02 May 2017

EBF_024760

# EBF response to the ECB Draft Guide on “fit and proper assessments”

## Key points:

- It is not clear how the ECB draft guide relates to the EBA/ESMA guidelines on the assessment of the suitability of members of the management body. One set of principles and one uniform assessment process should be established.
- The draft guide aims to harmonise the implementation of assessment criteria applicable to fit and proper assessments. Such harmonised implementation aims to achieve common supervisory practices. Further harmonisation of the procedure and timelines is essential to create efficient processes and a level playing field. A similar procedure as described in Directive 2007/44/EC (Antonveneta directive) would create a truly harmonised assessment process. At times, we experience that it is unclear when the assessment documentation is considered to be complete and the assessment period has commenced. We therefore suggest that timelines should be harmonized. As standard procedure, supervisory authorities must always inform the institution within two working days on whether the assessment notification is considered to be complete or not in order to avoid (undue) delays. In line with the Antonveneta directive, the competent authority could only suspend the decision making period once when asking for additional information. One set of assessment forms should be created so it can easily be determined whether the assessment documentation is complete.

  We believe this would lead to greater harmonization and certainty for the institution and the candidate regarding the assessment procedure, timing and/or information that is required from them. This would also create a level playing field.
- The ECB is responsible for decisions on the appointment of members of the management body/bodies of significant credit institutions that fall under its direct supervision. Question 9 to the guide indicates that the guide could also be applicable to the assessment of key function holders to the extent possible under the national law. Reference shall be made to our comments to the ESMA-EBA Guide on suitability, where we claim that no assessment of key function holders should be provided by Guidelines. The inclusion of this group is beyond the mandate provided by CRD IV to EBA (see Article 91.12 of CRD IV).
- Furthermore, we want to highlight the importance of the proportionality principle and its proper implementation. As it is explained in the draft guide, the principle of proportionality applies throughout the whole fit and proper process, meaning that the supervisory process of the ECB as well as the application of the suitability criteria should be commensurate with the size of the entity and the nature, scale and complexity of its activities, as well as the particular role to be

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filled. From our perspective, this principle requires further developments. Indeed, we only found one remark on that principle in chapter 5, 6, 7 and 8. In light of these further developments, we also think, that some practical implications should be included in all of the assessment criteria as explained in the guide, however with the exception of the reputation criteria on which we agree with the SSM, that the principle of proportionality cannot apply.

# EBF comments:

- **Section 3 Principles**

In our opinion institutions could only make a plausibility check of information provided by the respective candidates and not provide a full criminal investigation.

Principle 1: the supervised entities must on a best effort basis ensure they have the fully transparent cooperation of the individuals concerned: it shall be on a best effort basis only because they can put in place safeguards to this respect but they cannot be substitute of individual's cooperation. Should a lack of cooperation result in an issue in relation to the suitability, this should be dealt within the assessment process.

As regards triggering events: the range of triggering events is too broad and may lead to an overload files sent to the competent authority (even in case of any delegation of power to NCA's for vanilla cases).

As regards interviews, we do support neither mandatory interviews for CEO and Chairperson nor interviews as provided in these guidelines. We would like some safeguards to be put in place – see below for further details.

- **Section 5.1. Experience**

The assessment made by the ECB Guide with the usage of thresholds relating exclusively to recent practical experience in areas related to banking or financial services in the first stage may not be consistent with the nature of the composition of the Board of Directors, taking into account the need to have sufficient diversity and a broad range of experiences in the management body.

Establishing a particular period of experience exclusively in areas related to banking or financial services as threshold would mean that suitable appointees with less experience or experience in other areas also necessary for the institution or non-suitable appointees with the required experience will fall below or over the threshold, providing an objective indication of the suitability of the appointees.

This "tick the box" proceeding, even if it merely provides a presumption (but needing the entity to evidence the contrary), cannot be implemented in the scope of a diverse management body. Indeed, the current regulation demands that the management body should be diverse (and policies must be approved in this regard), and that it handles matters not only related to banking and financial services (such as remunerations, IT, risks, cybersecurity, etc.). This threshold proceeding should not favour the participation in the management body only of persons with recent experience in areas related to banking or financial services (who are likely to pass the objective threshold and, therefore, would pose less problems for the institution) and, on the contrary, limit the participation in the management body of persons with different backgrounds and with different number of years of experience in the financial industry. Moreover, the analysis

by presumptions is also not admissible, as the entity would have the burden of proof in justifying why it deviated from the fit and proper fixed and objective standards of the ECB Guide that, it must be highlighted, do not favour diversity and a broad range of experiences. Moreover, while there is a caveat that other justifications for appointments can be provided, the very specific nature of the requirements could severely limit the ability to appoint individuals at the most senior levels outside financial services due to the limited scope within smaller countries. This could also impact on diversity policies. Further restricting impacts could arise due to the small population in some jurisdictions.

Additionally, in the stage 1 of section 5.1 of the ECB Guide references to "adequate experience for the management body in its management function" and "adequate experience for the management body in its supervisory function" should be replaced by references to "adequate experience of executive directors or members of the management body" and "adequate experience of non-executive directors or members of the management body". The division line between the management body in its management function and in its supervisory function is not appropriate in unitary board systems. Under such systems the supervisory and management functions fall under the same body, and by law such functions will not be performed independently in the way that section 5.1 expects. Hence, functions are performed, yet not independently from one another, but rather in a coordinated manner.

Furthermore, only in case of dual board structures, the required period of experience in an adequate hierarchy role is often not presentable by supervisory board members which are appointed by the employees (as required by national law).

In addition to the above, in some local regulations, boards of directors of companies which employ a certain number of permanent employees have also to comprise board members that are representatives of employees. These board members are appointed by employees and not selected by the nomination committee. It is therefore not possible to expect the same level of experience from board members that are representatives of employees as other board members. Therefore it should be clearly indicated that these board members are not assessed the same way as other board members – please refer to Article 91.13 of CRD IV with this respect in order to clarify this point.

- **Section 5.2. Reputation**

As it is stated in the first paragraph of this section, a person can have either a good or a bad reputation, but it is necessary to highlight that, unless very objective criteria are set out (like the absence of convictions for certain type of offenses related to its functions) it is a rather subjective opinion and, therefore, the presumption of innocence (and, therefore, of good repute or, at least, not bad repute) must be enhanced and protected at its maximum.

At this regard, the first sentence of the second paragraph assumes that the appointee will have the benefit of the presumption of innocence. However, the subsequent paragraph indicates that "*Even if the conclusion is in favour of the appointee, the supervisor may question the underlying circumstances of the proceedings to determine whether there is any impact on reputation*". In a court or administrative proceeding, the appointee would have a legal right to defence, which would imply, amongst other aspects that he/she would have the right to be heard, full knowledge of the accusation, and regulated steps and rules of the proceeding, which grant legal certainty.

The extracted paragraph, and the remaining paragraphs of the section, suggest that even if the appointee is declared innocent by the competent court or authority, the supervisor would be entitled to take into account the facts and evaluate him/her on such

facts, following a proceeding where he/she would not have legal certainty of its rules and the rights that assist him/her, ending in a potential declaration of lack of suitability (with implications such as contractual breaches, layoffs, etc.).

The ECB Guide then intends to reserve the right to review the facts and other aspects affecting the suitability, regardless of a court's or authority's decision, following a process with no clear rules and rights assisting the appointee. We thus kindly request that all references regarding the supervisors evaluation of matters where legal proceedings are pending or even concluded must be deleted. In particular, if the person was declared non-guilty in any proceeding, the facts of such proceedings should not be re-evaluated by the supervisor, should not be taken into consideration in any manner and should not be even required to be disclosed as are not relevant given the non-guilty declaration by the competent body.

With respect to the minimum set of information required from the appointed member by the regulator, the following sentence should be amended: « any understanding of his or her conduct gained by the appointee over time » by replacing it as such: "appointed member's clarification of the facts"

Finally, this section refers to corporate offences as part of the background check to be carried out. When assessing the suitability of a member of the management body, it would be unfair/irrelevant to account for facts occurred at a time when such a member was not member of the management body of the concerned entity.

- **Section 5.3. Conflicts of interest and independence of mind**

The ECB Guide defines the conflicts of interest as follows: "*There is a conflict of interest if the attainment of the interests of a member adversely affects the interests of the supervised entity*". Such definition is imprecise and lacks clarity, as the meaning of "*adversely affect the interests*" is not explained. It must be stated that the regulation of the relevant EU Member States on accounting, financial reporting, capital markets and corporate enterprises already provides clear definitions of conflict of interests situations (and also of related parties), as well as of the different measures available to mitigate or manage the conflicts. Therefore, such definitions should not be included in the ECB Guide.

The above also applies to the different circumstances included in Table 1 of section 5.3, which clearly exceed the conflict of interest situations taking into account by the banks in accordance with the regulation. These presumptions of material conflicts of interest are formulated far too broadly. E.g. pursuant to the ECB Guide, a manager would be in conflict of interest if it had a non-preferential loan of EUR 150,000 granted by the entity, or if its private business has a current account opened in the bank. Simple circumstances such as these examples cannot question a director's independence of mind, considering the high-level matters that are dealt with within the management body of a bank.

Additionally, regarding financial conflicts of interest, the reference made to any conflict with "any of the supervised entity's clients" is an extremely wide and unspecific concept which can lead to legal uncertainty. A manager or a Board member who has a financial obligation with a third person may not know that such person is a client of the entity; even more if such financial obligation is hold by a related person or belonging to the family context of the board member.

Given the size disadvantage of some countries and small pool of potential appointees, these restrictions may not be workable within these countries.

Finally, it should be clarified that it is not an obligation of the institution to assess such an individual and subjective aspect as the independence of mind.

- **Section 5.4. Time commitment**

The applicable regulation on corporate enterprises already provides the directors' fiduciary duties *vis–à–vis* the entity, considering the nature of the directors' position and the functions attributed to them, and ensures that they have sufficient dedication. This is complemented in the case of credit entities' regulation with detailed provisions on the sufficient time commitment of the directors and on the limitation of positions. The applicable regulation thus already provides the framework of the time to be committed by directors, by mixing the due directors' compliance with their fiduciary duties (reflected in a commitment made by the director to the entity) plus an objective limitation of positions set out in the credit entities' regulation.

Other provisions included in the ECB Guide regarding specific time to be committed or the full list of mandates and full time occupation, exceeds the requirements and scope of the regulation, and may provide distorted and possibly wrong view of the time that the proposed director may commit to the entity. We therefore suggest deleting the minimum set of information required from the supervised entity, except the self-declaration, as well as the additional information that may be required (there is no guidance as to the balance to be done with the principal function of the member / job). If such a list is kept, and with respect to mandates for which member may have any additional responsibility; we would like to clearly exclude non decision-maker committees (such as advisory committees).

The draft Guide provides for a buffer of time for both (i) situations affecting the institutions (M&A, crisis situation …) and (ii) circumstances that could unexpectedly affect time commitment of the member of the Management Body (such as court cases). We are not comfortable with such a requirement as it could be difficult for a credit institution to require each member of the Management Body to commit to keeping additional time aside on an ongoing basis in case of extraordinary event. As a minimum we would like following clarifications:

- as regards the way to account for such a buffer of time, i.e. would we need a buffer of time for each directorship or would it be a global buffer of time? The second approach is preferable as periods of increased activity would not be the same in all companies.
- As regards directorships: we would like to exclude directorships held for non-commercial purposes as these directorships are less subject to crisis.

For the case of dual board structures, we would appreciate clarification that at least for supervisory board members "the same group" may also be a group of the real economy (and not only groups of the financial market). Otherwise it would be very difficult, or even impossible to find suitable candidates.

- **Section 5.5. Collective Suitability**

The self-assessment of the collective suitability shall not be "*discussed*" with the JST. It is very relevant to highlight that banks, although they are subject to the supervision of the supervisor, are not and shall not be, and may not be considered or treated as, intervened entities. Therefore, banks will not have to discuss or negotiate with the JST an appointment, as this would constitute a clear interference in the governance of the

banks that goes well beyond the requirements of the regulation. We therefore suggest that such reference to a discussion to be held with the JST is deleted.

Additionally, we request that the reference "*, for example based on a suitability matrix*" is also deleted. The ECB Guide should leave to the entire discretion of the bank the self-assessment proceeding it wants to implement, and should not suggest a matrix or any other tool, that shall be considered and evaluated on a case by case basis.

ECB Guide states that the supervised entity should provide a short reasoned statement on how the appointed member will contribute to the collective suitability of the management body and further specifies that, in CRD IV significant institutions, this statement should be drafted with the involvement of the nomination committee. Reference to nomination committee should be removed where it has not been involved in the nomination process, such as in the case of employee representatives.

- **Section 6. Interviews**

If the national law does not require a re-assessment in case of a single change of roles such an interview cannot be mandatory.

Even though CEO and Chairman positions of the management body are the most risk-associated, we strongly consider interviews for these positions should not be mandatory as:

- These positions are held by very well-known individual in most significant CRD Institutions
- These positions are held by experienced individuals in relation to whom there is no issue as regards integrity (because of the reputational risk for the institution)

As regards interviews to be held for other appointed members (as opposed to proposed member for which in France it is not possible to have an ex ante assessment): it is necessary to have a member of the management body to be part of the interviews for confidentiality reasons.

- **Section 7. Assessment process**

This section sets out that the changes of role within the management body and the renewals shall be notified to the NCA in case a fit and proper assessment is not required by such NCA. We consider that such notification shall necessarily be made only if it is also required by the NCA.

Regarding changes of role, these are organizational decisions adopted within a duly appointed management body, and we consider that there is no basis or reasonable purpose for a notification.

Regarding the renewals, unless substantial facts affecting a fit and proper assessment have arisen, we also consider that there is no basis for a notification to the NCA. Indeed, the relevant banks will have information of the management body's structure available to the supervisor for review, but a specific notice requirement is excessive and may result in overloading the regulators. We therefore suggest such requirement is deleted from the ECB Guide.

The list of triggering events is too vague and too broad: « new facts or any other issue" should be removed.

Finally, it should be clearly specified if an individual reassessment is considered here rather than a collective reassessment.

- **Section 8. Decision**

As the supervisor knows, in jurisdictions such as Spain, it is common practice that, once a director is appointed by the shareholders and its appointment is duly registered, he/she will not perform his/her functions until the green light is obtained from the supervisor. The ECB Guide sets out that a positive decision on the fit and proper assessment can be complemented by a recommendation, a condition or an obligation. The ECB Guide lacks a clear explanation of the legal consequences of such issues in terms of effectiveness of the appointment made, and several questions arise. For example, can a director formally perform its functions while the recommendation, condition or obligation is not complied with yet? Can a director be taken into consideration for the purposes of quorum and voting within the management body while the recommendation, condition or obligation is not complied with yet? Is there any consequence in case a recommendation is not followed?

The ECB Guide therefore lacks a clear legal analysis of the consequences of the recommendations, conditions and obligations, as well as of the legal condition held by an appointed director while such issues are not complied with. For example, a mere indication that "*Failure to comply with a condition means that either the ECB decision never becomes valid or is no longer valid*" brings no legal certainty to the banks and the appointees.

It must be considered that the appointee will have fiduciary duties as stipulated in the applicable regulation since he/she is appointed, so the ECB Guide should provide substantially more clarity on the legal aspects of the recommendations, conditions and obligations. In addition, it should be noted that these are issues that affect also the Companies Law regime according to EU and national law, so any guidance given at this regard must be compatible and coordinated with applicable Company Law

Generally, we would appreciate prompt decisions and prevention of delays (caused by the involvement of different authorities and decision making bodies).

- **Section 9. Removal of members from the management body**

Some national law gives no competence to the (national) competent authorities to remove a member. In such member states the national law may provide that the competent authority would be entitled to call a (extraordinary) general meeting in order to take relevant actions on removing such member from the management body or the competent authority may give an instruction to the financial institution to remove a member.

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