


# POSITION PAPER



## **ESBG response to the EBA-ESMA consultation on Guidelines on the assessment of the suitability of members of the management body and key function holders**

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ESBG welcomes the opportunity to comment on the proposals in the 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”.

ESBG broadly supports this initiative to clarify and harmonise the criteria to assess the suitability of the members of the management body and key function holders. However, regulation on the assessment of the suitability of members of the management body and key function holders is becoming increasingly complex. There are multiple regulations on the same matter – national legislation, EBA guidelines, ECB guidelines and individual supervisory practices – which contribute to a very complex system which needs to be applied by credit institutions. ESBG is of the opinion that there should be fewer criteria applied in a clearer format. Although there may be reasons to further harmonise the supervisory practice there is no explicit analysis showing that there is a need for a new package of far-reaching and detailed rules. It is necessary that new demands are based on evidence and carefully analysed in advance.

ESBG would like to highlight that we are not in favour of having a mandatory requirement for an ex-ante assessment. There are several reasons for not introducing such a requirement; an ex-ante regime is very inflexible and could create problems for the institutions in numerous different situations e.g. in an M&A setting.

Further we believe the draft guidelines are too detailed and therefore too restrictive and as such they do not provide sufficient flexibility which makes them very difficult, and to some extent impossible to apply in a unitary board structure. It must be noted that in a unitary board structure the board’s decisions are made collectively, and that it hence is not logical to impose strict requirements on individuals. Deficiencies or weaknesses in national law should primarily be addressed in the context of national law. The CRD IV is clear in this area, article 102 and 104, and enables competent authorities to take necessary measures at an early stage when an institute does not meet the requirements in the directive.

## **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?**

In general terms, the guidelines should respect national legislation applicable to credit institutions and company law, both based on directives, especially regarding the unitary versus dual board structure. In some aspects, the guidelines tend to favour a dual board structure, as it is evidenced by the fact that the premise is that key function holders may be part of the management body in its management function and therefore they should be assessed in the same manner. This is not always the case, as in non-significant institutions with an unitary board structure, such functions are not generally part of the management body, that is, they are not executive directors, but part of the internal management structure of the institution. In addition, the same is true for institutions with a dual board structure, where the key function holders are not executive directors, but part of the internal management structure of the institution.

There must be a clear difference in the competence requirements for members of the management body in its supervisory function and members of the management body in its management function. For example, the rules for management bodies cannot be implemented in Sweden as they cannot be



applied to the board of directors, being composed of non-executives, elected by the shareholders. There are no requirements to have a management team, and thus it cannot be introduced through guidelines. The Swedish Companies Act stipulates that companies must have three decision-making bodies in a hierarchical relationship to one another; the general meeting, the board of directors and the CEO. The board (i.e. the management body in its supervisory function) is responsible for the company's organisation and the management of the company's affairs. The board is a body where decisions are taken collectively, where individual members does not have personal powers to make decisions.

It must be considered that in some cases the institutions have no influence on the occupation of the management body in its supervisory function and its committees. Within public institutions like savings banks representatives of the municipal trustees are by act of law - ex officio - members of the management body in its supervisory function. This also may lead to institutions having members of the management body that may not have the full required level of knowledge, skills, experience or diversity while entering in function. Nevertheless, training can help to ensure the suitability. For example, in Germany the competent authority runs the administrative practice that training within six months after appointment is sufficient.

The increasing level of detailed requirements in terms of diversity, specific competencies, education, experience, maximum number of directorships, independence, independence in mind etc. leads, in practice, to an unsolvable equation due to the large number of terms to be taken into account. It cannot be ruled out that the combined set of rules may be counterproductive when it comes to the objective of establishing the optimal composition of members. It is also important to stress that additional detailed requirements, on top of what is already required in diverse legislations and the risks for individual sanctions, will further complicate populating the boards going forward.

## Implementation

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

The European Central Bank (ECB) in November 2016 published a 'Draft guide to fit and proper assessments' which is also in public consultation. According to paragraph 1.3 of the ECB's draft guide, it takes into account the definitions and concepts contained in the draft EBA-ESMA Guidelines on the assessment of the suitability of members of the management body and key function holders. Given the overlap in defining subject matter and scope, we would like to stress the importance of full coordination and consistency between these two sets of guidelines, especially during and after their respective public consultation processes.

In the matter of assessment of suitability or 'fit and proper assessments' credit institutions must comply with national legislation which transposed Directive 2013/36/EU (CRD IV), the supervisory criteria applied by the competent authorities and the criteria contained in the relevant guidelines. The discrepancies that may arise between such rules may cause unnecessary uncertainty and added costs to credit institutions both in terms of time and expense. Furthermore, in our opinion, criteria that in any way limit the rights of institutions should be regulated by legislation, preferably at EU level, in directives and/or regulations.

For the definition of significant institutions, according to the draft, the competent authority will be able to determine other institutions in addition to systemically important institutions (G-SIIs and O-SIIs). The concrete distinction, however, remains unclear. Since the guidelines already take into



account criteria such as the size of the institution, the complexity of the business activities, etc. a separate distinction for the purposes of these guidelines seems unnecessary. ESBG would like to propose basing the definition only on systemically important institutions - global systemically important institutions (G-SIIs) and other systemically important (O-SIIs). It would also bring more clarity to the text if 'significant institutions' could be replaced by 'systemically important institutions'.

For the definition of key function holders, 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. Therefore, these guidelines should follow the requirements set out in CRD IV. The definition is so far clear 'persons who have significant influence over the direction of the institution', as key function holders are the heads of internal control functions and the CFO, where they are not members of the management body, however ESBG is in favour of removing the addition 'and other key function holders'.

## **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?**

According to paragraphs 16 and 26 institutions should assess the individual suitability of the members of the management body on an ongoing basis, even when there is no occasion for re-assessment. But art. 88 (2) CRD IV requires only significant institutions for assessment on an ongoing basis. ESBG is not in favour of extending the ongoing assessment to less significant institutions, as it requires a significant amount of time for the management body. The occasions for reassessment, as set out in article 20, are sufficient, such as concrete doubts or concerns. The principle of proportionality could be applied in this case.

ESBG does not think that the scope of assessments for key function holders should be the same as the scope of assessments for members of the management body. Article 91 CRD IV only refers to members of the management body, not to key function holders. Therefore, ESBG proposes that it would be sufficient to assess the key function holders' suitability only once, upon appointment. With this in mind, we would recommend removing para. 30 'd. in any event that can otherwise materially affect the suitability of the individual' because continuous monitoring requires disproportionate effort.

### **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 organization and the nature, scale and complexity of the activities of their institution to support their answers.**

ESBG welcomes and agrees with the regulation of the proportionality principle and the criteria proposed in chapter 4 'Application of the proportionality principle' of the draft guidelines. However, the application of the proportionality principle is limited in practice. National regulation and supervisory practices tend to apply the same regulation on the assessment of suitability to institutions, without allowing for a proportionate application of the rules. This set of 'one size fits all' criteria should not be the rule. Experience suggests that very small institutions are required to comply with the same requirements as significant institutions. Therefore, it is considered desirable that a more effective application of the proportionality principle should be introduced in the assessment of suitability legislation and related supervisory practices.



ESBG is in favour of having the subsidiarity principle recognised at EU level in order to allow the legal national framework of savings and retail banks, including those which follow the cooperative business model, not to be affected by the guidelines.

Finally, the section on proportionality (paras. 33-36) should be moved to the beginning of the guidelines, clearly stating that the principle of proportionality is applicable to all statements in the guidelines.

**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.**

The draft guidelines themselves tend to differentiate application of certain criteria between those applicable to significant institutions and to non-significant institutions (e.g. para. 145).

Non-significant institutions comprise a wide variety of entities, as far a size, complexity and legal form and some of the obligations to which they will be subject could imply disproportionate structural costs. For example, the obligations regarding human and financial resources for training members of the management body and the policies and procedures involved (Title III of the draft Guidelines) could be excessively complex and costly for this type of institution. The possibility of outsourcing obligations such as this should be provided for in order to minimise the internal costs of institutions.

A more proportionate application of the guidelines could be in place, in particular as the ongoing assessment of suitability without specific reason is not proportionate for less significant institutions.

## **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?**

The proposed calculation of directorships held in undertakings in which institutions hold a qualifying holding (paras 49 and 50) is in conflict with applicable provisions of some Member States' national laws where they currently count as one single directorship. ESBG therefore proposes to stick to the current applicable rules regarding the calculation of directorships and thus remove the following text:

Para 49 'That single directorship in qualifying holdings counts as a separate single directorship, i.e. the directorship held within the same institution and the single directorship in its qualifying holdings together count as two directorships.'

Para. 50: 'When multiple institutions within the same group hold qualifying holdings, the directorships in all qualifying holdings should be counted, taking into account the consolidated situation (based on the accounting scope of consolidation) of the institution, as one separate single directorship. That single directorship in qualifying holdings counts as a separate single directorship, i.e. the single directorship counted for the directorships held within entities that belong to the group and the single



directorship counted for the directorships held in all qualifying holdings of the same group count together as two directorships.’

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

Regarding the definition of the notion of sufficient time commitment of a member of the management body, difficulties arise in the calculation of time commitments of a member when they relate to ‘the directorships in organisations which do not pursue predominantly commercial objectives’ and ‘other external professional, political activities and other functions and relevant activities, both within an outside the financial sector’ (para. 39 d) and g) of the draft guidelines). Regarding paragraph 39 j. it will not be possible to find appropriate and relevant benchmarking on time commitment. Furthermore, ESBG does not believe it is reasonable to record in writing the expected time commitment for each position within the management board, as required in paragraph 40. The focus should be on the competence of the board as a whole and there should not be requirements on individuals. There is no need for such a detailed requirement and furthermore, not effective to regulate time commitment in hours. Moreover, the expected time commitment will differ from time to time depending e.g. on the company’s development phase and business activities.

To calculate such time commitments institutions must rely on the disclosure made by the member. When asking members for such information, it must be considered that ‘directorships in organisations which do not pursue predominantly commercial objectives’, which include charities and other non-profit organisations, and ‘other external professional, political activities and other functions’ may imply an indirect declaration of a political ideology or religion that the member may not be willing to disclose.

These obligations also entail keeping records of ‘all external professional, political and other functions’ which could potentially raise personal data protection issues, especially if the information refers to ‘ideology, trade union membership, religion or creed’ which are specially protected data.

The requirements for sufficient time commitments could be difficult for institutions to assess (paras. 40-44); the proposal takes for granted that institutions are responsible for the sufficient time commitment of the members of the management body. ESBG believes that this responsibility should lie with each of the members. Monitoring and written documentation of the time commitment by institutions is not feasible. The time commitment vacillates respective of a person’s experience, travel time, need for training and so on. ESBG therefore recommends that an institution’s assessment of the time commitment of each member only when there are concrete concerns, e.g. long-term absences.

For situations where a reassessment of the individual member should be performed, there is a concern amongst institutions that on-going investigations resulting from judicial, administrative procedures or other analogous investigations (para. 71) could give rise to a claim to the courts and/or the administration by consumer associations or by individual plaintiffs. Therefore, any automatism in the application of these types of provisions should be avoided.

Para. 77 f) ‘political influence of the members of an institutions management body can create conflict of interests’ does not take into account that within public institutions like savings banks the management body in its supervisory function is democratically legitimised. Some Member States’ banks operate under ‘municipal trusteeship’. The elected mayor of the town, district etc. is automatically by law (ex officio) member of the management body in its supervisory function. The municipal trustee (town, city, districts or special-purpose associations) can - mediated through its





representatives in the supervisory board - safeguard that the savings bank fulfils its public mandate for the population of the municipality.

Since the representatives (e.g. mayor) have political influence, it is very important to remove point (f.) or at least to add an exception for representatives of municipal trustees. *“The presence of shareholders’ representatives and representatives of municipal trustees in the management body is acceptable.”*

### **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?**

In ESBG’s opinion, the bureaucratic requirements (paras. 85-91) regarding the introduction and training are too broad. The requirements in paragraphs 84 and 85 must be read in light of paragraphs 59 to 62, since the requirements are so extensive it may be difficult to meet the requirements in six months. The same holds true with regard to paragraph 83, i.e. the one-month period for induction may render it more difficult to provide a sufficiently-comprehensive induction within such a short time span. It is also important to clarify how employee’s representatives in the management body should be treated. The fact that institutions have to set out detailed guidelines for this purpose is, in our opinion, not necessary in all cases and too burdensome for some institutions, without guaranteeing the expected added value. These topics should be handled individually.

### **Title IV – Diversity within the management body**

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

ESBG proposes amending para. 92 so that the obligation to draw up guidelines on diversity applies only to systemically important institutions.

In addition, institutions are required to define diversity guidelines not only for the management body, but also for the employees of the institution. This is not required in CRD IV and should, therefore, be done on a voluntary basis. With this in mind, ESBG proposes that para. 97 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?**

According to para. 113, where a nomination committee is not established, the management body in its supervisory function should have the responsibilities named in Art. 88 (2) CRD IV, however the responsibilities listed in the CRD IV text are aimed only at significant institutions. Now, the EBA guidelines require every institution to carry out a large part of the committee’s tasks, even if no committees have been set up. ESBG would propose amending the draft guidelines to take into account the principle of proportionality so that, for an institution that is not required to form committees, the management body is not required to take on these responsibilities.



In some cases, the number of members in the governing bodies is legally fixed, so that the institutions cannot influence them. ESBG would recommend further clarity in para. 114 so that there is always an adequate number of members in these cases.

Additionally, we are of the opinion that general concept behind independence and conflicts of interest and the distinction between these two concepts is not sufficiently clear in either the EBA draft guidelines on fit & proper, the ECB draft guide on fit and proper, or the EBA-ESMA draft guidelines on internal governance. The proposed independence criteria for members of the management body in its supervisory function in Chapter 18 of the EBA draft guidelines on fit and proper are unsuitable and do not take into account national legal provisions. The applicability of the proposed independence criteria will impede in the future the election of suitable and high qualified members and will consequently significantly restrict the proper selection of members of the management body in its supervisory function.

The definition of independence in the context of conflicts of interest should fall under national law, so as to avoid contradictions with specific national legislations. For instance, the criteria which is related to personal, professional or economic relationships with the owners of qualifying holdings in the institutions with the institution's or any subsidiaries is in direct conflict with national provisions (e.g. Article L.512-106 of the French Monetary and Financial Code). The legal framework of the cooperative banks is a leading model in some Member States and should be taken into consideration as well.

One of the key instruments of group steering is the right of the parent company to nominate members of the management board in its supervisory function of the subsidiaries. Most of the proposed independence criteria are formulated in a very restrictive manner that will make impossible the use of this basic principle and right of parent companies towards its subsidiaries within a group structure. Besides, the EBA-ESMA draft guidelines on internal governance require that in a group structure the consolidating institution should ensure that governance arrangements, processes and mechanisms are consistent and well integrated group-wide (Section 8, para. 75). It would be more difficult for consolidating institutions to ensure that these arrangements, processes and mechanisms are implemented group-wide if one of the key instruments of group steering is absent.

In this context, it should be mentioned with regard to stock corporations that the only way in which the group steering by the parent company can be exercised is through its representatives in the management body in its supervisory function of the subsidiaries. The ECB Fit & Proper Draft Guide states that the presence of shareholders' representatives in the management body is acceptable.

The EBA draft guidelines on fit and proper does not take into account the presence of employees' representatives in the management body in its supervisory function. The right of the employees' council to nominate members of the management body in its supervisory function is part of some Member States' labour law and should not be affected or restricted by the proposed independence criteria. We therefore propose that the guidelines allow the independence criteria to be fulfilled by employee representatives.

Additionally, the representatives of municipal trustees should fulfil the independence criteria, see our comment on Question 7, para. 77 f).

Therefore we propose the re-wording of para. 123 as follows:

*'123. In order to facilitate constructive challenge and discussion, a CRD-institution's management body in its supervisory function should include a sufficient number of fully independent members (whereby representatives of the employees' council*





*~~and representatives of municipal trustees should be considered as independent in any case) that do not have a mandate as a member of the management body in its management function within the scope of prudential consolidation, are not employed by any entity within the scope of consolidation and are not under any other undue influence or conflict of interest, internal or external, political or economic that would impede their objective judgment, including as a result of close family relationships to other members of the management body.~~*

The presence of shareholders and shareholders representatives in the management body in its supervisory function is common practice and also compliant with legal requirements since they have a very significant interest in the welfare of their participations. This is also mentioned and accepted by ECB in section 5.3 'Conflicts of interests and independence of mind' of its draft guide to fit and proper assessments. From the formulation of para. 124 b. as proposed in the EBA draft guidelines it can be concluded that the shareholder representatives in the supervisory boards of institutions are not supposed to be independent and finally not suitable. Thus, we propose re-wording the text of para. 124 a) as follows:

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

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

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

In the situations given in para. 124, the necessary independence is generally not to be given.

ESBG is concerned in particular with para. 124 f). The 12 year membership within the management body of a group entity as proof of the lack of independence is inappropriate considering that experienced members with good knowledge of the group structure have the ability to constructively challenge the management actions and decisions while maintaining the necessary independence. 12 years' experience is mostly a benefit for experience within the management body of the institution or group. Therefore we are in favour of removing this presumption. Otherwise, in order to be more pragmatic regarding this restriction, we would propose the following wording:

*'f. the member served as member of the management body within the CRD-institution the group for 12 years or longer; after a cooling-off period of at least 2 years the member shall be considered as fully independent again.*

Regarding para. 124 g) ESBG understands that a close family relationship of a member or candidate member to another member of the management body of the CRD-institution or another group entity may affect the independence of the respective member or candidate, we are of the opinion that including family relationships to the persons referred to under para. 124 a)-f) into the same category is not necessary, and that this reference should therefore be deleted as follows:

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

All cases in para. 124 should at least be refutable in order to be able to decide on a case-by-case basis.



## **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?**

ESBG does not understand why the assessment procedure and results have to be reported by the institution to the competent authority. When appointing new members to the management body the institution assesses the suitability of the person. If the result was negative, the institution would not appoint the member. But if the institution informs the competent authority about the forthcoming appointment, the member is suitable. There is no need to mention that fact to the competent authority. This appears to be an unnecessary administrative burden for both the institution and the supervisory authority. The institutions should, according to paragraphs 150 and 158, inform the supervisory authority without delay of any shortcomings identified concerning the members of the management body, and so ESBG requests that paragraph 149 is deleted.

Paragraph 125 states that the management body in its supervisory function should ensure that the management body is suitable. In a unitary structure this means that the members of the management body should assess themselves, which seems illogical. Even though they shall make an annual assessment it will not be an independent assessment because it will be self-assessed. This also applies for the whole Title VI, which makes it problematic for unitary structures to apply.

In relation with the assessment of the suitability of an individual member of the management body, para. 136 e) of the draft guidelines provides that institutions should ‘validate, to the extent possible, the correctness of the information provided by the assessed individual’, which, according to para. 47, may come from ‘internal whistleblowing or from external sources’. ESBG requests that the guidelines clarify the extent to which institutions should investigate the veracity of the assessed person’s declarations or disclosures. This obligation could be limited to public information and/or to the jurisdiction(s) where the institution carries out its activities.

The matrix proposed in Annex I (para. 141) is in our view designed on a granularity level which is an unnecessary burden for smaller and less significant institutions (regardless of whether they stand alone or are part of a banking group). Thus, it is our understanding that for these institutions the collective suitability needs to be assessed in a way that is proportionate with the risk profile, business model and complexity of the respective institution. We therefore further propose to specify that for small institutions the suitability matrix should not be applicable at all, and the text should be amended as follows:

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

- a. the suitability matrix included in Annex I. Institutions may adapt this matrix taking into account the criteria described in Section 4 [proportionality]; for small and less significant institutions regardless of whether they stand alone or are part of a banking group) the suitability matrix is not applicable.*
- b. their own appropriate methodology in line with the criteria set out in these guidelines (including the proportionality requirements under Section 4) and required by competent authorities.’*

## **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?**

In relation to the timing of ex-ante assessment by the competent authority of the members of the management body unless duly justified reasons for an ex-post assessment exists, it is considered that the minimum period of assessment by the competent authority of between 3 and 4 months is excessive, especially if the period is suspended when additional information or documentation is required.

The ex-ante assessment by the competent authority in the case of members of the management body is of special relevance when the member is to be appointed by the general meeting of shareholders, which implies that the notice of the meeting is to be published on the web page of the entity and communicated as a significant event, in the case of listed companies. Therefore, in order to comply with the legal notice periods, positive assessment of the candidate should be obtained more than a month before the date of the general meeting of shareholders. Consequently, recruitment processes for new members of the management body will take well over six months. The whole process will be more complex if more than one vacancy has to be filled.

In relation to the CFO and the heads of internal control functions, an ex-ante assessment that can run to up to six months can seriously affect the functioning of the institution, given the importance of these functions and the need to comply with the corporate governance principles and rules applicable to credit institutions and, in the case of listed institutions, it may even affect the quotation of its shares.

The assessment procedure by competent authorities before the appointment of the member (para. 159) is not compatible with the principles of some Member States' public sector banks, where a number of members of the management body in its supervisory function are elected by the local parliament, and the head of the municipality's administration (e.g. the mayor) usually by law (ex officio) chairs the management body in its supervisory function. A previous assessment is not possible in these cases and ESBG would favour an opening handling.

With respect to the proposed ex-ante assessment some Member States' national law is incompatible with the SSM Framework Regulation (art. 93) according to which institutions have to notify the competent authorities of appointments and any changes to the members of the management body (ex-post assessment). We therefore propose maintaining the neutral approach of the current Fit & Proper guidelines which allows the competent authorities to implement an ex-ante or ex-post assessment, depending on national legal provisions. In case this is not possible please consider our proposals to chapter 25 (competent authorities' assessment procedure) below.

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

In the event that a positive assessment of the member of the management body is not obtained before the general meeting of shareholders and notice of the meeting has been published, two potential effects have been identified:

- Firstly, it could have a reputational cost for the candidate, as it could affect any other nomination or the recruitment process in which he or she may be involved. It could even mean that he or she could be questioned in other positions he or she may hold inside or outside the financial sector. The reputational cost could also affect the institution itself, as a



negative assessment of a candidate by the competent authority could lead to the questioning of the adequacy of the internal selection and evaluation processes.

- Secondly, if the members of the management body necessarily have to be appointed by the general meeting of shareholders and an extraordinary meeting of shareholders has to be convened to appoint the members of the management body, entities will have to incur significant additional costs, especially in the case of listed companies.
- Finally, the ex-ante assessment cannot be implemented by the French savings banks. According to the provision of the French Monetary and Financial Code (Article L521.90), every 6 years, for all savings banks at the same time, the whole management body (in its supervisory function i.e. Conseil de Surveillance) is totally renewed by a general process of election including 5 different processes set up by the French law.

The difference between listed and non-listed credit institutions must also be considered, as the former can opt to make appointments by co-option, while some unlisted institutions do not have this option.

To minimise the impact and costs which may arise from this type of situation, we propose a system in-between ex-ante and ex-post assessment of members of the management body. The proposal is that, without prejudice to national company law, institutions should be able to appoint a member of the management body subject to a positive assessment of his or her suitability by the competent authority. This would mean that the appointment of the member, even if it complies with company law, will not be effective until it is authorised or registered in the appropriate register of the competent authority (e.g. Banker's Register). Consequently, the appointed member will not be able to exercise their functions as member of the management body until he or she is effectively registered or otherwise authorised by the competent authority.

Regarding the ex-ante assessment of key function holders, although we agree that they should be assessed following criteria similar to that applicable to members of the management body, key function holders are generally employees of credit institutions and, therefore, their legal relationship with the credit institution is regulated by labour or social legislation and, if applicable, collective worker's agreements. The draft proposal also entails that the requirement for ex-ante assessments by the competent authority applies to heads of internal control functions and the CFO in significant institutions (paragraphs 159-161). Here, the practical problems and risks associated with an ex-ante requirement become quite pronounced. If such a person resigns prematurely or if the competent authority's scrutiny of a proposed person is time-consuming, important positions in the institution concerned will not be filled and would presumably have to be held by temporary/acting heads.

We believe that for operative and legal reasons, key function holders should not be subject to ex-ante assessment by competent authorities. Alternatively, a suitability assessment of key function holders should be carried out by institutions and their appointment notified to the competent authority within the scope of on-going supervision.

Additionally, an ex-ante assessment with duration of 4 months would prevent that members of the management body change respectively apply for position in management bodies of other institutions, which is counterproductive.

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



No comment.

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

The guidelines only require authorities to inform the institutions about negative assessment results (para. 174); positive results, however, are known only by the deadline. We advocate that positive assessment results should also be communicated to the institutions without delay, in order to create certainty at the institutions.

Paragraph 171 states that the supervisory authority may participate as an observer in meetings of the management body. It is questionable if it is appropriate that a supervisory authority is involved in the business or activities the authority is required to supervise. Can the independence be maintained if the supervisory authority takes part in such meetings? Furthermore, if the supervisory authority would participate in such meetings, it would likely not constitute a normal meeting of the management body.

In case the ex-ante assessment applies, ESBG proposes restricting it at least to initial appointments (excluding from the scope of application re-appointments which should be further on subject to ex-post assessment). We also propose keeping the applicability of ex-post assessments to small and less significant institutions, regardless of whether they stand alone or are part of a banking group. Therefore, the text of para. 161 should be amended as follows:

*'161. The procedures should ensure that all individuals newly appointed ~~or re-appointed~~ for such positions and, where applicable, the management body as a collective body, are assessed by the competent authority in order to determine their suitability before their appointment. In duly justified cases and in case of members appointed and reappointed for the management bodies of small and less significant institutions, the assessment of suitability by competent authorities may be performed after the appointment.'*

In our view there is a lack of practicability of the proposed ex-ante assessment (para. 166) as well as a high degree of legal uncertainty and increased costs for the institutions and the candidates, in case the proposed assessment period of three to four months (possibly six) is not significantly reduced. ESBG proposes that the EBA takes into consideration that the internal assessments by institutions also require a sufficient preparation time. From this perspective, having time periods of four (possibly six) months before the appointment of candidates by the management body in its supervisory function is impractical. Such long assessment periods could especially cause serious problems for listed companies as the shareholders' meetings for these companies are extremely expensive and take several months to prepare. For this reason listed companies normally have just one shareholders' meeting per year, also under the application of the current ex post-assessment regime.

The preparation time for a shareholders' meeting with the agenda item 'Election of Supervisory Board members' will amount to at least 9 months taking into account the proposed ex-ante assessment process of up to six months, keeping in mind that after the positive assessment of the supervisory authority also a decision by the management body in its supervisory function has to be taken and finally considering that the convocation of the shareholders' meeting has to be published one month prior to the meeting. In the case that a member of the management body in its supervisory function resigns from his/her function e.g. at the beginning of the year the aforementioned duration of the assessment process would make it impossible to appoint a new member in the ordinary shareholders' meeting of the same year (which normally takes place between April and June of the respective year).

The above-mentioned legally-binding steps result overall in an extremely tight internal preparation schedule for appointments which would become even more complex in case that the ex-ante



assessment and the extremely long assessment period by the competent authorities as proposed by the Fit & Proper draft guidelines comes into force.

Furthermore, it should be considered that in case appointed members of the management body in its management function cease to be members (resignation or death) it is absolutely necessary and of major significance (in order to safeguard the institution's ability to operate effectively) to have a replacement as soon as possible which is not feasible if the new member has to go through the entire assessment procedures (internal and by the competent authorities) within such a tight timeframe as proposed by the EBA guidelines. ESBG therefore proposes reducing the assessment period by competent authorities by amending the text as follows:

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





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

### ESBG – The Voice of Savings and Retail Banking in Europe

ESBG brings together nearly 1000 savings and retail banks in 20 European countries that believe in a common identity for European policies. ESBG members represent one of the largest European retail banking networks, comprising one-third of the retail banking market in Europe, with 190 million customers, more than 60,000 outlets, total assets of €7.1 trillion, non-bank deposits of €3.5 trillion, and non-bank loans of €3.7 trillion. ESBG members come together to agree on and promote common positions on relevant regulatory or supervisory matters.



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