Brussels, 30th October 2020
VH/MK

EACB comments on revised Draft 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

(EBA/GL/2020/19)
(ESMA35-43-2464)

Key messages

The EACB welcomes the opportunity to comment on the revised Draft 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.

EBA mandate

We have serious doubts whether the EBA has level 1 legislation-based power to provide further regulation on:

- External assessment of key function holders by the supervisor, as CRDV does not provide for such an assessment (§182 and s);
- AML provisions extended to key function holders as they are not covered by the CRD V Directive (§53);
- Retroactivity: the revised Guidelines should apply only to members of the management body appointed as from 26 June 2021 and not retroactively to members of the management body appointed as from 30 June 2018 (§ 18).

Article 16(1) of Regulation EU /1093/2010 does not give legislative powers to the EBA and that the democratic debates should be respected.

The notion of collective responsibility

Para. 155 should be removed as it is contrary to the principles of collegiality and joint and several liability of board members, where these principles exist in national law. Generally, and specifically in that case the focus should be on the responsibilities of the various board committees.

Date of application and suitability assessment by competent authorities

The date of application should be postponed as in the context of the Covid crisis, credit institutions are fully mobilized to support the economy and their clients and they should not

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have to deal with additional constraints and to review their procedures and IT systems because of guidelines. It should be taken into consideration that the assessment of the key function holders by the supervisor, especially if not limited to the level of the central body or the parent company, would imply a considerable increase of the number of files without any improvement.

Answers to specific questions

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

- **Date of application**

The date of application of the GL should not be stated as a precise date, due to potential problems related to late transposition of the CRD V or IFD by Member states, late translation of the GL, "comply or explain" process from national authorities which could be longer than expected in some Member States and due to the Covid-19 context, as credit institutions are fully mobilized to support the economy and their clients, they should not have to deal with additional constraints and to review their procedures because of guidelines. The entry into force should be at least 3 months after the last transposition of CRD V and IFD in the Member states and the finalization of the comply or explain process in all jurisdictions.

With regard to the implementation and transitional provision the revised para. 18 of the Guidelines provides that: "*competent authorities should not implement Title VIII concerning the initial suitability assessment of newly appointed members of the management body and key function holders with regard to persons appointed before 30 June 2018.*"

In terms of date of application para. 17 of the revised Guidelines states: "*These Guidelines apply from 26 June 2021*."

First, it is not sufficiently clear whether according to the revised Guidelines, the competent authorities should implement Title VIII with regard to persons appointed between 30 June 2018 and 26 June 2021.

Provided that is the case, we actually do not agree with the transitional provision differentiating treatment of persons appointed before 30 June 2018 and persons appointed between the 30 June 2018 and the 26 June 2021. This retroactivity is highly debatable and questionable from a legal standpoint.

There should be no expectation to implement Title VIII concerning the initial suitability assessment of newly appointed members of the management body and key function holders with regard to persons appointed after 30 June 2018 but still before the application date of these Guidelines. The revised Guidelines should apply only to members appointed as from 26 June 2021. Apart from the legal difficulty, one should consider the administrative burden.

Paragraph 18 may have been useful in the "original" Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders, but in its amended version the provision does not make sense in our opinion. Retroactivity is legally questionable and would imply a considerable administrative burden.

Moreover, we believe that the GL cannot be applied in any case before the application of the transposed CRD V (Directive (EU) 2019/878) provision as a minimum (29 December 2020) as

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this is the legal basis for most amendments. To ensure a proper implementation of the revised GL we advocate for a clear transitional provision in paragraph 18 which allows e.g. for a transition period of 12 months after the publication of the final text for the whole new provisions of the GL (and not only parts).

- **Rationale and objective of the Guidelines**

The new paragraphs 51, 52 and 53 in Section on Rationale and objective of the Guidelines on page 16, are not sufficiently clear on whether institutions are obliged to designate one or more individual members of the management body (when referring to the board of directors) responsible for AML/ACF matters. The GL should allow both options, for at least in some Member States the collective responsibility of the board of directors is a principle ratified in the legislation. Furthermore, the institutions should be allowed to decide by themselves how they allocate the responsibilities regarding AML/CFT amongst the top management, to make sure that the outcome is suitable for each institution and as effective as possible. It should be clear that in some Member States there is no individual allocation of responsibilities to a member of the management body. In some jurisdictions (e.g. France), it is therefore contrary to the principles of collegiality and joint and responsibility that govern the management body.

EBA and ESMA need to clarify Para.51 as "reasonable grounds…institution" is a very subjective criterion which questions the presumption of innocence and gives an almost discretionary power to the supervisor to interfere in the internal governance.

The new paragraphs 52 and 53 in Section on Rationale and objective of the Guidelines state that the person responsible of implementing the AML/CTF-framework is a person in the management body. They could be in conflict with national AML law transposing the AMLD (insofar as Article 46 of the AML Directive states that Member States shall require that, where applicable, obliged entities identify 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). For example, in France, Articles L 561-32 of the Monetary and Financial Code on the application of AMLD) refer to a "high hierarchical function" of the person responsible for AML/ACF matters. However, it is not a member of the management body - but it can be the general director. Also, in Spain, Article 26ter of the AML Law 10/2010 does not require banks to identify a member of the management board who is responsible for the implementation of the relevant AML provisions.

Regarding the background and rationale of the Guidelines paragraph 52 on one hand stresses the importance of senior management taking responsibility for ML/TF risks and on the other hand requires institutions to identify a member of the management board who is responsible for compliance with the AMLD. We understand this background paragraph in the sense that the appointment of responsibility in the management board means that there is no additional responsibility in the management below the management board (apart from necessary provisions from the AMLD, e.g. AML Officer).

In the last sentence of par. 57, we believe that the word "untrusted" actually should be "entrusted".

We have serious doubts whether the EBA has level 1 legislation-based power to provide further regulation on external assessment of key function holders by the supervisor, as CRDV does

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not provide for such an assessment (§182 and s).In addition, CRDV and AMLD do not provide for all the KFH to be assessed in relation to the AML/FT provisions.

- **Scope of Guidelines**

Difficulty in understanding the scope, which nevertheless clearly includes investment firms.

- **Terminology:**

We would like to request the use of the term "management body" (and not "Board") consistently throughout the Guidelines.

- **Proportionality**

It should be explicitly stated that this principle should be applicable in the implementation within groups of a credit institution.

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

Paragraph 27 c i)is not clear enough if it implies that re-assessment of the suitability of the members of the management body should be performed when the institution has been used for money laundering/terrorism financing purposes. This in fact would mean that re-assessments will have to be done almost daily. It is impossible for banks to detect all cases of money laundering as the definition is so wide and it is by definition impossible to detect all cases. It is not required by CRDV. The decisive point is a substantial breach of duties of banks. The same comments can be done with regards paragraph 32c and paragraph 37c.

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

- **Adequate knowlegde, skills and experience (para. 58)**

Paragraph 58 could be in conflict with national AML law transposing the Directive (EU) 2015/849 (insofar as Article 46 of the AML directive states that Member States shall require that, "where applicable", oblige entities to identify a member of the management board who is responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with this Directive). In fact, Art. 46(4) of Directive 2015/849 only suggests that Member States should "where applicable, oblige entities [to] identify 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". The clause "where applicable" leaves room for Member States to stipulate otherwise. The revised GL do not consider the scenarios of the national transposition in all Member States, as some do not allocate such obligation to members of the management board. This is the case, for instance, in France where the national AML legislation does not require banks to identify a member of the management board who is responsible for the implementation of the relevant AML provisions. By conclusion, with these provisions the EBA oversteps the limits set by the legislative framework of Directive 2015/849 and contradicts national laws. The relevant passages should be deleted in order to be brought in line with Directive 2015/849.

- **Reputation, honesty and integrity (para. 74, 75, 77)**

Concerning:

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- revised para. 74 point (b) of Section 8 on page 40 where the following has been added: "(…) findings (…)";
- revised para. 75 of Section 8, under Title II on page 40 where the following has been added: *"other adverse reports with relevant, credible and reliable (e.g. as part of whistleblowing procedures) information should also be considered (…)"* and
- concerning the revised para. 77 point (e) of Section 8, under Title II on page 41 where the following has been added: *"or serious allegation based on relevant, credible and reliable information (…)"*

We find these amendments ambiguous: allegation, findings, adverse reports should not be taken into consideration and reference to them should be deleted.

In this context, it is important to highlight the necessity to respect the data protection regulation. Moreover, creditability standards regarding any sources should be sufficiently high in order to avoid any abuse by such sources of information.

We believe the reference to whistleblowing procedures should be removed. In fact, the Fit&Proper Officer or assessing committee may not have access to all relevant information due to the relevant provisions in the Whistleblowing-Directive (Directive (EU) 2019/1937). According to Art 16 the identity of the reporting person must not be disclosed to anyone beyond the authorized staff members competent to receive or follow up on reports. This applies to any other information from which the identity of the reporting person may be directly or indirectly deduced. Therefore, the credibility of the information of the whistleblower on the person in question cannot be adequately verified in practice and is not valid as a credible accusation, which could have consequences in form of a criminal or administrative procedure which is then taken into account. Only the outcome of the procedure following the whistleblowing should be relevant.

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?

With regard to the revised para. 107 and new para. 108, in our view, they should not be introduced in the text of these Guidelines, as they concern policies applicable to the whole staff and not solely to the management body and key function holders (diversity, equal treatment, non-discrimination).

If such guidelines are considered necessary, it would be sufficient to include them in Guidelines on internal governance. In fact, in the EBA consultation paper on "Draft Guidelines on internal governance under Directive 2013/36/EU (EBA/CP/2020/20)" there are already similar provisions under the revised paragraphs 98. and 99 on page 42.

- **Diversity policy objectives; paragraph 102 last sentence**

We advocate for deleting the last sentence of paragraph 102: "Having employee representatives, where required under national law, of the underrepresented gender alone is not sufficient to ensure that the management body in its supervisory function has an appropriate gender balance". While the intention behind this rule is understandable, we

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nevertheless have to underline that it can only be an orientation for establishing the gender balance. The rule must not lead to a situation where the under-represented gender would be over-represented in the end as in that case now balance could be achieved.

We want to point out that employee representatives in the management body facilitate a diverse composition of the board and we do not understand the rationale behind not accepting employee representatives for ensuring of the appropriate gender balance. The aim of diversity is to have an equibalanced reflection of the undertaking in the management body. Therefore, employee representatives are the most appropriate board members to address this aim, since they are elected from the staff and represent the staff according to the diversity aim.

Alternatively, in case the last sentence of paragraph 102 is not deleted we think it should not refer to the supervisory function of the management body but rather the management body in general (meaning both executive and supervisory function) in our opinion. Therefore, the last sentence of paragraph 102 should be amended as follows: "Having employee representatives, where required under national law, of the underrepresented gender alone is not sufficient to ensure that the management body has an appropriate gender balance".

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

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

Para 155 should be removed as it is contrary to the principles of collegiality and joint and several liability of board members where these principles exist in national law. Generally, and specifically in that case the focus should be on the responsibilities of the various board committees.

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

- **Suitability assessment by competent authorities (Title VIII)**

We would like to highlight that CRD V does not provide for the assessment of the KFH by the supervisor unlike the suitability assessment of members of management bodies (Art. 91) and that amendments to paragraphs 182, 196 and 202 should be removed. The evaluation by the supervisors was refused during discussions on CRDV, and that the democratic debate must be respected.

EBA sees a legal base for suitability assessment of the key function holders in the Article 74, requiring that the CRD-institutions must have "robust governance arrangements" in place. This is a very extensive interpretation, provided that there is a more restrictive specific clause (lex specialis) in Article 91. Hence, the draft revised guidelines regarding the suitability assessment of key function holders are too categorical especially in co-operative banking groups.

The guidance regarding key function holders should at least clearly provide that the requirement on suitability assessment of key function holders only apply to the central institution/parent entity level in banking groups where the main responsibility of the said functions is centralized and not to require the assessment of key function holders at the level of local and regional cooperative banks. An equally restrictive approach should be applied to

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less significant institutions in general. The same approach should be adopted for the "other key function holders" having a significant influence over the direction of the institution.

In addition the wording of the revised version of paragraph 182 "re-assess the individual or collective suitability of the members of the management body and heads of internal control functions and the CFO" in our opinion is misleading as it might indicate there could be a collective suitability of key function holders. Therefore, the scope of application would be significantly extended, and this would make no sense, since key function holders are not part of a board but rather act as individual persons.

- **Cooperation between competent authorities; paragraph 199**

According to paragraph 199, competent authorities should make use of the system for the exchange of information relevant to the assessment of the fitness and propriety of inter alia "holders of qualifying holdings". We believe this reference should be removed as the Fit&Proper assessment by the authority does not apply to shareholders (with or without qualifying holdings).

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

Yes, we find the proposed changes appropriate and clear enough.

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