuit. To counter this risk, credit institutions monitor all payment transactions and report any suspicions to the authorities. As institutions comply with their obligations in this respect, there is therefore no need to reassess the suitability of their management.

The second requirement also fails. This is because not every (minor) breach of the extensive catalogue of legal and supervisory requirements for the prevention of money laundering leads to the conclusion that the institution has generally not installed adequate risk management in this area. Only in such a case, however, would it be appropriate to subject the management level to another suitability assessment.

The third requirement is generally impractical, as it assumes that an increase in the risk of being misused for money laundering or terrorist financing is accepted by the institution in order to enforce a change in the business model. However, in view of the large number of requirements to be observed, in particular from the 4th and 5th AMLD, this case cannot occur. This is because institutions are obliged to take appropriate measures to counter each identified risk or to refrain from doing business.

In addition for Paragraph 37 - key function holders subject to re-assessment should be limited to the key function holders, who have a role or a responsibility which has enabled him/her to have an impact on the identified ML/TF issues.

***Paragraph 30*:** We propose that the added text is removed as the “broad range of experience” is already covered by the first sentence; given that the sentence stipulates that the management body shall “collectively” possess adequate knowledge, skills and experience. If a “broad range of experience” refers to something else, it should be clarified in the text.

The text also states that institutions should ensure that the overall composition of the management body reflects a broad range of experience. It must be taken into account that some institutions have no influence on the composition of the management body in its supervisory function and therefore cannot ensure a broad range of experience. In the case of public savings banks in Germany, the selection of the members of the management body in its supervisory function is the sole responsibility of the municipalities (which are the trustees of the savings banks).

For example, in some Member States certain types of banks (both savings and cooperative) operate under ‘municipal trusteeship’. The management body in its supervisory function is democratically legitimized. Only the municipal trustee (town, city, districts or special-purpose associations) has the sovereignty to choose the representatives for the management body in its supervisory function and therefore can safeguard that the savings bank fulfils its public mandate for the population of the municipality. The savings banks do not have any influence on the decision of the municipality. They can ensure sufficient knowledge through training, but they cannot ensure a broad range of experience. Such situations should be taken into account.

1. **Are the changes made in Title III appropriate and sufficiently clear?**

***Paragraph 58*:** It is questionable whether this actually adds anything substantially new. The wording is also unfortunate given that some national laws do not presume that any particular member of the management body is specifically appointed as responsible for AML/CTF-framework, see the comment to paragraph 53 (of the background) above.

If the paragraph is to remain, we have the following comments on the language of the paragraph (proposed changes in red): “*Members of the management body ~~that are~~ responsible for the implementation of the legal requirements ~~laws~~, regulations and administrative provisions necessary to comply with Directive (EU) 2015/849, should have adequate knowledge, skills and experience regarding ML/TF risk identification and assessment, ~~and~~ AML/CFT policies, controls and procedures. Members of the management body ~~They~~ should have a good understanding of the institution and its business model, and the extent to which this [what is “this” referring to? “business model”?] exposes the institution to ML/TF risks.”*

***Paragraph 74*:** The references specifically to dividend arbitrage schemes should be removed. It is not reasonable to point to a specific tax evasion scheme in this context. Tax offences should be sufficient in this regard. Inclusion of this amendment would set a bad precedent as it would set an expectation of the guidelines being updated whenever a new tax evasion scheme emerges.

***Paragraph 75 and 77*:** In relation to paragraph 77, the guidelines should not specifically point out to allegations being sufficient as it is clearly in contravention on the basic principle of “innocent until proven guilty”. The qualification of “credible and reliable information” is not a sufficient safeguard. It is plain to see that financial institutions are likely to err on the side of caution and remove individuals based on accusations even where the evidence is poor, to the detriment of the individual and potentially also to the financial institution. This applies primarily to paragraph 77 which deals with allegations, but also to paragraph 75.

**Paragraph 86:** This paragraph states that membership in affiliated companies or affiliated entities does not in itself constitute an obstacle for a member of the management body to act without independence of mind. Here we ask for the addition that this also applies to those members of the management body in its supervisory function which are representatives of municipal trustees, as the situation is comparable to that of shareholder representatives / shareholders and therefore equal treatment should be applied. (Please see the justification provided for paragraph 30 in Question 2)

1. **Are the requirements in section 12 sufficiently clear; are there additional measures that should be required to ensure that diversity is appropriately taken into account by institutions and that the principle of equal opportunities for all genders is appropriately reflected?**

***Paragraph 108*:** Consider adding “including non-binary gender” after gender. In addition, neither the Charter of Fundamental Rights nor banking supervision law (CRD V) provide a legal basis for comprehensive anti-discrimination policies. The European Charter is already implemented by existing national law. In the context of proportionate implementation, institutions must be given leeway on how to ensure non-discrimination. It is not necessary for credit institutions to have their own anti-discrimination policies.

In addition, most EU Member States already have separate anti-discrimination and women's promotion schemes in place. It should at least be made clear in paragraph 108 that plans for gender equality already drawn up on the basis of other regulations should be considered as policies within the meaning of these EBA guidelines. This would prevent institutions from having to draw up further internal policies in addition to those required by national or regional law.

In accordance with paragraphs 102 and 107, a gender balanced composition of the governing body and management positions should be sought. These objectives are understandable. However, in countries with a dual board structure, the management body in smaller institutions often consists of only two members, who usually hold this position for a longer period of time. A gender-balanced composition would mean that one board member should always be a woman. Though, application procedures show that women do not always apply for board positions. In this respect, we would like to point out that this objective cannot always be achieved for purely factual reasons.

1. **Are the changes made in Title VI appropriate and sufficiently clear?**

***Paragraph 120*:** There is a theoretical issue in the proposed paragraph 120 in relation to situations where a jurisdiction has adopted a lower standard than the European Union standard, while local law for whatever reason simultaneously stipulates that a “higher” standard cannot, in part, be applied. We suggest that the amendment is removed. Alternatively, the amendment should be reworded to clearly state that such higher standards cannot be applied where it would be in breach of local law (please compare with the first sentence).

1. **Are the changes made in Title VII appropriate and sufficiently clear??**

***Paragraph 146 b*:** Proposed change in red: *“including assessment whether there are reasonable grounds to suspect that ML/TF is being or has been committed or that the risk thereof could be increased”.*

***Paragraph 146 c*:** It is hard to imagine how such information is to be gathered in practice given that independence of mind, and the subsets thereof, are rather intangible concepts which are harder to measure and verify than e.g. curricula vitae are. Paragraph 146, as currently in force, is sufficient and adequate and the amendment should therefore be removed.

***Paragraph 147*:** It should be clarified that it is ML/TF of the individual member of the management body that shall be considered. Please also note that “institutions” is misspelled. We suggest that the amendment is reworded to: “In this assessment institutions should take into account the existence of reasonable grounds to suspect that ML/TF is being or has been committed or attempted by the member of the management body, or that the risk thereof could be increased due to the conduct of a member.

***Paragraph 151*:** In line with our comment on paragraph 30 above, we propose that the added text is removed as the “broad range of experience” as the paragraph already provides that the management body shall be “collectively” suitable. If it shall remain, “broad range of experience” should be reworded as it is unclear what this relates to, especially considering that the EBA is proposing to add this in paragraph 30 in addition to the references to the management body collectively possessing adequate knowledge, suggesting that these are not the same.

Institutions should verify that the overall composition of the management body reflects a broad range of experience. It must be taken into account that some institutions do not have any influence on the composition of the supervisory body and therefore a broad range of experience is not always ensured. In the case of public savings banks in Germany, the selection of the members of the management body in its supervisory function is the sole responsibility of the municipalities, which are also the trustees of the savings banks. Thus, the institutes themselves cannot work towards a balanced spectrum of experience. (Please see the justification provided for paragraph 30 in Question 2)

***Paragraph 152*:** This added paragraph might be difficult to apply given that actions which give rise to suspicions that ML/TF-matters have not been sufficiently considered may occur much later, when the management body may have a completely different set-up of members. There is also considerable difficulty to determine whether sufficient understanding of ML/TF risks has been demonstrated. Furthermore, it is questionable if “demonstration of understanding” is an appropriate standard, in contrast to e.g. ML/TF risks having been given “due consideration”. On balance, our suggestion is that the paragraph is removed entirely as the guideline already provides that ML/TF-risks shall be considered.

***Paragraph 154 j***: The entire section needs to be simplified. Proposed changes in red: *“any reasonable grounds to suspect that money laundering, ~~or~~ terrorist financing or other financial crimes is being or has been committed or attempted, or if there is an increased risk thereof, including following such adverse findings made by the internal or external auditors or competent authorities regarding the adequacy of the institution’s AML/CFT systems and controls [overly complicated sentence, hard to read].*

1. **Are the changes made in Title VIII appropriate and sufficiently clear?**

**Paragraph 182:** In this paragraph, key function holders are to be added. Art. 91 Directive 2013/36/EU refers only to members of the management body, not to key function holders. There is no legal basis for setting the requirements for assessment on key function holders. This already applied to the previous guidelines, which is why we had already criticized this in the last revision of the guidelines. Even with the revision of CRD V, there was no change at this point, so that a legal basis is still missing. In future, not only an initial assessment, but also a repeated, ongoing assessment of key function holders by the competent authorities will be carried out. We reject this for the reasons mentioned above.

In any case, there should at least be a corresponding addition that key functions only have to be identified by significant institutions and therefore paragraph 182 does not apply to less-significant institutions. The requirement for this restriction also results from paragraph 37 “Relevant institutions should monitor on an ongoing basis...”.

***Paragraph 196*:** Misspelt (proposed changes in red): “*Where appropriate, competent authorities should contact the AML/CFT supervisor in the relevant Member State to obtain additional information necessary to assess the integrity, honesty, good repute and suitability of an institution’s management body or key function holders. In addition, in situations where the risk of ML/TF associated with the institution or member of a management body is increased, competent authorities should also, where appropriate seek information from other relevant stakeholders, including the Financial Intelligence Units and law enforcement agencies to inform their suitability assessment.”*

***Paragraph 202*:** Proposed change in red – “*Where a competent authority decides that a member of ~~the~~ a management body or a head of internal control function and the CFO, where they are not part of the management body as referred to in paragraph 172, is not suitable based on relevant facts in the context of ML/TF risks or events, the competent authority should, without prejudice to national law, share their findings and decisions with the competent AML/CFT supervisor.”*

1. **Are the changes made in Title IX appropriate and sufficiently clear?**

No comments.



**About ESBG (European Savings and Retail Banking Group)**

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