POSITION PAPER

ESBG response to the ECB consultation on the draft guide to fit and proper assessments

ESBG (European Savings and Retail Banking Group)

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ESBG Transparency Register ID 8765978796-80

January 2017

ESBG

	Chapter	Paragraph	Amendment, clarification or deletion	Comment
No. 1	**5. Assessment criteria – Experience**	**5.1**	**amendment**	**Draft:** *"For the purposes of assessing a member's theoretical experience, the level and profile of the education, which should relate to banking and financial services or other relevant areas (mainly banking and finance, economics, law, administration, financial regulation, strategy, risk management, internal control, financial analysis and quantitative methods) are taken into particular account. … All members of the management body are expected to possess, as a minimum, basic theoretical banking experience relating to: …"* **Comment:** The requirements for the professional qualification are to be significantly increased for members of the management body in its supervisory function, and are to be adjusted with the qualifications of members of the management body in its management function. The management of an institution requires a high level of professional experience. We believe, however, that there are other requirements needed by the members of the management body in its supervisory function. The requirement for theoretical knowledge of banking and financial services or other relevant areas (mainly banking and finance, economics, law, administration, financial regulation, strategy, risk management, internal control, financial analysis and quantitative methods) is lacking in practical relevance, and could additionally reduce the diversity of a management body. 1. ESBG is in favour of differentiating between the requirements for members of the management body in its management function and in its supervisory function. In the case of members of the management body in its supervisory function, it should in principle be sufficient that they can adequately control the management body in its management function. This would allow the management body to a good understanding of an institution's activities and assess their level of risk.

				2. We ask for relief and adequate procedures for those Board members, which are ex-officio members of the management body. The same is true for those members of the board due to the members' occupational backgrounds. 3. ESBG is in favour of reducing the number of years of experience required to 3 years of relevant experience.
No. 2	**5. Assessment criteria - Reputation**	**5.2**	**deletion**	Draft: *"Pending - as well as concluded - criminal or administrative proceedings may have an impact on the reputation … While there is a presumption of innocence, the very fact that an individual is being prosecuted is relevant to propriety… Even if the conclusion is in favour of the appointee …"* Comment: This is not compatible with the principle of the rule of law and the presumption of innocence (see article 48 of the EU Charter of Fundamental Rights, article 6(2) EMR). The presumption of innocence is still valid even after conclusion of proceeding by a verdict of not guilty, therefore ESBG would prefer that this statement is deleted.
No. 3	**5. Assessment criteria - Reputation**	**5.2**	**amendment**	Draft: *"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."* Comment: In relation with the situations where a reassessment of the individual member should be performed, there is a worry amongst institutions that on-going investigations resulting from judicial, administrative procedures or other analogous investigations are applied with automatism. In this respect, we appeal to a sense of prudence regarding re-evaluation in this type of circumstances, in order not to encourage or facilitate the submission of claims in the courts, which may prove unfounded.
No. 4	**5. Assessment criteria – Conflicts of interest and**	**5.3**	**clarification**	In addition, the definition of independence in the context of conflicts of interest should fall under national law, so as to avoid contradictions with specific national legislations. For instance, the criteria which is related to personal, professional or economic relationships with the owners of qualifying holdings in the institutions with the

	independence of mind			institution's or any subsidiaries is in direct conflict with national provisions (eg. Article L.512-106 of the French Monetary and Financial Code). The legal framework of the cooperative banks is a leading model in some Member States and should be taken into consideration as well.
No. 5	**5. Assessment criteria - Conflicts of interest and independence of mind (political)**	**5.3**	**amendment**	Draft: *"The appointee or a close personal relation holds a position of high political influence. "High influence" is possible at every level: local politician (e.g. mayor); regional or national politician (e.g. cabinet); public employee (e.g. governmental job); or state representative. …The presence of shareholder representatives in the management body is accepted."* Comment: This presumption does not take into account that for public institutions – such as some savings banks – the management body in its supervisory function is democratically legitimised. Some savings banks, such as in Germany, do not have members; instead they operate under "municipal trusteeship" (Trägerschaft). The elected mayor of the town, district etc. is automatically (by law) member of the management body in its supervisory function. The municipal trustee (town, city, districts or special-purpose associations) can - mediated through its representatives in the supervisory board - safeguard that the savings bank fulfils its public mandate for the population of the municipality. Since the representatives (e.g. mayor) have political influence, ESBG is in favour of deleting this presumption or allow for an exception for "representatives of municipal trustees" as these people are not shareholder representatives.
No. 6	**5. Assessment criteria - Conflicts of interest and independence of mind (political)**	**5.3**	**amendment**	Draft: *"When the materiality of a conflict of interest is determined the supervised entity must adopt adequate measures* ***in accordance with national law****. ~~It must:~~* *~~• perform a detailed assessment of the particular situation;~~* *~~• decide which mitigating measures it will take based on its internal policy, unless national law already prescribes which measures must be taken.~~* *~~The supervised entity should reply with a "Conflict of Interest Statement", explaining the above to the satisfaction of the supervisor~~"*

				Reason: Some Member States' legal framework already contains some 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.
No. 7	**5. Assessment criteria - Conflicts of interest and independence of mind (professional)**	**5.3**	**clarification**	Draft: *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.* Comment: The general concept behind independence/conflicts of interests and the distinction between these two concepts in the EBA Fit & Proper Draft GL, and the ECB Fit & Proper Draft Guide and Internal Governance Draft GL are not sufficiently clear. Some of the criteria mentioned in the ECB Draft Guide are treated as conflicts of interests, while in the EBA Fit and Proper Draft GL a similar situation is considered as 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.
No. 8	**5. Assessment criteria- Conflicts of interest and independence of**	**5.3**	**amendment**	Draft: "*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~~; Period: Current or in the ~~past two~~**last** years~~*"

	mind (professional)			Comment: From the proposed formulation regarding professional conflicts of interest above 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 a serious concern for ESBG as 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. In this context it should be mentioned with regard to stock corporations that the only way in which the group steering by the parent company can be exercised is through its representatives in the management body in its supervisory function of the subsidiaries, since according to the provisions of the Austrian Stock Corporation Act (Para. 70 sect. 1) the management body in its management function of the subsidiary is not bound by the instructions of the parent company. Furthermore, the Austrian Banking Act lays down certain supervisory requirements which consolidating institutions have to comply with on a consolidated basis and for the fulfilment of which they are responsible (Para. 30 sect. 6). For this purpose, the subsidiaries are legally required to provide the consolidating institutions with the necessary information and documents (Para. 30 sect. 8). 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.
No. 9	**5. Assessment criteria - Conflicts of interest and independence of mind (personal)**	**5.3**	**amendment**	Draft: *"conducts* ***significant*** *business, in private or through a company, with the supervised entity or with the parent undertaking/ its subsidiaries.* ***The significance of the private business will depend on what (financial) value it represents to the business of the appointee or his close personal relation."*** Comment: With respect to the proposed personal conflict of interest we propose to insert a 'significance' threshold also for private businesses as a similar threshold applies to commercial relationships too.

No. 10	**5. Assessment criteria - Time commitment**	**5.4**	**amendment**	Draft: *"The following additional information may be required (in the light of individual circumstances and based on a proportionate approach): whether the appointee is in full time occupation or not, providing the number of hours or days dedicated to each mandate or position; …"* Comment: Since this requirement is necessary for each chair of a management body or committee, the information on existing mandates and time expenditures is too broad. ESBG believes that it would be sufficient to indicate the total time requirement only in its estimated sum.
No. 11	**5. Assessment criteria - Time commitment**	**5.4**	**deletion**	Draft: *~~"The ECB takes a restrictive approach to counting. If one appointee holds a directorship in each of the entities A to E in the example below, this will count as two directorships and not as one. Even if the appointee holds one directorship in entity A and one directorship in entity E, this will also count as two. However, if the appointee holds directorships in entities A, B and C it will count as one directorship.~~* *~~Figure 2~~"* Comment: The proposed calculation of directorships held in undertakings in which institutions hold a qualifying holding is in conflict, for some Member States, with applicable provisions (e.g. the Austrian Banking Act (§§ 5 par. 1 no. 9a c) and 28a par. 5 no. 5 c) and the CRD (Art. 91 par. 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.
No. 12	**5. Assessment criteria - Time commitment**	**5.4**	**clarification**	Figure 2: We ask for clarification of the following different constellation. If, for example, a member has mandates in companies B – E, but not in the mother company A, then the functions would be counted as one function.
No. 13	**5. Assessment criteria - Time commitment**	**5.4**	**clarification**	Draft: "*1. Directorships in organisations which do not pursue predominantly commercial objectives do not count. Nevertheless, presence on the boards of these organisations may have an impact on overall time commitment and should be declared as part of the fit and proper notification.*"

				Comment: Institutions may face certain problems in the calculation of the number of directorships a member of the management body may hold, especially in organisations which do not pursue predominantly commercial objectives. If this type of organisation, as may be deducted from the content of the draft EBA-ESMA Guidelines, includes charities and other professional and political activities, institutions will depend on the information provided by the person subject to evaluation. If this is considered essential, disclosure of such information should be made in a manner that it may not imply an indirect declaration of political or religious ideology. If these obligations also entail keeping records of external professional and political functions, data protection issues may arise, as this type of data has special protection.
No. 14	**6. Interviews – Scope and types**	**6.2**	**deletion**	Draft: *"~~Interviews will be mandatory in the case of new appointments for CEO and Chairman positions…~~"* Comment: In our view, mandatory interviews are not necessary. All necessary information can also be submitted in writing. Interviews should not be mandatory, but should be an exception if there are serious doubts.
No. 15	**Interviews – Scope and types**	**6.2**	**clarification**	Regarding the obligation imposed on institutions to verify the information provided by the assessed individuals, ESBG believes that the extent to which institutions should "investigate" the veracity of the assessed person's declarations or disclosures should be clarified. In any event this obligation should be limited to public information and/or to the jurisdiction(s) in which the institution carries out its activities.
No. 16	**Assessment process – New appointments**	**7.1**	**clarification**	Draft: *"The typical SSM internal process followed with respect to new appointments starts with notification of the NCA by the supervised entity of the (proposed) appointment of a new member of the management body…"* Comments: An assessment procedure by competent authorities before the appointment of the member is not compatible with some Member States' principles of public sector banks.

				A number of members of a savings bank's management body in its supervisory function are elected by the local parliament, and the head of the municipality's administration (e.g. the mayor) usually – by act of law – chairs the management body in its supervisory function. A previous assessment therefore is not possible in these cases. Likewise, the ex-ante assessment can't be implemented by the French savings banks. According to the provision of the French Monetary and Financial Code (Article L521.90), every 6 years, for all savings banks at the same time, the whole management body (in its supervisory function i.e. Conseil de Surveillance) is totally renewed by a general process of election including 5 different processes set up by the French law. The ex-ante assessment by the NCAs in the case of members of the management body is of special relevance when the member is to be appointed by the General Meeting of Shareholders, as the proposed appointment must be included in the agenda of the General Meeting which must be published with a month's notice. Institutions usually include the appointment of members of the management body in the Ordinary General Meeting of Shareholders. If an extraordinary or special General Meeting of Shareholders has to be convened to appoint directors, in some cases it would imply disproportionate costs which would be difficult to justify. The difference between listed and non-listed credit institutions must also be considered, as the former can opt to make appointments by co-option, while some unlisted institutions do not have this option. To minimise the impacts and costs which may arise from this type of situation, a system in-between ex-ante and ex-post assessment of members of the management body could be devised. The idea is that, without prejudice to national company law, institutions should be able to appoint a member of the management body subject to a positive assessment of his or her suitability by the NCA. This would mean that the appointment of the member, even if it complies with company law, will not be effective until it is authorised or registered in the appropriate NCA's register (e.g. Banker's Register). Consequently, the appointed member will not be able to exercise its functions as member of the management body until he or she is effectively registered or otherwise authorised by the NCA.

				Regarding the ex-ante assessment of key function holders, we agree that they should be assessed following criteria similar to that applicable to members of the management body. However, the different positions of key function holders, as compared to the members of the management body, must be taken into account. Generally, key function holders are employees of credit institutions and, therefore, their legal relationship with the credit institution is regulated by labour or social legislation and, if applicable, collective worker's agreements. On the other hand, and unlike the members of the management body, they are not part of a collective body. Consequently, a continuous vacancy of a key function holder can endanger the normal functioning of the institution, especially in the case of institutions which do not have a large number of employees with the kind of knowledge and experience required for these functions. ESGB believes, that for operative and legal reasons, key function holders should not be subject to ex-ante assessment by NCAs. Alternatively, suitability assessment of key function holders should be carried out by institutions and their appointment notified to the NCAs within the scope of on-going supervision. However, if it is decided that institution's capacity to appoint employees to hold key functions should be limited by the fact that the NCA would have to authorise the assessment of the suitability of the individuals to be appointed, such limitation should be embodied in a legal regulation, either at European or national level.
No. 18	**Assessment process – New appointments**	**7.1**		It is necessary that the ECB reduces the time limits currently applying for the assessment of supervisory authorities in relation to the authorisation process, it would provide them higher efficiency and agility. The current limit of 6 months is too long for day-to-day management and usually delays many decisions at institution-level. If we consider that the time limits established for ex-ante assessments by the NCAs can take up to six months, this could seriously affect the functioning of the institution and its compliance with applicable corporate governance rules and, in the case of listed institutions, it may even affect the quotation of its shares. In practice, the NCAs use up the entire assessment period established whereas, in the draft EBA-ESMA guidelines on the assessment of the suitability of members of the management body and key function holders, a minimum period of assessment by

				NCAs of three months is established. Such period may be extended to up to six months if it is suspended when additional information or documentation is requested by the NCA. Generally, it is considered that the time limits for assessment decisions are excessively lengthy. Therefore, in our opinion if, as it is provided in the draft guide, the primary responsibility for selecting and nominating individuals for the management body lies with the banking institutions, the assessment procedure by the NCAs should be carried out in a fluid an efficient manner.
No. 17	**Decision**	**8.2**	**amendment**	Draft: *"The appointee or the supervised entity has the option to request a review by the Administrative Board of Review or to challenge the decision directly before the Court of Justice of the European Union."* Comment: This limited remedies shorten access to legal process disproportionately.
No. 19	**General comments section**			The ECB should hold off finalising and publishing its final Guide until the EBA and ESMA have submitted the final version of their Guidelines on the same issue, currently also under consultation. In case the ECB comes up with its final version earlier than that EBA and ESMA, there are likely to be differences between the two guides, and due to their respective responsibilities the ECB should consider waiting for the EBA and ESMA to prepare their guidelines first. The EBA and ESMA are the authorities responsible for setting the guidelines financial institutions will need to comply with, while the ECB is responsible for supervising the compliance with those requirements (in the form of guidelines, with its implications). Therefore, setting the supervisory methodology without prior knowledge of the actual requirements by the EBA and ESMA might lead to confusion in the industry and incoherence between the requirements and the supervisory activities.
No. 20	**General comments section**			The scope of the Guide should be clarified, as it only states that it covers "all institutions under the direct supervision of the ECB (SIs), whether credit institutions or (mixed) financial holding companies, and in the case of licensing or qualifying holdings, LSIs". However, in the recent EBA-ESMA consultation it is stated that "CRD-institutions should comply with these guidelines on an individual, sub-consolidated and consolidated basis, including their subsidiaries not subject to CRD IV." Therefore, it

				seems as though the ECB should clarify if its guidelines will also apply to all subsidiaries not subject to CRD IV, although it should be profoundly avoided, as it would end up requiring, for instance, financial expertise to members of the management body of non-financial subsidiaries. The ECB should clarify if its scope also includes these subsidiaries.
No. 21	**General comments section**			In relation to the assessment of the suitability of the members of the management body and key function holders of credit institutions, there are multiple regulations at European level and even international level (EBA guidelines, ECB supervisory guide and BCBS principles). This regulatory dispersion of the fit and proper assessments can result in excessive complexity in the practical application by institutions. Multiple regulations can also give rise to discrepancies in their interpretation and/or application, which may result in costs for institutions, both in terms of time and expenses incurred in assessment procedures.

About ESBG (European Savings and Retail Banking Group)

ESBG – The Voice of Savings and Retail Banking in Europe

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

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Published by ESBG. 20 January 2017.