FEDERATION
BANCAIRE
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ECB draft guide to fit and proper assessments

FBF response

Preliminary remarks

We understood the purpose of these guidelines and of the guidelines provided by both EBA and ESMA in the joint Guidelines on suitability assessments is to harmonise practices regarding fit and proper assessments across Member States. We however noted some discrepancies between both documents, i.e. EBA and ESMA joint Guidelines on suitability assessments and the ECB draft guide. Hence these mismatches would not lead to such a harmonization.
Nevertheless, in some cases, ECB's position should be favored on EBA's interpretation – see below for further details.

The FBF welcomes that the ECB acknowledges the existence of different governance models (One-tier, Two-tier and in between system) and strongly supports the ECB definition of « management body », which is in line with CRD IV provisions (in particular Recital 56).

Finally the FBF also welcomes that the ECB does not choose between ex-ante and ex-post assessment and leaves the option to local regulators in order to comply with national regulations, as provided for by CRD IV. Therefore, the draft guide should always refer to the « appointee/appointed member ».

- **Section 3 Principles**

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 resulting 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 4 Scope of the ECB's fit and proper assessments**

The FBF would like to recall that this Draft guide is non-binding and shall comply with both CRD IV requirements (as transposed in the Member States) and national company law (see art. 4.3 of SSM Regulation and Recital 55 of CRD IV).

- **Section 5 Assessment criteria**

  - **Section 5.1. Experience**

Practical and theoretical experience: In the last paragraph, reference is made to the training plans to be followed by the appointed member. Pursuant to Article 91 of CRD IV, members of the management body shall fulfil the requirements provided in paragraphs 2 to 8. These requirements form the fit and proper. However according to the Draft Guide they do not account for training. From these guidelines, we understand training is part of the experience to be assessed. But such an assessment regarding the "Experience" criteria cannot include training plans to be followed by the appointed member. This should only remain part of the training and induction (different from the fit and proper).

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**

Regarding legal proceedings: Pursuant to the Draft Guide we understand that even if the outcome of the proceedings is in favor of the appointed member, the supervisor may question the underlying circumstances of the proceedings to determine whether there is an impact on reputation. This power granted to the supervisor seems obviously contrary to the general principle of res judicata, which is common to all Member States. Therefore the sentence « even if the conclusion is in favor of the appointee…on reputation » should be deleted. This would in any case not result in lack of transparency but rather comply with res judicata principle: there is no upside for the regulator to be aware of these proceedings.

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 irrelevant to account for facts occurred at a time where such a member was not member of the management body of the concerned entity. It is the approach chosen in the background checks provided with respect to US Swap Dealer regulation (NFA 8R Form -. "Disciplinary Information - Criminal Disclosures".

Regarding the minimum set of information required from the appointee/appointed member by the supervisor, the sentence « any understanding of his or her conduct gained by the appointee over time » should be clarified. Therefore the following sentence should be amended by replacing « any understanding of his or her conduct gained by the appointee over time » with "appointed member's clarification of the facts"

It would be useful to specify that the proportionality principle applies to the assessment by the supervised entity of the facts on which the proceedings are based. If the appointee/appointed member has in any case to provide an assessment of the underlying facts, the proportionality principle should allow the relevant management body of the supervised entity to examine only the pending proceedings that may have a material impact on the reputation of the appointee/appointed member and to confirm its confidence in the appointee/appointed member only in these cases. On this point, the ECB should take up the EBA guidelines

provisions (paragraph 68): “the assessment of reputation, honesty and integrity should also consider the impact of the cumulative effects of minor incidents on a member’s reputation”.

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

The Draft Guide provides that the supervised entity should have corporate arrangements in place for disclosing, mitigating, managing and preventing conflicts of interest whether they are actual, potential (i.e. reasonably foreseeable) or perceived (i.e. in the mind of the public).
The perceived conflicts of interest which are neither actual, nor potential but only exist in the mind of the public should not be included in a conflict of interest policy. A perceived conflict of interest refers to a situation where no competing interest (or conflict) exists but the circumstances give the public the impression of a conflict. In our view, there can be no room for mere impression in a corporate arrangement. In addition, the perceived conflicts of interests are not predictable and cannot be prevented in advance and Institutions cannot be accountable for rumors.

Table 1 on material conflicts of interest is too detailed. In accordance with CRD IV provisions, conflicts of interest should be dealt with at national level.
The presumption that a material conflict of interest exists when the appointee/appointed member, or a close personal relationship of the appointee/appointed member, currently has a substantial financial interest in or financial obligation to “any of the supervised entity’s clients” should be deleted, or at least narrowed: its scope seems too broad for Institutions which have many companies and business entities among their clients. In cooperative banking institutions, the majority of the board members shall be clients and cooperative shareholders.
Furthermore, the materiality threshold of 100.000€ under which non-preferential loans, secured or otherwise, performing or non-performing, are deemed not to give rise to a material conflict of interest seems too low and should be adjusted to the size of the institution’s balance sheet.

The FBF strongly support the ECB’s strict interpretation of independency criterion and its limitation to « independence of mind ». We favor such an interpretation over the EBA’s extensive approach.

- **Section 5.4 Time commitment**

The Draft Guide states that additional information on time commitment may be required, and among other things, confirmation that “crisis buffers” have been provided for. The definition of the purpose of such “crisis buffers” is slightly different from the one provided in the Draft Joint ESMA and EBA Fit and Proper Guidelines.
These Guidelines justify the requirement of a “buffer” of time by the need for a member of a management body to be able to fulfil his or her duties in periods of particularly increased activity, such as when making an acquisition, a merger, a takeover or when a crisis situation is ongoing, or as a result of some major difficulty with one or more of its operations, a higher level of time commitment than in normal periods may be required. Pursuant to the Draft Guide, the “crisis buffer” means extra time that can be used not only in crisis situation related to the institution, but also in circumstances that could unexpectedly affect time commitment (e.g. court cases). Such a buffer is not predictable and cannot be calculated. Therefore it should be deleted from the draft guide.
Should it be maintained in the Draft Guide:
- it should be clearly specified that it is a global « buffer of time » for all directorships of a member of the management body.

- As regards directorships and the buffer of time: we would like to exclude directorships held for non-commercial purposes.

Regarding the counting of directorships, the ECB takes a restrictive approach to counting. Even if the appointee/appointed member holds one directorship in the top entity and one directorship in a qualifying holding, this should be counted as two. Such counting rules are based on a restrictive interpretation of Article 91.4 of the CRD IV directive pursuant to which "*[f]or the purposes of paragraph 3, the following shall count as a single directorship: (a) executive or non-executive directorships held within the same group; (b) executive or non-executive directorships held within: (i) institutions which are members of the same institutional protection scheme provided that the conditions set out in Article 113(7) of Regulation (EU) No 575/2013 are fulfilled; or (ii) undertakings (including non-financial entities) in which the institution holds a qualifying holding*". An interpretation more consistent with this text would be to count directorships in qualifying holdings and executive or non-executive directorships held within the same group as a single directorship.

Furthermore, the "separate single directorship" counting rule would lead to distortions. For instance, an executive director of the parent undertaking might have to resign from a directorship he/she rightfully holds in a subsidiary only because the parent undertaking has sold some shares and loses the majority.

Furthermore, the FBF welcomes the fact that the detailed explanation of the time commitment for each directorship is not always required but only in cases where the number of directorships exempted from counting is high.

Finally, the possible synergies between the positions of the appointee/appointed member when they are held within the same group which should be mentioned where the number of directorships exempted from counting is high, should be more broadly taken into account in every assessment of time commitment and therefore should be added in the list of additional information that may be required in the light of individual circumstances and based on a proportionate approach..

- **Section 5.5 Collective suitability**

The Draft Guide states that the supervised entity should provide a short reasoned statement on how the appointee/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. The Draft Guide should provide for an exemption to such an involvement of the nomination committee where, in duly justified cases, the nomination committee has not been involved in the appointment of such member (e.g. if shareholders nominate members that have not been proposed by the institution). In particular, such an exemption should be provided for by the ECB guide for employee representatives as well as representatives of regional banks or of subsidiaries.

- **Section 6 Interviews**

The FBF fully supports the ECB approach as regards interviews: their aim shall only be to complement and/or verify the information gathered in the assessment form.

Even though CEO and Chairman's position 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 we cannot have an ex ante assessment): we would need a member of the staff of the banking institution to be part of the interviews for confidentiality reasons.

- **Section 7 Assessment process**

The FBF strongly supports that the ECB (point 7.1: « the (proposed) appointment » does not choose between ex-ante and ex-post assessment and leaves the option to national law, as provided for by CRD IV. Therefore, the Draft Guide should always refer to the « appointee/appointed member».
Indeed we believe that it is crucial to maintain a neutral approach leaving the regulator/competent authority the choice of implementing ex-ante or ex-post assessment processes in accordance with local regulation.

As being a director of a banking institution implies increased liabilities and heavy time commitment, it could become difficult for Institutions to attract high quality profiles of members, in particular independent members, while taking into account the additional constraints arising from balanced gender composition requirements such as those existing under French law.

An ex-ante assessment entails a recruitment process which, in accordance with the Guidelines, would last at least between 4 to 6 months. As the fit and proper assessment period will only start at the receipt of the full documentation required with the risk of being suspended if any information is missing or additional information is needed, such assessment period, and thus the corresponding recruitment process, would, in practice, last around or more than 6 months. It is uncertain whether the best candidates would wait such period of time putting on hold any other proposals they may receive from non-banking institutions. In addition to this, listed institutions need to publish resolutions of the annual general meeting ("AGM") 3 months before the AGM.

If an ex-ante assessment is made mandatory, it would at least be necessary to clarify the "duly justified reasons" for an ex-post assessment.

As for the assessment of suitability performed by the Institution, an ex-post assessment should at least be possible when shareholders nominate members that have not been proposed by the management body.

For instance, in cooperative groups, an ex-ante assessment by the competent authority appears difficult to reconcile with procedures for appointing representatives of the cooperative shareholders sitting on the Board of the central institution as provided by national law.
With regards to some French cooperative regional banks, national law indeed provides for specific requirements regarding the composition of their supervisory boards. Members which shall sit on the supervisory board of such cooperative regional banks: members elected by the regional and local authorities and public establishments for the cooperation between local authorities and members elected by and among the employees of such regional bank. The other members are elected by the general shareholders' meeting among the candidates submitted by the cooperative companies which wholly-own such regional banks.

The timing of such an ex-ante assessment would also not be compatible with French company law regarding the co-opting of members of the Board of directors when their number falls below the minimum required by the by-laws, as, pursuant to Article L. 225-24 al. 3 of the French commercial code, the Board shall, within the three-month period following the vacancy, appoint new directors to reach the required number.

Regarding triggering events: re-assessment should not be triggered by a large range of events. Therefore, the fact that re-assessment can be triggered by « new facts or any other issue » which is much too vague and should be removed.
In addition, it should be made clear it is an individual re-assessment and that only the member directly concerned by the event would be re-assessed and not the collective suitability of the management body as a whole.

We duly noted that a proportionate approach is applied to most of the smaller entities falling under the direct supervision of the ECB.
The Draft Guide provides that the supervised entity uses the forms and templates provided by the National Competent Authority to notify new appointments of members of its management bodies.
It would be useful that each National Competent Authority issues (in both local language and English), forms to be filled in:

- for initial appointments of members of the management body in its management function and members of the management body in its supervisory function;
- for renewals/changes of role of members of the management body in its management function and members of the management body in its supervisory function.

Regarding the change of role in the management body, it should be ensured that a lighter re-assessment is required in such cases, as the member has already been assessed at the time of his/her appointment. The institution should only be required to explain why this member has been chosen for this new role within the management body.

- **Section 8 Decision**

  - **Section 8.1 Positive decisions**

The FBF fully supports that the ECB favors the positive decision.

Regarding the positive decision with condition, the Draft Guide provides that the ECB can include recommendations, conditions or obligations. One of these conditions could be a probationary period below the level of the management body. Such a probationary period seems difficult to implement in practice given that:

- a candidate is selected for a specific function at a determined level; and
- it may be difficult to identify which would be the relevant level below each type of management body.

In French company law, such a probationary period does not exist. Therefore it should be specified that the most common conditions include “probationary period below the level of the management body if applicable under national law”.