POSITION PAPER

ESBG response to the ESMA and EBA consultation on the revised joint Guidelines on the assessment of the suitability of members of the management body and key function holders

ESBG (European Savings and Retail Banking Group)

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ESBG

General comment:

ESBG appreciates the opportunity to comment on the draft Guidelines and the effort to further clarify suitability assessments and governance requirements. However, in view of the comments and suggestions from our members, several points would benefit from revision. In particular, we have concerns regarding proportionality and the resulting administrative burden, the limited consideration of certain governance structures (notably where institutions cannot influence the composition of the supervisory body), and provisions that appear to go beyond the CRD VI framework.

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

On the matter of **Implementation (paragraph 20)**, ESBG believes that the Guidelines should enter into force no earlier than six months following the availability of all official language versions, in order to ensure that institutions are granted an adequate implementation period to adjust their governance frameworks where necessary. In the event that publication takes place after 30 June 2026, the wording "at the latest by 31 December 2026" must not have the effect of reducing the implementation period to an unreasonably short or effectively non-existent timeframe.

Para 19: To ensure legal certainty, we recommend that any reference to Key Function Holders (KFHs) be aligned strictly with Article 3(1)(9a) CRD VI. The definition introduced in the GL "individuals with significant influence over the direction of an entity/branch", appears redundant and risks unintentionally expanding the scope of KFHs, thereby creating divergent supervisory expectations. We therefore suggest deleting this additional definition, as the Directive already provides a clear and sufficient definition of KFHs.

Question 2: Are the changes made in Title II appropriate and sufficiently clear?

Title II, para. 28: While the distinction between the suitability requirements applicable to members of the management body in their management function and those in their supervisory function is appropriately acknowledged, the additional reference to the "mapping of duties" under Article 88(3) CRD VI gives rise to legal uncertainty. That provision applies exclusively to members of the management body in their management function and to key function holders. It therefore remains unclear whether, and to what extent, the second sentence of para. 28 is intended to extend to members of the management body in their supervisory function. In the interest of legal clarity, the reference to Article 88(3) CRD VI should either be deleted or expressly limited in scope.

Title II, para. 31: A general obligation to reassess suitability in response to any organisational change in the allocation of responsibilities would be disproportionate and lacks a sufficient legal basis. Such a requirement would impose an undue administrative burden on institutions. The reference to "additional duties" should therefore be deleted. At a minimum, it should be clarified that only such additional duties that materially affect the required time commitment are relevant for the purposes of a renewed assessment.

Title II, para. 29 and 34: There is no mandate in CRD VI to integrate the individual statements and mapping of duties as part of the suitability assessments (individual and collective), in this regard references to Article 88(3) CRD VI should be removed, as

suitability assessment should be conducted in accordance with the criteria and requirements of Article 91 (2) to (6) CRD VI. Maintaining references to Article 88(3) may lead to legal uncertainty and confusion as to the applicable framework governing suitability assessments and the respective scope of governance and suitability requirements.

Question 3: Independent non-executive directors:

The Joint GL set out provisions on independent non-executive members of the MB. The Joint GL apply in a proportionate manner and distinguish between different types of entities (GSII, OSII and other institutions) and specify that for institutions other than significant ones only one independent director as a minimum is required. Furthermore, the Joint GL provide criteria for the assessment of "being independent". In light of the above, the EBA and ESMA would appreciate further input on the impact of the independence criteria.

Do you have any views on the provisions regarding these independence criteria? Please explain any aspects that may influence the effectiveness, clarity, or implementation of these independence criteria across different business models/types of institutions.

Title 3, Section 9.2 Para 93 h: We do not consider that the prior exercise of executive functions compromises a director's independence of mind; rather, it only affects independence in a formal sense. References to cooling-off periods and any limitations on assuming a role as a member of the management body should therefore be addressed exclusively under Section 9.3.

Some ESBG members have indicated that a cooling-off period of five years is considered excessive in light of the current pace of market developments. A period of three years is deemed sufficient to ensure independence while maintaining proportionality.

The existence of a business relationship with an entity shall not, in itself, be regarded as a determining factor compromising independence.

Prior professional engagement with a company, including a period of up to twelve years of employment, should not automatically preclude a finding of independence.

Question 4: Are the changes made in Title III appropriate and sufficiently clear?

Title III, Section 8. Paras- 86 et seq: We consider that the approach introduced in the GL regarding ML/TF-related risk factors for assessing the good repute of members of the management body and Key Function Holders (KFHs) would benefit from strengthened proportionality safeguards. While we acknowledge the supervisory interest in identifying circumstances that may compromise the integrity of individuals in key positions, several elements of the current non-exhaustive list raise concerns:

- The reference to broad sectors such as *energy, international trade, precious metals,* and *defence* may lead to overly expansive interpretations, capturing legitimate business activities that do not constitute ML/TF risk. We encourage the EBA to articulate more precise criteria to avoid disproportionate supervisory outcomes.
- The inclusion of "connections to persons or geographies considered high-risk" requires clear boundaries to prevent individuals from being

assessed on the basis of remote, incidental, or purely historical associations, which do not, per se, amount to ML/TF risk. We recommend specifying that only *material, demonstrable, and ongoing* links relevant to the individual's professional conduct should be considered.

- The reference to family members convicted of ML/TF offences raises significant proportionality and fairness issues. Assessments of good repute should focus primarily on the individual's own conduct and accountability. We suggest limiting this factor to cases where there is evidence of direct involvement, benefit, or complicity by the individual under assessment.

Title III, Section 9.3, paras. 98 et seq: The requirements relating to the "formal independence" of certain members of the supervisory body (paras. 98 et seq.) are not supported by the CRD framework and should therefore be removed. Article 91 CRD VI refers exclusively to the concept of independence of mind, applicable to the management body as a whole. It does not establish a separate or additional requirement of "formal independence". This is particularly relevant in jurisdictions, such as Germany, where no corresponding national requirements exist. ESBG therefore strongly suggest that these requirements be removed.

In any case, the Guidelines should clarify that the requirements relating to the presence of members meeting formal independence criteria within the supervisory management body do not apply where such requirements are not provided for under national law.

Title III, Section 9.4: The provisions on safeguards (para. 103) are disproportionate and risk circumventing the exemption explicitly provided for in Article 91(14) CRD VI. The requirement to carry out a suitability assessment immediately following the appointment of a member fails to take due account of the specific governance arrangements of certain institutions, in particular municipal savings banks. From their status as local banks, it follows that the supervisory board of the municipal savings bank needs to be democratically legitimised. The municipality's elected representative body determines the composition of the supervisory board of the local savings bank at the beginning of each local election period. This is enshrined in the savings bank laws of the German Länder. In such cases, the appointment of members of the management body in its supervisory function is exclusively the responsibility of the municipality's elected representative body, who acts with full awareness of the applicable regulatory requirements. Any ex post internal assessment by the institution would interfere with this allocation of competences, just as in the case of an ex-ante assessment. Institutions are neither empowered to influence these appointments nor to challenge them through subsequent internal evaluations. Accordingly, an internal suitability assessment - irrespective of its timing - is neither appropriate nor compatible with the underlying governance structure. The democratic legitimacy of the appointed members provides a sufficient basis for effective oversight. It should therefore be explicitly stated in para. 103 that no ex post internal suitability assessment is required in such circumstances.

In addition, adequate safeguards are already in place to ensure the suitability of the members of the management body in its supervisory function without the need for internal reassessment. Competent authorities conduct comprehensive fit and proper evaluations, and newly appointed members are regularly subject to targeted induction and training measures shortly after taking office. This established framework has proven effective and appropriately reflects the specific characteristics of the savings banks sector.

By contrast, the requirements set out in **paras. 103 - 105** would give rise to a disproportionate administrative burden without generating any discernible supervisory benefit, particularly given that induction and training obligations are already addressed in Title IV, Section 10.

Question 5: Are the changes made in Title IV appropriate and sufficiently clear?

Question 6: Are the changes made in Title V appropriate and sufficiently clear?

Title V, Section 12, paras. 116 et seq: In cases where institutions have no influence over the composition of their management body in its supervisory function, the requirements relating to diversity policies and targets pursuant to Article 91(14) CRD VI should not apply. This should be expressly clarified in the Guidelines.

Title V, Section 12, paras. 119: We support the objective of fostering diversity in the composition of the management body. In the sake of clarity, we consider that the existing regulatory framework, including the Directive on gender balance in corporate boards, already provides a comprehensive and sufficiently proportionate basis to address this objective. Introducing additional references to "qualitative targets" may risk diluting the framework, as such targets are inherently difficult to define and assess in a consistent and objective manner. We therefore recommend removing these references, in particular paragraph 119.

Question 7: Are the changes made in Title VI appropriate and sufficiently clear?

Question 8: Are the changes made in Title VII appropriate and sufficiently clear?

Title VII, Section 17, para. 150: The requirement for the management body in its supervisory function, or the nomination committee, to assess the suitability of members of the management body in their management function prior to their appointment is not feasible in institutional frameworks where such appointments do not fall within their competence. In such cases, the provision is inapplicable. It should therefore either be deleted or explicitly limited to situations where it does not conflict with applicable company law.

Title VII, Sections 17 - 21, paras 150 et seq: The extensive and highly prescriptive requirements concerning internal suitability assessment processes are at odds with the objective of reducing regulatory complexity and administrative burden. Smaller and less complex institutions, in particular, would be disproportionately affected without a commensurate supervisory benefit. For instance, para. 160 requires all institutions,

irrespective of size or governance structure, to update and review suitability information at least annually. Such a uniform requirement fails to reflect the principle of proportionality and should be reconsidered. For smaller institutions, an annual, formalised review process is excessive, especially given that ad hoc assessments remain applicable. Furthermore, there is an inconsistency with para. 175, which provides for differentiated review cycles depending on the significance of the institution. The requirement set out in para. 160 should therefore be deleted or aligned with these differentiated provisions. The same considerations apply to para. 184 with regard to key function holders.

Title VII, Sections 18, para 167: The wording of paragraph 167, which requires entities to ensure that *"all material individual roles and duties of the management body are allocated to a member of the management body"*, should be deleted, as it may be interpreted as requiring an individual allocation of responsibilities that is not envisaged under CRD VI and is inconsistent with the collective nature of the management body's functions.

Question 9: Are the changes made in Title VIII appropriate and sufficiently clear?

Title VIII Section 23 para. 205: According to our understanding the appropriate and current applicable process in a fit and proper procedure is that the initial information is provided by the institutions together with the notification. In case that this information is deemed by the competent authority as insufficient, the institutions are requested first to submit the missing information. The proposed text of par. 205 doesn´t seem to take this intermediary but important step into consideration since it states that in case that the institution fails to provide sufficient information (without specifying whether after the notification or after an information request by the competent authority) the competent authority can decide that the assessed person is not appointed or the decision is negative. We strongly recommend specifying that a negative decision can be taken only after the respective notification was submitted and in case of missing information the respective institution repeatedly did not provide the requested information.

Title VIII Section 23 para. 208: "*Extensions of the assessment period of four month in the case of large entities should only be made under exceptional circumstances."*
Since an ex-ante notification requirement for large entities is now introduced, specifying in par. 202 that the suitability application has to be submitted to the competent authorities 30 working days before taking up the respective position we are against any extension of the assessment period for competent authorities, even if this is only in exceptional circumstances.

Title VIII, Section 26, paras. 233 et seq: The provisions relating to suitability assessments in the context of anti-money laundering and counter-terrorist financing risks should be closely aligned with the framework established by the AMLA. Any duplication of regulatory requirements must be avoided, particularly in light of the forthcoming reallocation of competences in this area. It is equally essential to prevent inconsistencies and unclear delineations of supervisory responsibilities. In particular, it should be ensured that the mere classification of a member of the management body as a politically exposed person (PEP) under AML rules does not, in itself, trigger more stringent fit and proper requirements.

Question 10: Are the changes made in Title IX appropriate and sufficiently clear?

Question 11: Are the changes made to Annex 1 and Annex II appropriate and sufficiently clear?

As regards **Annex 2**, some members have indicated that the language used may be an internationally recognised de facto working language within the body, provided that it ensures effective communication and operational efficiency.

Question 12: Is the table on scope of application of the Joint Guidelines appropriate and sufficiently clear?

About ESBG (European Savings and Retail Banking Group)

ESBG represents the locally focused European banking sector, helping its 32 members in 27 European countries, which bring together 859 savings and retail banks, strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. Advocating for a proportionate approach to banking rules, ESBG unites 859 European banks, which together employ 620,000 people driving innovation at 37,000 branches. ESBG members have total assets of € 6,35 trillion, provide € 3,72 trillion in loans to customers, and serve 163 million Europeans seeking retail banking services. ESBG members commit to further unleash the promise of sustainable and responsible 21st century banking.

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