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EBF comments on the EBA/ESMA revised Guidelines on the assessment of the suitability of members of the management body and key function holders

Key points:

- Key Function Holders: These guidelines will be published after the entry into force of the Capital Requirements Directive ('CRD V'). When discussing insertion of key function holders into the CRD V, Member States rejected it so that CRD V does not provide for the assessment of any of the KFH by the supervisor and amendments to paragraphs 53 of the "Background and rationale" section, 182 (referring to the heads of internal control functions and the CFO), 196 and 202 (referring to the heads of internal control functions and the CFO) shall be removed. This goes beyond the scope of CRD V (where insertion of KFH was already discussed and pushed back by member states). For the same reason, AML provisions shall not be extended to key function holders as they are not covered by the CRD V.
- The newly introduced provisions pertaining ML/TF exceed the EBA's mandate included in article 91(12) and would present serious difficulties of implementation, especially in Member States where it is hard to reconcile with national transposition of AML directives and in Member States where the management body acts as one single collegial body which is assigned all rights and responsibilities.
  Moreover, the new obligation would appear to contradict what is already stated in the Guidelines on Internal Governance (e.g. current paragraphs 155-156), whereby the heads of internal control functions should be directly accountable to the management body. It is thus hard to see the rationale behind a new accountability regime, specific to AML/CFT issues, where the responsibility would lie with a director instead of with the corresponding internal control head, accountable directly to the management body as a whole (as mandated by the Guidelines).
- The date of entry into force of the guidelines shall be amended in order to account for transposition into national law and the proper translations and comply or explain process of these specific Guidelines. It is not possible to expect institutions to apply the guidelines if the comply or explain process is not completed.

European Banking Federation aisbl

Brussels / Avenue des Arts 56, 1000 Brussels, Belgium / +32 2 508 3711 / info@ebf.eu
Frankfurt / Weißfrauenstraße 12-16, 60311 Frankfurt, Germany
EU Transparency Register / ID number: 4722660838-23

www.ebf.eu

EBF position:

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

First of all, we would like to remind that Article 16(1) of Regulation EU/1093/2010 states that the Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions. This provision does not give legislative additional powers to the EBA to the extent that EBA powers of interpretation derives from EU law in force. The guidelines are supposed to only "help to interpret the scope of the provisions" of regulations and directives, as pointed out by the Board of Appeal of the European Supervisory Authorities.

We do not understand the amendments made to the definition of "Prudential Consolidation", especially as it is changed in the EBA Guidelines on Internal Governance whereas it is left as it was before in the Guidelines on Suitability. Even though this change does not modify the content of prudential scope of consolidation and is in line with the CRD/CRR definition, we are of the opinion that the same definition should be used in both Guidelines. Besides, the existing definition has the advantage to clarify that all the subsidiaries (in particular nonregulated subsidiaries) of the Group are not necessarily part of the prudential consolidation.

When applying the guidelines on the consolidated basis, we are of the view that the principle of proportionality should also apply. It would be useful for this to be clarified by way of cross reference to this principle where the scope of application is contemplated and it should be explicitly stated that the principle of proportionality is also applicable in the implementation within the group of a credit institution.

Principle of proportionality also should be considered in connection to applying the same requirements towards subsidiaries in prudential consolidation (sub-consolidation) groups. The suitability assessment for non-regulated subsidiaries within EU should be risk-based; i.e. there may be instances where it is not proportional to request application of all the details. As an example, the time commitment shall be assessed in a lighter way for entities that are not subject directly to CRD V but that are part of the prudential consolidated perimeter.

Paragraph 17
As regards the date of application is referred to as 26 June 2021.

However, the date of application should be subject to national transposition. Indeed:

- it should be subject to the date of transposition in national laws of CRD V directive and of IFD, in order to avoid creating law aside of the democratic process.
- it should also account for the translations and the "comply and explain" process from competent authorities, which in practice is longer than expected in some Member States. Entities should not bear the uncertainty of the regulators / supervisors not finalising process in time.

Therefore, in order to take into account this rather long process we would suggest to include 31 December 2021 or 30 June 2022 as the date of application..

Paragraph 18
The paragraph on transitional provisions is not clear. Does it mean that institution should apply the Title VIII "concerning the initial suitability assessment of newly appointed members of the management body" to newly appointed members between the 30 June 2018 and the "coming into force" of the Guidelines? If so, how can the guidelines be applied retroactively? Apart from the legal difficulty, one should consider the administrative burden since these newly appointed members have already been approved. Preferably this date is later than 30 June 2021 taking into consideration the time needed for newly appointed members of the management body or key function holders. Therefore, we suggest to align this date with the date of application of the Guidelines mentioned in paragraph 17 (see also our comment above).

Paragraphs 51-53 (Preamble - general comment regarding the newly introduced provisions pertaining ML/TF)

The most significant changes introduced in the Guidelines are linked to the amendment included in CRD V, article 91(1).

The corresponding EBA mandate was included in article 91(12), which now reads:

"EBA shall issue guidelines on the following:

(f) the consistent application of the power referred to in the second subparagraph of paragraph 1."

The foregoing is important to highlight for it is the framework within which the EBA is expected to prepare its level 3 text.

In this sense, we believe the EBA should take into account the following before publishing the final text of its Guidelines:

A. Regarding the allocation of responsibilities individually to members of the management body

In one-tier systems, company law conceives the management body (board of directors) as one unique and inseparable body through which both management and supervisory functions are performed. All the members of the Board imperatively perform all the functions assigned to it as they are all, collectively, part of the decision-making process, and they all have the same rights and responsibilities; they are all under the same liability regime, for they act as one single collegial body.

The allocation of different roles and responsibilities to different board members is thus inadequate for one-tier systems, given that no efficient or real separation of responsibilities can be implemented where company law conceives the board as one unique and inseparable body through which all functions are performed.

Roles within the Board are primarily attributed for the enhancement of checks and balances, as well as to enable an optimum supervision and control and adequate running of the institution, but decisions within a collegial body carry no tags as to the types of members who adopted it. Moreover, roles are not assigned prior to a directors' appointment, only after he/she becomes part of the Board, and they are part of a constant rotation process, alongside the Board itself.

Consequently, the wording of the corresponding paragraphs of the Guidelines (among others, **paragraph 52 of the background and rationale; paragraphs 58 and 182)** should be adjusted in order for the Guidelines not to be interpreted as an individual allocation to a member of the management body.

In connection with the foregoing, and as will be highlighted hereunder in section C, the Guidelines have established a direct link between facts (e.g. ML/TF occurrence) and individual responsibility of a given director (e.g. paragraph 155), contrary to the notion of collective responsibility of one-tier board systems.

B. Regarding the allocation of responsibilities specifically to the management body when they already rest with the senior management

In line with what has been put forward under section A, the fact that the Guidelines expects institutions to allocate AML/CFT responsibilities to a member of the management body would be hard to implement in institutions where such responsibility lies with a member of the senior management.

In this sense, it is important to highlight that the new obligation would appear to contradict what is already stated in the Guidelines on Internal Governance (e.g. current paragraphs 155-156), whereby the heads of internal control functions (risk management, compliance and internal audit functions) should be directly accountable to the management body and "be able to have access and report directly to the management body in its supervisory function to raise concerns and warn the supervisory function, where appropriate, when specific developments affect or may affect the credit institution".

The independence of internal control functions and their accountability to the management body regarding, precisely, issues such as AML/CFT risk and compliance was a major breakthrough in the 2017 internal governance amendments, and has driven major organizational reforms within institutions. It is thus hard to see the rationale behind a new accountability regime, single only to AML/CFT issues, where the responsibility would lie with a member of the management body instead of with the corresponding internal control head, accountable directly to the management body as a whole (as mandated by the Guidelines).

The issue might be more easily reconciled in dual board-systems, where the person responsible for AML/CFT could be a member of the management board accountable to the supervisory board, but in one-tier systems it would entail assigning that responsibility to an executive director (e.g., the CEO, who is in many instances the sole executive member within the board "effectively directing the institution"), and that would put into question the independence and accountability framework from internal control functions to the management body in its supervisory function envisaged in the Guidelines on Internal Governance.

It would be also impossible in hybrid system (for instance, in France) where there is a CEO who can be (but not systemically) part of the board of directors.

C. Regarding the allocation of responsibilities specifically to the management body, where national AML/CTF law does not include such provisions

The 4th AML Directive (Directive (EU) 2015/849) requires banks to identify "**where applicable** (…) the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Directive" (article 46.4). **This Directive is naturally subject to transposition into national law by all Member States, and not all Member States have allocated said responsibility to a member of the management body.** For instance, the law transposing Directive 2015/849 in Spain has not included a specific obligation to appoint a board member in the sense provided and assumed for in the Guidelines (the situation is similar in other member states such as France).

Institutions need not necessarily allocate the responsibilities envisaged in the 4th AML Directive to a member of the management body, as the Guidelines seem to have assumed.

The assumption that the responsibility for AML rests with a board member is thus not correct and contradicts at least with some national legislation, and should therefore be amended, given that the assumption has inspired relevant changes in suitability requirements across the Guidelines which will be hard to reconcile and implement in those Member States without that regime.

Consequently, we strongly encourage that these specific guidelines (no. 58 and 155) be deleted or at least clarified, in the sense that (i) they will only be applicable in those countries that have incorporated the corresponding references of Directive 2015/849 into their respective legislations in the same terms or (ii) they will be subject to the particular implementation of Directive 2015/849 made in each jurisdiction.

D. Regarding the link between suitability and the "attempt, commission or increased risk of ML/TF"

The fourth issue to be highlighted regarding the new ML/TF provisions included in the Guidelines pertains the assumption that the Guidelines seem to have made, whereby board members are directly responsible for the occurrence or increased risk of ML/TF and that, therefore, individual and collective suitability of directors is inherently tied to those facts or increased risk thereof. This is especially evidenced in sections 19 and 20 (paragraphs 152, 154 and 155).

In this sense, it should be noted that "reasonable grounds to suspect that money laundering or terrorist financing is being committed or attempted" is an issue with potentially no link to the suitability of directors, which revolves around the notion of having a management body of good repute and which possesses sufficient knowledge, skills and experience of members **to perform its duties** (among other criteria set forth in article 91 of CRD IV).

Director's suitability cannot be assessed in light of material facts or risks of the institution, but rather whether they are correctly performing their duties in connection with those facts or risks. In the case of ML/TF risk, assessment would have to be done of individual and collective knowledge, skills and experience to adequately comprehend said risk, in order to adequately carry out its supervisory functions (detailed in great depth in the Guidelines on Internal Governance). But isolated facts or increased risk, as such, cannot be linked directly to a suitability deficit or loss, whether pertaining ML/FT risk or any other risk; they will always

have to be analysed within the framework of the management body's duties and responsibilities.

Even in instances where the understanding of ML/FT risks by a given management body (individually or collectively) might comparably exceed that of another institution, ML/FT could be suspected or committed. The Guidelines would appear to imply that the management body would not be suitable should that occur, when those issues might in fact have come to the attention of the management body precisely because of its members having a more profound understanding, or because of the intensity of that management body's analysis or control over ML/FT risks.

Given that AML/CTF already has a detailed legal framework in place, including the corresponding responsibilities for its breaches (whether they be at the executive or board level), **it is important that the Guidelines remain within the level 1 mandate, i.e "the consistent application of the power referred to in the second subparagraph of paragraph 1 [of article 91]". In this sense, if the proposed text where left as it stands in the final Guidelines, such consistency would doubtfully be achieved, as board members would appear to be directly responsible for AML/CTF breaches or increased risk when the CRD's seeks only to ensure that "requirements set out in this paragraph [article 91.1] are still fulfilled where they have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted, or there is increased risk thereof in connection with that institution"**.

Paragraphs 152, 154 and 155 should be revised in light of the foregoing.

E. Regarding the difficulties that will arise in implementing some of the provisions newly included in the Guidelines

The concept of ML/TF has been introduced across the Guidelines, at times with undue consideration of its implications, in other instances generating doubts over how institutions should comply or assess the given circumstances. In this sense, in addition to the paragraphs highlighted above, the following paragraphs should be revised:

- **Circumstances triggering suitability re-assessments** have been widened beyond what would appear reasonable to be linked to directors' suitability (e.g. **paragraphs 27.c.ii and 32.c.ii**. include no qualification and could be interpreted as any minor sanction, deviation or similar committed by any employee within the group, no matter how remote or small the subsidiary – it is hard to see how that could or should be linked to individual or collective suitability of directors' within the parent institution).
- Institutions' obligations at the time of individual suitability assessments now require them to "assess whether there are reasonable grounds to suspect that ML/TF is being or has been committed or that the risk thereof could be increased" (**paragraphs 146.b. and 147**), which is not only **extremely broad** but additionally **undefined** (should institutions analyse those facts in connection to previous institutions with which the director was involved? If so, how would it gather said information? Otherwise, should that information be linked directly to the director? How would an institution be able to gather information regarding "reasonable grounds" pertaining a new potential candidate to join the board, or from previous entities where he provided services of was a staff member?
  These provisions present serious implementation hurdles for institutions to implement.

- **Paragraph 154 j)**: as explained above (section C), it is unclear how it should connect or be applied in the context of collective suitability. When assessing collective suitability, institutions analyse the overall composition of the management body, to ensure that it possesses adequate collective knowledge, skills and experience to be able to understand the institution's activities, including the main risks.

Paragraph 27 of the Guidelines
EBA and ESMA need to clarify what they mean by "reasonable grounds to suspect that ML/TF is being or has been committed or attempted, or there is increased risk thereof in connection with that institution". This is a very subjective criterion questioning the presumption of innocence. This gives a very important and almost discretionary power to the authorities to interfere in the governance. Banks are subject to ML/TF and attempts thereof every day; hopefully the bank detects that, investigates and reports to the FIU. EBA and ESMA needs to elaborate on this to make it clear what is in scope here (i.e. by clarifying that only information that is relevant, important, serious or exceptional to that institution in particular could trigger "reasonable grounds to suspect" or an "increased risk thereof"). This problem recurs in other paragraphs (for instance 194).

Paragraph 52 (Background and rationale)
As per the 2015/849 Directive, EBA and ESMA uses the words "management board". We should make clear reference to the Directive here (in order to account for local transpositions and translations).

The EBA stresses the importance of senior management taking responsibility for the identification, assessment and management of ML/TF risk. EBA should clarify how senior management relate to management body and Key Function Holders.

Paragraph 53 (Background and rationale)
This paragraph mentions "authorities and bodies" without clarifying what is meant by "authorities" and "bodies". This needs to be clarified by EBA otherwise we suggest removing those references.

Common comment to paragraphs 52 and 53 (Background and rationale)
We propose to remove all references to the identification of a member of the management board as responsible for ensuring compliance with the national implementation of AMLD included, on the grounds of contradiction with national corporate law. Such identification might be contrary to the principles of collegiality and joint and several responsibility that govern the management body.

Paragraph 57 (Background and rationale)
In the last sentence we believe that the word "untrusted" actually should be "trusted".

Paragraphs 9 and 117
Similar to the other guidelines, the references to "offshore financial centres" are confusing (also in section 27 of the Background and rationale), while later we see references to "third country" (numerous paragraphs). We suggest EBA to align the references throughout the Guidelines.

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

First of all, we would like to mention that the EBA lacks a legal basis to set suitability requirements for key function holders, including internal control functions. When discussing the insertion of Key Function Holders into CRD5, this was rejected by Member States meaning that CRD5 currently does not provide for a legal basis for the suitability assessment of Key Function Holders by competent authorities. In addition, this also means that EBA cannot require AML/CTF to be part of the suitability assessment of Key Function Holders as there is no legal basis.

More importantly, the European Commission (EC) launched a consultation on the final Basel III reforms in the EU in October 2019.[1] The consultation specifically addresses the fact that the current CRD framework does not provide for the assessment of Key Function Holders and acknowledge that the Joint ESMA and EBA Guidelines on suitability go further in this respect. The EC has not yet come back with the outcome of this consultation which could potentially result in amending CRD5. Due to the fact that not all Member States have implemented KFH suitability assessment in national legislation, further harmonisation of suitability assessment of Key Function Holders is essential to create a level playing in the EU. EBA and ESMA should refrain from introducing (additional) suitability requirements to Key Function Holders where there is no legal basis and await the results of the aforementioned EC-consultation. The same also applies to the AML/CFT suitability requirements for Key Function Holders.

Paragraph 27c
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

A reassessment of the suitability of the members of the management body is not required by the CRD V, providing for a specific assessment by the competent Authority. EBA should refrain from adding requirements where there is no legal basis under CRD V. Therefore, the added paragraph should be deleted.

Paragraph 30
EBA needs to clarify what is meant by 'adequately broad range of experience' within the overall composition of the management body.

Paragraph 32
It is worth noting that the Board is responsible for ensuring a proper risk management framework regarding money laundering and terrorist financing. It is unreasonable to state that any suspect of breach on this matter entails a new collective reassessment of the Board. Such aspects could be possibly considered in the occasion of the yearly assessment just in case a serious lack in the management framework of such kinds of risks has been ascertained by the Board.

Question 3: Are the changes made in Title III appropriate and sufficiently clear?

Paragraph 58
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF". And more specifically, our comment regarding the transposition of the

[1] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-basel-3-consultation-document_en.pdf

requirement under the 4th AML Directive to identify "where applicable (…) the member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Directive" (article 46.4).

The transposition of this requirement under the 4th AML Directive differs amongst Member States. Although EBA clearly presumes that there are specific board members who are responsible for AML/TF risks, i. It is key to, at least, refer to the members responsible for the implementation of AML/CFT regulation pursuant to local regulation.

All references to the identification of a member of the management board as responsible for ensuring compliance with the national implementation of AMLD shall be deleted on the grounds of contradiction with national corporate law. Such identification might be contrary to the principles of collegiality and joint and several responsibility that govern the management body.

Paragraph 74
In paragraph 74,iii), reference to "illicit dividend arbitrage schemes" is subjective. EBA should make clear what is meant in this respect. In our view, it should be limited to cases where a final court decision has been issued or where there is a formal decision by the AML/FT supervisor. The same also applies to 'findings' (paragraph 74.b). It is rather large and imprecise definition. EBA should be more concise as to what a 'finding' entails.

Paragraph 75
The notion of 'adverse reports' is also rather large and unprecise. In addition, it is very broad and not in line with the European Convention on Human Rights and Charter of Fundamental Rights of the European Union as long as it clearly refers to cases where there is neither a decision/measure that has been taken by a competent institution, nor an on-going investigation resulting from judicial or administrative procedures as referred to in the first sentence of the same paragraph.

Paragraph 77
We also consider that the addition in paragraph 77,e) referring to "allegation" should be deleted and only reference to evidence should stay. Allegations cannot be considered as sufficient in order to assess a member of the management body. Institutions cannot bear the risk of this subjectivity.

Paragraph 83
The situations where a member of the management body is a "politically exposed person" should not be considered as significant in terms of independence of mind, taking into account the extension of the definition. This would lead to include, for example, situations where Board members are members of the administrative, management or supervisory bodies of State-owned enterprises. Such situations cannot be considered as detrimental to the independence of mind of a board member.
In any case it is not clear if the positions held as "PEP" in the past 12 months are considered in the draft as relevant.

It would be better to make reference to the criteria adopted by the ECB in its guidance on fit&proper assessment where it is specified that "*the materiality of the conflict of interest depends on whether there are specific powers or obligations inherent in the political role which would hinder the appointee from acting in the interest of the supervised entity*".

Paragraph 86
In addition, clarification is needed regarding the meaning of "member" of affiliated companies. In addition, EBA should also clarify the definition of 'affiliate'. Although this reference is taken directly from Directive 2019/878, it would be very much welcome that the guidelines provide clarity regarding what is to be considered a "member". In this sense, the Guidelines should clarify whether "membership" is to be understood as "member of the management body".

Question 4: 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?

Section 12 should only focus on measures to ensure that gender balance is taken into account when selecting members of the management body. The provisions referring to the staff (e.g. new paragraph 108) go beyond CRD V and the scope of application of these Guidelines. Considering the fact that members of the Management Body in its Supervisory Function shall be independent, it is inappropriate to provide for the measures to be put in place when selection staff for management positions in this section.

Paragraph 102
This paragraph is (or seems to be) vague in respect to what is understood as an 'appropriate representation of all genders within the management body'. Should this be measured within the group as a whole, on aggregate level, or per board? In addition, the principle of 'appropriate representation of all genders' should also be respected when 'selecting members of the management body'.

Paragraph 107
We object to the use of the word "staff". In Sweden the only person of the management body who is employed by the bank and falls under the wording "staff" is the CEO. Reference to policies that facilitate the reintegration of staff after maternity or parental leave shall not be dealt with in these Guidelines as it goes beyond the scope of the EBA/ESMA mandate– it is not accurate. We suggest the word is changed to "persons".

Paragraph 108
In line with the general comment included above, regarding the scope of application of the Guidelines in general, and specifically this new provision, the Guidelines should avoid general references to "staff", which is not defined within the text and could potentially cover the entire organization, which remains outside their scope of application and beyond the EBA/ESMA mandate.

In this sense, the provisions of paragraph 108 are sufficiently engrained in paragraph 102 (i.e. appropriate representation of all genders in the management body and, moreover, equal opportunities when selecting members of the management body). It is only natural that institutions will have to implement adequate policies, procedures or other internal measures, at the lower levels, in order to adequately achieve diversity and equal opportunities at the higher levels. Paragraph 108 could thus be eliminated without "side-effects", and the elimination would ensure that the Guidelines remain within their remit. Moreover, the Guidelines on internal governance, which are likewise being amended, already include a section on diversity.

Should the paragraph remain, contrary to the suggestions made above, greater clarity is needed regarding the terminology used. The article uses the words "property" and "birth" and we do not understand what they mean in this context. Regarding "birth" we have discussed whether it is used as a synonym for "origin", but since origin is already mentioned earlier in the sentence, it must mean something else. We suggest that EBA elaborate on what is to be understood by each of these diversity concepts if they are to remain in the article.

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

No, the changes made in Title VI are not appropriate and sufficiently clear. Please see below our specific comments in this respect:

Paragraph 117
The terminology of "offshore financial center" should be defined, as it is not a legal concept and is not defined in the CRD V either. Please see our previous comments in this respect.

Paragraph 120
We do not agree with the amendment provided in paragraph 120 as subsidiaries located in third countries shall also comply with local regulation which may be in contradiction with EU regulation (gender balance for example). In addition to this, undertakings cannot be treated as subsidiaries as the weight of the credit institution in the entity might be not enough to impose all governance standards. Lastly it is not possible to ask the same degree of details in the application of suitability standards in third countries (such as the counting of hours to calculate the time commitment where there is no regulation on the number of directorships).

In this sense, it is important that the EBA remember the importance that the proportionality principle acquires in the framework of group-wide application of arrangements, processes and mechanisms, as outlined by article 109 of the CRD. The Guidelines should not impose or expect the same standards or suitability policies in subsidiaries located in third countries, not only because group policies will have to account for a wide array of legal frameworks, as outlined above, but likewise because subsidiaries will likely have very different risk profiles, business models, size, internal organisation, complexity, etc.

All these facts are envisaged in Title I of the Guidelines and have to be taken into account by CRD-institutions when applying them, including at the time of elaborating group-wide suitability policies and processes. The notion of proportionality would appear to conflict with the amended paragraph 120.

Moreover, the new wording of paragraph 120 introduces the notion of "lower standards", which is subject to interpretation. It has to be borne in mind that suitability requirements and processes differ across Member States, particularly where supervisors have introduced more stringent procedures or require more information. Therefore, suitability procedures might not always be the same even within the European Union, yet they would all be in conformity and would respect EU regulations. It would thus be difficult to decide which standard is the "higher" one, against which to judge the standards of third country subsidiaries.

Similarly, third country subsidiaries will have their own processes or procedures to be respected, as well as specificities (legal, organizational, structural) within their

management bodies that have to be respected and might not make it possible – or necessary – for EU processes to be applied. This would potentially raise a problem for the EU parent undertaking, if it has to prove that the suitability standards applied in third country subsidiaries are indeed "not lower" than in the institution.

Consequently, we suggest that the newly-introduced phrase in paragraph 120 be eliminated, instead introducing a cross reference to proportionality principle (Title I), which is likewise embedded in the level 1 text and of utmost importance in the context of group-wide application of European regulations.

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

Paragraph 146
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

We propose to delete the added part in point b), taking also into account that the banks are already required to gather information on reputation, integrity and honesty of Board members. Please see also our comments with reference to paragraph 27c

The section "c" of this paragraph does not seem to include anything relevant. Bearing in mind that section "e" already contemplates obtaining information on conflicts of interest, it is difficult to think what would be the contribution of gathering information on "independence of mind" (how can one check "courage", "conviction and strength" or "being able to resist group-think"?).

Paragraph 147
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

We propose to delete the added part. Please see also our comments with reference to paragraph 27c.

Paragraph 152
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

There appears to be no need for the newly-introduced paragraph 152, since references to "risks" already include the risks of AML/TF (in this regard, see paragraph 15 - "any references to "risks" in these guidelines should also include money laundering and terrorist financing risk"), and therefore its content is understood to be covered in paragraph 66 ("The management body should collectively be able to understand the institutions activities, including its main risks").

There is no underlying reason for the degree of assessment that is expected as regards the understanding of ML/TF risks by the management body compared to any other risks. This burden is thus imposed for a very specific type of risk and does not appear to be founded on the CRD provisions.

In this sense, the modified article 91 of CRD focuses on ensuring that suitability persists upon the occurrence of certain events, i.e., when there are reasonable grounds that ML/TF are taking place or have taken place in the institution, but the underlying obligation of

suitability has not been altered. Consequently, the Guidelines should not expect, nor impose new obligations on institutions pertaining how ML/TF is analysed by the management body.

The effect of proposed article 152 thus exceeds the scope of the changes introduced by the level 1 text, and would impose obligations on institutions which are unparalleled in comparison with any other risk under analysis by the management body. It is questionable whether institutions should demonstrate more understanding of ML/TF risks than any of the remaining risks it analysis, and this paragraph raises the question of whether institutions, in order to demonstrate management body's understanding of ML/Ft risks gather ad hoc evidences that are not aligned with its processes regarding collective suitability analysis.

Additionally, the reference to "decisions" within the paragraph should be corrected, as matters linked to ML/TF will not always entail a decision; in many instances they will be subject to analysis, supervision and control, not necessarily involving a specific decision.

Paragraph 154
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

The section "j" is encumbered with the same problems as paragraphs 30, 32 c and 37c. EBA and ESMA needs to elaborate more and explain exactly what they mean here. Is it the member of the management body´s own actions that are in scope – if so it needs to be written much clearer. The CRD, in its article 91(1), as amended, does not mention the activities of the members of the management body as such, rather those that pertain to the institution.

Paragraph 155
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

All references to the identification of a member of the management board as responsible for ensuring compliance with the national implementation of AMLD shall be deleted on the grounds of contradiction with national corporate law. Such identification might be contrary to the principles of collegiality and joint and several responsibility that govern the management body. It is not possible to allocate material fact or finding to one or more responsible members of the management body. A compromise could be to refer to the "relevant body or person in accordance with local regulation" in order to account for the above.

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

No, the changes made in Title VIII are not appropriate or sufficiently clear.

Paragraph 182
Please see above, "General comment regarding the newly introduced provisions pertaining ML/TF".

The heads of control functions and the CFO, where not member of the Management Board are explicitly included in the suitability assessments when collective suitability does not

apply to non-board members. This should be removed as it seems to have been included by error. The same comment would apply to paragraphs 196 and 202.

It is very important that the Guidelines remain clear regarding their scope of application, especially as regards provisions linked to key function holders, who are not members of the management body. In this sense, it is important to remember that the suitability of key function holders is not regulated in the CRD, let alone collective suitability which, by definition, implies a group and is only applicable to members of the management body by way of article 91. Paragraph 182 should thus avoid any confusion by eliminating the references to heads of internal control functions, CFO and/or any other key function holder.

It appears there is a typo at the end of this paragraph: the reference to paragraph 173 should be replaced by a reference to paragraph 172.

Paragraph 196
The obligations proposed by paragraph 196 are not clear. The paragraph provides for that *'competent authorities should also (…) seek information from (…) FIUs and law enforcement agencies to inform their suitability assessments*. It is not entirely clear what is meant by this. We assume that the competent authorities will only seek general information on AML/TF from FIUs and law enforcement agencies rather then personal information on (proposed) board members as this highly confidential supervisory information which cannot be shared between competent authorities and FIUs.

Paragraph 202
In case of a conclusion of not suitability of a member of the management body or a head of internal control function and the CFO based on the relevant facts in the context of ML/TF risks or events the competent authority should share their findings and decisions with the competent AML/CTF supervisor. This is not in line with the purpose of the AMLD and therefore not acceptable taking into consideration proportionality and subsidiarity.

In the context of the AMLD and the requirement of appointing a specific member of the management body to be responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with the AMLD, this should be limited to that specific member of the management.

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

We think that it should be clarified in the Guidelines that when a new member of the management body is appointed, the assessment should be limited to the newly appointed member.

It should be made clear in this new section that the decision of the supervisor regarding the new board member is provided immediately – we shall not be subject to any delay in a context of resolution.

As a new Title IX has been added in order to account for BRRD, would it be possible to add a new section dedicated to the consolidation, specifying that when there is already an existing assessment provided in the context of a shareholding interest, entities that are already subject to the fit and proper shall not provide anything else as regards fit and proper. This is in line with Articles 104, 97 and 102 of the CRD V.

Annex I
It is mentioned that Annex I is amended to include compliance with AML/TF requirements. Due to the fact that no amendments are included, is it meant to refer "risks" which should now also include the risks of AML/TF (in this regard, see paragraph 15 - "any references to "risks" in these guidelines should also include money laundering and terrorist financing risk")?

Annex III 1.2d
Why to document the acceptance by the individual to the expected time commitment for the position?

Annex III 5.1f
Please see our comments under paragraph 83 where it is explained why the situations where a member of the management body is a "politically exposed person" should not be considered as significant in terms of independence of mind.

Annex III seems to further enlarge the situations considered as potentially relevant in terms of independence of mind, by also requiring disclosure about any relationship or association with a "PEP". This enlargement is not agreeable as well as not feasible. The concept of "relationship" is too broad and generic and leads to disclose a lot of relationships which are inconsistent with the independence of mind requirements.

With this regard, we propose to make reference to the ECB guidelines, as above mentioned under paragraph 83.

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For more information contact:

Blazej Blasikiewicz
Director of Legal, International & Public Affairs
b.blasikiewicz@ebf.eu
+32 2 508 37 32