

EAPB position paper on the ECB draft guide to fit and proper assessments

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General remarks**Interrelationship between the ECB draft guide and the EBA/ESMA draft guidelines**

The ECB is propounding a draft for a “Guide to the assessment of suitability of members of the management body”, which addresses the same topic as the draft of the collective EBA/ESMA guidelines on the “Assessment of suitability of members of the management body and key function holders”. The ECB and EBA/ESMA are pursuing the goal of standardising the criteria for suitability assessments within the Eurozone/EU. However, by submitting two documents on this group of topics at the same time, the European institutions are themselves, creating different regulatory frameworks. From a user perspective, an agreement by the EU institutions would therefore be necessary to achieve the standardisation objective.

Differing interpretation of the legal basis

EBA/ESMA refer to article 91 paragraph 12 of the CRD IV guideline as a legal basis for submitting the guideline on suitability assessment for “Members of the management body” as well as “Key function holders”. However, article 91 of the CRD IV guideline only mentions “Members of the management body”. The submission of guidelines covering “Key function holders” is not included by the legal basis. Obviously, the ECB also takes this view when it is stated in figure 4 of the draft guide for assessment of specialist qualifications and personal trustworthiness that “*Article 91 of CRD IV applies to members of the management body in management appointments (with managerial responsibility) and in supervisory appointments (without managerial responsibility)*”. The ECB therefore emphasises that the EBA/ESMA guideline concerning regulations for “Key function holders” is clearly not covered by the legal basis in article 91 CRD IV. This aspect underlines the need for coordination between the EU institutions before the publication of guidelines or guides.

Principle of proportionality

The draft guide sets out several minimum requirements which are applicable to every member of the management body. However, some of these requirements seem to be overly burdensome for management body members of smaller banks and banks with a specialised business model. The application of the principle of proportionality should thus be better reflected in the guide. For instance, this could be done by amending section 5.1 in a way that practical experience can compensate theoretical experience. Further, it could be foreseen that certain requirements can be collectively met by the management body, instead of individually by every member of the management body.

Timeline for the fit and proper assessment

The draft guide does not include any indicative timeline for the assessment process. From an institution’s perspective it would however be very important to at least have an indication of how long an assessment will approximately take. The reason for this is that in practice there can be several follow-up actions which are linked to the appointment of a member of the management body. For instance, the appointment of a new member of the management body should be publicly announced only after the ECB’s approval. Therefore, we would suggest to also including an indicative timeline in the guide as banks need a certain degree of clarity for necessary follow-up actions.

Detailed remarks

With regards to p.8 principle 4 on proportionality and case-by-case assessment, EAPB would like to emphasise the particular case of public and promotional banks when applying the principle of proportionality. As a matter of fact, public and promotional banks often display large balance sheets despite their lean and low risk business models and specialised field of activities. Therefore, EAPB would want to highlight the need for proportionality and simplified procedures which should not only be derived from a quantitative size criterion but also from a business model perspective.

P. 9 scope of the ECB's fit and proper assessment: The differentiation between members of the management body with a management function and members of the management body with a supervisory function could cause legal uncertainties in some member states. Under certain circumstances, the nomination of management bodies with executive functions is not mandatory or the management body does not display of executive functions (e.g. limited companies with Board of Directors in France). Such cases heavily depend on the individual set up of a credit institution, legal provisions driving the composition of the management body or, for public and promotional banks, the role of the government as a shareholder of that bank. Consequentially, the scope should be reviewed reflecting such circumstances.

On p.10 section 5.1, subsection "Function-specific and minimum requirements": We suggest that it should be considered at this point that especially promotional banks, which on the one hand are subject to ECB supervision due to their size, can on the other hand have a risk averse and less complex business model. This should be taken into consideration, in particular for the principle of proportionality and, therefore, for presumed experience. We therefore suggest the following adjustment on p. 10: "The principle of proportionality is applicable, per se, since the required amount of experience depends on the main characteristics of the specific appointment and institution. The more complex the characteristics, **with regard to the business model for example**, the more experience is required". Moreover, the abstract "All members of the management body are expected to possess, as a minimum, basic theoretical banking experience relating to..." should rather be seen as a requirement to the overall management body, but not to every of its members individually. This would allow compiling a management body with various skills and qualifications that compliment each other. Moreover, from an organisational perspective, it would be difficult to maintain this requirement if imposed on individual member level given the fact that members of the management body are being elected.

On p. 12, the assumptions regarding appropriate experience for the management body in its supervisory function are presented in the table. From our perspective, the required experience in conjunction with reference to practice, presents a hurdle and results in frequent threshold violations. This would lead to a regular, detailed assessment and ultimately to a considerable reduction of available chairpersons of the management body in its supervisory function. Thus, we propose adjusting the phrasing as follows: "**Five ~~ten~~** years of recent relevant practical experience". Furthermore, the experience of non-executive members should not be limited to managerial positions only but broadened to accept also experiences in professional or more specialised technical positions linked to the respective field of banking.

Comment on the "Stage 2 Detailed assessment" section on p. 12: national law can contain supplementary requirements for appointing the management body, particularly for its supervisory function. This should also be taken into consideration when assessing affected members. The fact that shareholder representatives are accepted in the management body, is also laid out on p. 15 and should also be mentioned here. We therefore suggest the following adjustment to the text: "[...] This will be analysed by conducting a full detailed assessment of the appointee's experience, taking into account the need to have sufficient diversity and a broad range of experiences in the management body and, where relevant, national requirements to have staff representatives **and shareholder representatives** in the management body. **Specific national regulations on appointing the management body which serve to ensure that the company's purpose is fulfilled must also be observed.** Examples of justifications may include [...]"

Comment on footnote 14 on p. 12: The experience necessary for the appropriate exercise of the tasks of the institution's management body cannot be acquired solely from (private) companies but rather from public positions as well, such as ministries, financial authorities and administrative bodies etc. We therefore suggest the following adjustment to the footnote: "In assessing relevance, the degree of similarity in the size and complexity of the institutions **or public sector entities** where previous experience was obtained should be considered."

P. 14 and 15 on conflicts of interest and independence of mind: The notions of conflict of interest and independence of mind are closely related but the draft guide enumerates criteria for conflict of interest which could be perceived as lack of independence without actually being conflicted interests. Following the approach suggested in the draft guide, executive members of the management board would be labelled to have a conflict of interest even if the underlying issue would be the lack of independence. Such a confusion of both notions can also be observed in the case of members of a

management body of a subsidiary which are at the same time employed by the parent group or in the case of members of a management body which also represent shareholder interests. If an actual conflict of interests arises at one point, it would be tackled following the credit institution's compliance provisions which would also provide for the respective member of the management board with conflicted interests to not be able to vote or to participate in negotiations. Against this background, we would also like to emphasize that the general concept behind independence/conflicts of interests and the distinction between these two concepts in the EBA Fit and Proper draft guidelines and the ECB Fit & Proper Draft Guide but also in the Internal Governance draft guidelines are not sufficiently clear. Some of the criteria mentioned in the ECB Draft Guide under section 5.3 (Conflicts of interests and independence of mind) are treated as conflicts of interests ("The appointee or a close personal relation holds at the same time a management or senior staff position in the supervised entity or any of its competitors, or in the parent undertaking/its subsidiaries"), while in the EBA Fit and Proper draft guidelines basically the same situation is considered an independence criteria ("a CRD-institution's management body in its supervisory function should include a sufficient number of fully independent members 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 ..."). Referring to the above mentioned criteria, we are of the opinion that it neither constitutes a conflict of interest, nor does it indicate a lack of independence when members of the management body in its management function at the same time hold mandates in the management body in its supervisory function in group entities. In fact the right of the parent company to nominate members of the management body in its supervisory function in its subsidiaries represents one of the key instruments of group steering and should therefore not be prohibited or restricted.

With respect to p. 15 table 1, we propose to insert a significance threshold also for private businesses as a similar threshold applies to commercial relationships too. From the proposed formulation regarding professional conflicts of interest, we understand that holding two directorships in two group entities at the same time represents a material conflict of interests and requires to be treated accordingly (detailed assessment and mitigating measure as stated in the draft guide). This is in our view inappropriate and impractical since the right of the parent company to nominate members of the management body in its supervisory function for its subsidiaries is one of the key instruments of group steering. The application of supervisory requirements on a consolidated basis and the legal obligations related thereto within group structures are also laid down by Art. 11 (1) CRR. Last but not least, the draft guide itself states that the presence of shareholders' representatives in the management body is acceptable.

On first abstract on p.15 after table 1: Several legal frameworks in member states already have provisions regarding the treatment of conflicts of interests and mentions mitigating measures (voting abstention of the concerned member, disclosure requirements, etc). Thus, we do not consider it necessary to foresee additional requirements for the institutions in this respect. Therefore, it is proposed to remove the two bullet points on p. 15 stating instead that "When the materiality of a conflict of interest is determined the supervised entity must adopt adequate measures ***in accordance with national law.***"

The following comment concerns the last row of table 1, "Material conflicts of interest" on p. 15: Promotional banks are created to pursue public policy objectives. Due to the often existing guarantees by their public owners, the business activities of such banks carry great importance for the aforementioned owners. Therefore, the membership of persons in political positions in the supervisory boards of promotional banks is essential for the government's budget responsibility and to ensure it fulfils its purpose. The mere official position itself does not lead to conflicts of interest; the interests of the company, which are generally geared towards legally defined purposes, as well as the interests of a representative of the public owner are usually aligned. We therefore suggest the following adjustment: "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, ***i.e. in the case of public promotional banks as defined in their government mandate.***" Furthermore, the following additions are proposed under table 1: "The presence of shareholder representatives in the management body is accepted. ***This applies particularly for the appointment of members of the management body in its supervisory function which is subject to specific national regulations which serve to ensure that the company's core purpose is fulfilled.***"

On p. 17, it says that “Where this is not the case, the supervised entity needs to deliver a detailed assessment of time commitment”. It would be desirable to have further clarification in terms of which information is required for this detailed assessment as the draft guide only provides for the minimum information and examples of additional information which may be requested.

P. 16 and 17 paragraph 5.4 on time commitment: the self-declaration on sufficient time stands in contrast to the responsibilities held by the members of the management body and does not seem appropriate unless special circumstances of the individual case would justify that the credit institution undergoes such an assessment. Moreover, the communication of the additional information as enumerated on p.17 should be left to the discretion of the credit institution as this information would have to be provided by the respective member of the management body. The communication of such information should thus be considered as additional engagement and not as a required assessment to be made by the management body.

On p. 18 first abstract: The proposed calculation of directorships held in undertakings in which institutions hold a qualifying holding is in conflict with applicable law in some member states (e.g. Austria) and the CRD (Art. 91 paragraph 3) according to which they currently count as one single directorship. We therefore propose to stick to the current applicable rules regarding the calculation of directorships and to remove the text as proposed above. Therefore, it is suggested to remove this abstract entirely.

In the abstract following figure 2 on p.18, EAPB would want to explore whether it is possible to refrain from requiring additional explanations or information as long as the rule on counting of directorships is respected since it might be difficult gathering that information.

On p. 19 on the motivation at time of appointment it would be suggested to use formal questionnaires, tables and standardised CV templates instead of written reasoned statements for the assessment on how the appointee would contribute to its collective suitability needs. This would allow a more fact-based approach and less time-consuming procedure as compared to a reasoned statement. In the case of the motivation of a candidate, it still would be necessary to assess it by a general written statement along with the documents. However, the compilation of such a statement and the collection of documents could be quite time-consuming all together and possibly go beyond the supervisor’s prescribed period for document submission.

On p. 25 on decision, EAPB would ask for further clarification on the timing with regards to the appointment of a candidate. EAPB would suggest allowing for more flexibility in submitting information to the supervisor either, and if possible, before the appointment, or, and if justified, afterwards. Taking into account all criteria requested in the guide, it will take longer to appoint a suitable candidate extending the overall selection procedure and vacancy period. Moreover, a preliminary fit and proper assessment could not be feasible for elected members of the management body unless the files of the interested candidates would be submitted to the supervisor beforehand which however would be difficult from a legal perspective.