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Consultation on Joint ESMA and EBA guidelines on the assessment of the suitability of the members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU

FBF response

Preliminary remarks

- As a general comment, the FBF would like to recall that EBA guidelines should comply with CRD IV requirements. The guidelines should clarify the interpretation of CRD IV provisions without undermining the national law transposing the Directive as provided for by Recitals 55 and 56 of CRD IV. Moreover, no requirement should be added to the CRD IV provisions.
  Art. 91.12 CRD IV mandates the EBA to develop guidelines on assessment of the suitability of the members of the management body and lists the specific items that shall be clarified by the EBA. The Authority cannot go beyond this specific mandate given by the EU legislator.

- The notion of "Senior management" as provided for in CRD IV is missing from the draft guidelines. It should be clarified that the Senior management is included in the notion of "management body in its management function" (cf. our comments below).

- Given the high complexity of the notions used and the diversity of governance models, it seems very important to ensure that the guidelines fit with any model (one-tier or two-tier).

- We do not support the existence of the definition of key function holders, which is not used in CRD IV (cf. our comments below).

  The specific case of entities within a Group should be more taken into account and specified. Duplication of formalities and documentation required at the different levels of a Group organization should be avoided. According to the proportionality principle, for subjects handled by the Group, subsidiaries and regional banks should have rules allowing them to benefit from exemptions or at least lighter requirements.
  For instance, when an entity is incorporated in a country, its shareholder incorporated in another EU Member State, and the shareholder of its shareholder in another different Member State, it is too burdensome to apply cumulatively the rules of each of those countries. It should be clear in such case that only the rules of the top mother company shall apply, hence excluding the application of the rules of each country of the shareholding chain.
  As a complement to proportionality principle, adaptations and flexibilities should be granted within a Group; different levels of entities concerned should be distinguished**:** fully owned subsidiaries should not have all the same requirements to fulfill as heads of Groups or listed entities. **This should be specified in the guidelines.**

- Regarding Article 109 of CRD IV, the distinction between the implementation of CRD IV rules “on an individual basis” and their application “on a consolidated basis” should be clarified in the Guidelines. The application on a consolidated basis cannot result in the same level of constraint than the application on an individual basis for consolidated entities. Only entities subject to CRD IV should apply CRD IV rules on an individual basis. Entities which are not subject to CRD IV but which are parts of the consolidated perimeter of an entity subject to CRD IV, should only apply CRD IV rules on a consolidated basis, i.e. as if the consolidated group is one single entity.

- Both ex-ante and ex-post assessment and the choice between the two options should be possible and left to local regulator/competent authority in order to comply with national law.

- Re-assessment should not be triggered by a too broad range of events and clarification should be made such a re assessment is on an individual basis (rather than triggering a collective re assessment).

- Conflict of interests should be dealt with by national laws and remain outside the scope of these guidelines (see Article 88.1 of CRD IV).
  Similarly the independence criteria of the members of the management body should not be introduced in these guidelines and be left to national law or national soft law. As CRD IV does not require the members of the committees to be independent, the draft guidelines go beyond the directive on this matter.

- Any reference to benchmarks (on time commitment, diversity objectives, induction and training) should be avoided in the guidelines, as the determination of the relevant pairs is subjective and difficult and benchmarking does not take into account the special features of each institution.

- The “buffer of time” that should be used in circumstances that could unexpectedly affect the time commitment is not predictable and cannot be calculated. It should not be introduced in the guidelines.

- Regarding the assessment by the supervisor, the decision should be positive and not implicit.
  Moreover, the starting point of the timeframe given to the supervisor to conduct its assessment should be clarified in order for the Institution to know when the 3-month period (or 2-month period depending whether the Credit Institution is subject to the French AMF or not) starts.
  Finally, the supervisor should only make one additional request to the institution in order to complete the assessment.
  From a practical point of view, experience has taught us that, in the majority of the fit and proper processes, the assessment period does not start before the competent authorities have received additional information requested on one or more occasions, so that its starting date may be postponed several times, and the end of the maximum period for the assessment may not be easily determinable.

Q1: Are there any conflicts between the responsibilities assigned by national company law to a specific function of the management body and the responsibilities assigned by the Guidelines to either the management or supervisory function?

I. No definition of Senior management

The notion Senior management, as provided for in CRD IV[1], is missing from the draft guidelines.
It should be clarified whether or not the Senior management is included in the notion of "management body in its management function" (as further developed in section III. below).

To our opinion, the "Senior management" covers:
(i) the CEO, and deputy CEOs in one-tier systems;
(ii) the management board in two-tier systems.

The guidelines should therefore reintroduce the notion of « senior management » and clarify the terms « management body in its management function » as noted above.

II. Introduction of a new notion : key function holders

We do not support the introduction of the notion of key function holders, which is not used in CRD IV and therefore not implemented into national law. **Such a notion should therefore be deleted from the guidelines.**

The introduction of such a notion would therefore contradict the national law.

III. Clarification of the notions of management body in its supervisory function and management body in its management function

The notions of management body in its supervisory function and management body in its management function need to be clarified, being understood that whatever the form of the corporate legal system in each country is, the aim of CRD IV rules is to ensure a clear separation between the daily management of the institution (Executive Function) and the supervision of such daily management (Supervisory Function).

Indeed, the different corporate legal systems within Europe can be synthesized as follows:

- One-tier system (ex. UK or Spain): one single collective body performs both Executive and Supervisory Functions; or
- Two-tier system (ex. German or France for system with supervisory board and management board): one collective body is in charge of the Executive Function and one other separate collective body is in charge of Supervisory Function.
- "In between" system (ex. France): one collective body (i.e. the Board of Directors) is in charge of the Supervisory Function and some Management Functions (including the determination of the institution's strategy); whereas the Executive Function (i.e. the daily management of the institution) is ensured by one or more physical persons (i.e. the CEO and Deputy CEOs). In such system, the CEO and Deputy CEOs can be allowed to be members of the Board of Directors but when acting as such members, they do not conduct executive missions (they act as every other board member).

[1] Article 3 (9) of CRD IV defines the notion of "senior management" as "those natural persons who exercise executive functions within an institution and who are responsible, and accountable to the management body, for the day-to-day management of the institution".

According to our understanding of CRD IV, a distinction should be made between the management function (i.e. covering the daily executive and the overall direction functions) and the supervisory function, irrespective the corporate legal system applicable. This general principle is observable throughout the whole CRD IV and can be illustrated in particular in article 88, 1. d) according to which "the management body must be responsible for providing effective oversight of senior management".

This being said, we welcome the EBA draft Guidelines on internal governance as they distinguish the management Function and the supervisory Function of the management body. We understand those guidelines as putting forward three definitions:

- The management body in its supervisory function: corresponds to the Supervisory function;
- The management body in its management function: combines some functions of the management function (i.e. Board of Directors in one-tier system) and the executive function (i.e. CEO and Deputy CEOs and [the persons who effectively run the undertaking in one-tier system] [to be clarified]);
- The management body: corresponds to either the supervisory or the management function (including the executive function) (see inter alia recital 56 of CRDIV).

An example of our understanding of these definitions can be read in article 70 of the draft guidelines on internal governance according to which: "**The management body** should define, adopt and maintain a governance policy to implement a clear organizational and operational structure with well-defined, transparent and consistent lines of responsibility taking into account the aspects set out in Annex I of these guidelines. **The management body in its management function** is responsible for the implementation of that policy. **The management body in its supervisory function** is responsible for overseeing its implementation and that it is fully operating as intended and should ensure that the institution's policy is aligned with the institution's overall internal governance arrangements, corporate culture and risk appetite".
This example clearly shows the allocation of functions between the Management body in its Supervisory function and the Management body in its Management function.

Those definitions clearly match with the objectives of CRD IV as regards the separation of functions between Executive and Supervisory Functions.

However, as each national law is different and because CRD IV expressly mentions in Recital 55[2] that "t*he definitions used should not interfere with the general allocation of competences in accordance with national company law"*, **we strongly recommend that the guidelines expressly clarify that when the term "management body" is used without reference to the supervisory or the management function, the missions allocated to the "management body" shall be allocated to the right body as identified under applicable national law.**
For instance, article 106 of the draft guidelines on internal governance states that: "The management body should approve and regularly review and update the outsourcing policy of an institution, ensuring that appropriate changes are implemented in a timely manner". In France, the role of the Board of directors is to review this policy but not to update such policy. The update of such policy is clearly a competence of the management function (in France, the CEO and its deputies (or, as the case may be, by way of delegation)).

[2] "Different governance structures are used across Member States. In most cases a unitary or a dual board structure is used. The definitions used in this Directive are intended to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aimed at a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competences in accordance with national company law."

I. Scope of the guidelines

As regards paragraph 10, the scope of these guidelines should be specified, taking into account entities belonging to a Group. It is critical for effective risk management and level playing field with non-EU groups that duplication of formalities and documentation required at the different levels of a Group organization must be avoided. **According to the proportionality principle, for subjects handled by the Group, subsidiaries should have rules allowing them to benefit from exemptions – especially when developing low - or non-regulated activities - or at least lighter requirements. The very practical consistency and efficiency of the Guidelines but also sometimes their legality vis-à-vis national Law are at stake here.**

A general principle should be added to give the possibility to rely on existing processes or rules defined at Group level.
Another example of this duplication of rules, formalities and documentation for subsidiaries is when an entity is incorporated in a country, its shareholder incorporated in another EU Member State, and the shareholder of its shareholder in another different Member State. Indeed, it is too burdensome to apply cumulatively the rules of each of those countries to the entity. It should be clear in such case that only the rules of the top mother company shall apply, hence excluding the application of the rules of each country of the shareholding chain.

As a complement to proportionality principle, adaptations and flexibilities should be granted within a Group: fully owned subsidiaries should not have all the same requirements to fulfill as heads of Groups or listed entities. This should be specified in the Guidelines, and different levels of entities concerned should be taken into account.

Pursuant to Article 109 of CRD IV, *"[c]ompetent authorities shall require the parent undertakings and subsidiaries subject to this Directive to meet the obligations set out in Section II ["Arrangements, processes and mechanisms of institutions] on a consolidated or sub-consolidated basis, to ensure that their arrangements, processes and mechanisms required by Section II ["Arrangements, processes and mechanisms of institutions] are consistent and well-integrated and that any data and information relevant to the purpose of supervision can be produced*". The distinction between the implementation of CRD IV rules "on an individual basis" and their application "on a consolidated or sub-consolidated basis" should be clarified in the Guidelines. The application on a consolidated basis cannot result in the same level of constraint, for consolidated entities, than the application on an individual basis.

Furthermore, **only entities subject to CRD IV should apply CRD IV rules on an individual basis**. **Entities, not subject to CRD IV but which are parts of the consolidated perimeter of an entity subject to CRD IV, should only apply CRD IV rules on a consolidated basis,** i.e. as if the consolidated group is an entity.

Moreover, it shall also be kept in mind that in certain specific situation, the consolidating company is not in position to impose the application of specific rules to other group entities (ex. existence of a shareholder agreement with veto right).

Q2: Are the subject matter, scope and definitions sufficiently clear?

As already said above (cf. Question 1), we believe:

- **"key function holders" concept should not be used**. It is important to bear in mind that CRD IV remains the legal framework of EBA guidelines.

Article 91.12 of CRD IV defines the EBA mandate with respect to issuance of guidelines for fit and proper. Article 91.1 CRD IV required the suitability assessment of the members of the management body excluding any other population, ie. not the key function holders or the CFO where he/she is not part of the management body and/or heads of internal control) by competent authority.
It is therefore not possible in these guidelines to provide for any other assessments than those provided in Article 91.1 of CRD IV, ie. other than assessment the one with respect to Management Body (in its both management and supervisory functions).

- **Scope of application of the Guidelines :**

  - **Distinction between the application of the CRD IV rules "on an individual basis" and their application "on a consolidated basis" should be clarified** in the Guidelines.
    We suggest the following amendments to Paragraph 10 (page 17): : "*CRD-institutions, as defined in these guidelines, should comply with these guidelines on an individual, sub-consolidated and consolidated basis, ~~including their subsidiaries not subject to Directive 2013/36/EU~~, in accordance with Article 109 of that Directive*". As currently drafted, we understand that Paragraph 10 overextends Level I.

  - **The application of governance rules on a consolidated basis cannot result in the same level of constraints than the application on an individual basis for subsidiaries already subject to CRD IV. The application on a consolidated basis should involve that all the entities within a Group apply the governance rules and processes of the Country where the Parent Company is located, in order to avoid any duplication.**

  - **According to the proportionality principle, for subjects handled by the Group, subsidiaries should have rules allowing them to benefit from exemptions** – especially when developing low - or non-regulated activities - or at least lighter requirements. **In addition, as a complement to proportionality principle, rules and obligations should be more adapted and flexible for entities within a Group;** different levels of entities concerned should be distinguished**:** fully owned subsidiaries should not have all the same requirements to fulfill as heads of Groups or listed entities. **This should be specified in the guidelines**.
    For instance when an entity is incorporated in a country, its shareholder incorporated in another EU Member State, and the shareholder of its shareholder in another different Member State, it is too burdensome to apply cumulatively the rules of each of those countries. It should be clear in such case that only the rules of the top mother company shall apply, hence excluding the application of the rules of each country of the shareholding chain.

Q3: Is the scope of assessments of key function holders by CRD-institutions appropriate and sufficiently clear?

As mentioned earlier, CRD IV does not refer to the concept of "key function holders" and particularly, **Article 91.1 of CRD IV does not provide for any assessment (nor any re-assessment) of this population by the competent authority. We therefore recommend removing the section regarding the suitability assessments of key function holders.**

For instance, in a significant cooperative group, the assessment of key function holders, meaning the CFO where he/she is not part of the management body, the Heads of compliance, risks and internal control and audit (exclusive of "other key function holders") by the supervisor would paralyze the cooperative banks. Indeed, the assessment of 3 to 4 key function holders per regional bank would require the supervisor to assess more than 150 additional assessment files, just for one single group. For one single cooperative network of 15 regional banks, such requirement will result in at least 45 additional assessments.
Furthermore, in the context of a banking group, the key function holders of subsidiaries and other entities in the prudential consolidation scope are often subordinates of the executives in the top level. In any case, there is an effective monitoring by the top entity and reportings organized.
Expanding the suitability assessment to key function holders of affiliated entities or/and subsidiaries would cause an unnecessary and excessive administrative burden for many types of banking groups.

Q4: Do you agree with this approach to the proportionality principle and consider that it will help in the practical implementation of the guidelines? Which aspects are not practical and the reasons why? Institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.

We agree with the general approach to the proportionality principle foreseen in the Guidelines, once different institutions require different governance arrangements.

As mentioned in the key points, the specific case of entities within a Group should be more taken into account and specified. Duplication of formalities and documentation required at the different levels of a Group organization must be avoided. According to the proportionality principle, for subjects handled by the Group, subsidiaries should have rules allowing them to benefit from exemptions or reduced obligations.
In addition, as a complement to proportionality principle, rules and obligations should be more adapted and flexible: fully owned subsidiaries should not have all the same requirements to fulfil, as heads of Groups or listed entities. **This should be specified in the guidelines** and different levels of entities concerned should be taken into account. For fully owned subsidiaries of a Group for instance, a proposition could be made to consider as independent, a board member that is a parent company employee, if he does not report to the Business Line of the subsidiary in which he is appointed.

In practice, it is absolutely not possible to determine what is a relevant qualitative information regarding the complexity of the activities. We do not want any reference to qualitative information.

Q5: Do you consider that a more proportionate application of the guidelines regarding any aspect of the guidelines could be introduced? When providing your answer please specify which aspects and the reasons why. In this respect, institutions are asked to provide quantitative and qualitative information about the size, internal organisation and the nature, scale and complexity of the activities of their institution to support their answers.

Paragraph 16.b) i): "when appointing new members of the management body, including as a result of a direct or indirect acquisition or increase of a qualifying holding in an institution"; It is necessary to clarify that the assessment has no impact on any other existing member but only (i) the new one and the (ii) collective as a whole.

Paragraph 21: Even if time commitment does account for both directorships for commercial purposes and directorships for non-commercial purposes, a re-assessment, should only be triggered by an additional directorship for commercial purposes in order to avoid an unnecessary heavy monitoring by the Institution and the competent authority.
For instance, the competent authority might be overloaded by the files/letter sent each time any of the board member takes an additional directorship for patrimonial purposes.

Paragraph 25 & 26: performing on-going assessment or re-assessment of the individual and collective suitability of the members of the management body following the occurrence of each triggering event appears operationally cumbersome. Yearly assessment analyzing the consequences of all triggering events that occur during the year should be more efficient.

In addition to that, and as a general comment, **a "lighter" version of re-assessment should be provided for some triggering events such as**:

- Renewals of members of management body (please refer to amendment in French law to account for such a possibility),
- Changes of functions in the management body in its management function,
- Additional directorships.

As already mentioned, Key functions holders should not be submitted to the suitability assessment and this concept should be removed from the Guidelines

Q6: Are the guidelines with respect to the calculation of the number of directorships appropriate and sufficiently clear?

Regarding the calculation of the number of directorships, the EBA & ESMA take a restrictive approach to counting. Even if the appointee holds one directorship in the top entity and one directorship in a qualifying holding, this counts 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.

Paragraph 39 j): any reference to benchmarks should be avoided as the determination of the relevant pairs is subjective and difficult and benchmarking does not take into account the special features of each institution. This is a general comment with respect to benchmark (including for diversity objective, induction and training …).
For instance, a French classical Credit Institution cannot be compared to a German Sparkasse because of the applicable regulation and because of the nature of the institutions.
The way it is drafted provides for a restrictive use of these benchmarks rather than being a criterion amongst others and seems to make Institutions be necessarily inside these thresholds, without accounting for any specificity (such as a huge number of the board members).

Paragraphs 38 & 43: 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. It also requires to take into account potential long-term absences.
It is understood that, 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 guidelines.**

Paragraph 51: What does "the same institutional protection scheme" mean? This notion is not explained.

Q7: Are the guidelines within Title II regarding the notions of suitability appropriate and sufficiently clear?

In some local regulations, boards of directors of companies which employ a certain number of permanent employees have to also 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. **It is not possible to expect the same level of experience from board members who are employee representatives.**

The criteria listed in **paragraph 60 and 66** are different. For simplification and operational purposes, they should be the same.

Annex II should only provide examples of skills to be considered in a suitability assessment (instead of a "non-exhaustive list") **or should be deleted from the guidelines**. As drafted, we understand that all skills provided in Annex II shall be deemed to be taken into account when assessing the member of the management body, in addition to those that the entity may consider appropriate. This would deprive the nomination committee of its mission. On the contrary, each Institution is preliminary responsible for such an assessment and should therefore consider and weigh skills at its discretion. Therefore, it should be specified in the Guidelines that such a list of skills is non-binding.

Regarding Reputation, honesty and integrity: Practically, all the points listed to be investigated in the guideline appear difficult to check and too extensive. Criminal records extracts or incumbency certificates as well as market reputation should be sufficient.

Regarding legal pending proceedings, only those proceedings related to facts that have occurred during the term of member's office should be included into the fit and proper assessment. It can be noted that such approach is the one reflected in section "Disciplinary Information - Criminal Disclosures" of the US swap dealer form (NFA Form 8R).] It indeed seems irrelevant to assess the reputation of a member of a management body on the basis of proceedings involving a legal entity in which he/she holds or has held a directorship which are based on facts which occurred before the beginning of such directorship.

Paragraphs 80 & 81: Conflict of interests rules are not included into the mandate given to the EBA by CRD IV. Only national law should apply in such matter.
Should these paragraphs be maintained in the Guidelines, the institution should only be required to prove that appropriate policy and procedure have been set up in order to identify and deal with conflict of interest. Furthermore, CRD IV does not require institutions to inform the supervisor of any conflict of interest. Therefore in any case, paragraph 81 should be deleted.

Paragraph 77 d) and e): such situations are inherent to cooperative institutions and these two points should be deleted from the guidelines. In cooperative institutions, the majority of the board members shall be clients and cooperative shareholders.
Point f): this point is not compatible with French law governing some cooperative banks which requires the Board to include some representatives of local communities.

Annex III Point 1.2 a): "as applicable" should be replaced by "if applicable" (under national law).

Q8: Are the guidelines within Title III regarding the Human and financial resources for training of members of the management body appropriate and sufficiently clear?

Paragraph 83: the period of one month for the newly appointed members of the management body to receive induction is too short. Such a period is not sufficient for the newly appointed members to clearly understand the institution's structure, business model, risk profile and governance arrangements. We recommend a longer period of time, such as 6 months.

Paragraph 84: It is absolutely not possible to identify gap with respect to the appropriate induction before the position is taken up because prior to the appointment of the board member by the General Meeting, the board member is not part of the Board (and it is not clear the board member is identified very soon before such General Meeting). Therefore, « before the position is effectively taken up » should be deleted from this paragraph.
In addition, the sentence "In any case, a member should fulfil all knowledge and skill requirements as set out in section 7 no later than 6 months…", confers an individual obligation whereas the general principle should be a collective suitability of the management body and therefore the "all" should be deleted. The 6-month period seems too short and it would be more appropriate to extend it to a one-year period as some training programs (such as the ones of FNCE and FNBP) are carried out over a period of one year.

Paragraph 86: as mentioned above, **any reference to benchmarks should be avoided as the determination of the relevant pairs is subjective and difficult – see above for further details.**

Q9: Are the guidelines within Title IV regarding diversity appropriate and sufficiently clear?

As already mentioned, **Annex II should only provide examples of skills to be considered in a suitability assessment or should be deleted from the guidelines.** Indeed it is quite impossible to meet all of these criteria. Moreover, **such a list of criteria would draw a standard candidate profile which would hinder diversity amongst Board members.**
Another detrimental effect should be the professionalization of the mandate of director and thus the breach of his independence.

Paragraph 93 :

- in the first sentence, « at least » should be replaced by « for instance » ;
- the geographical provenance should be understood as the knowledge of the territory ;
- French law already provides for a quota for gender. The Guidelines should not refer to this criterion and national law should apply ;
- Any reference to the diversity in terms of age should also be deleted from the Guidelines as it is already included into the knowledge and experience assessment.

Paragraph 95: as mentioned above, **any reference to benchmarks should be avoided as the determination of the relevant pair is subjective and difficult – see above for further details.**

Q10: Are the guidelines within Title V regarding the suitability policy and governance arrangements appropriate and sufficiently clear?

Paragraph 98: in the first sentence, "is accountable for the implementation of governance arrangements" should be deleted.

Paragraph 100: it should be clearly ensured that national law applies to determine the competent body or person which corresponds to the "management body".
In the last sentence, after "meetings", it should be added "if possible".
Finally, it should be specified that the approval of the suitability policy is given by the management body in its supervision function.

Paragraph 101: what does « transparent » mean? *vis-à-vis* which body/authority ?

Paragraph 103: according to our request to delete Annex II, point b) should also be deleted.

Paragraph 104: as already mentioned, Key functions holders should not be submitted to the suitability assessment and this concept should be removed from the Guidelines.

Paragraph 109: Regarding the suitability policy in a group context, we would like to remind our previous comments under Question 1, on the proportionate application of governance rules within a group.
Paragraph 109 seems to require the setting up / application of policies on an individual basis by subsidiaries established in third countries that are included in the scope of prudential consolidation. As such subsidiaries are not European entities, they should definitely be treated on a consolidated basis. **An application on a consolidated basis (to entities not subject to CRD IV) cannot be as extensive as an application on an individual basis (to entities subject to CRD IV).**

Paragraph 117: Regarding the composition of the management body and the appointment and succession of its members, **it should be clearly ensured that national law applies to designate the competent person/body referred to as the « management body » in this paragraph**.

Paragraph 118: in the last sentence, « regarding the performance…last term » should be deleted.

Paragraph 122: the last sentence should be modified as follows: « including any applicable ~~relevant applicable~~ interim arrangements".

Regarding the independence criteria for members of the management body required by the Guidelines, we would like to recall that the EBA has no mandate to introduce a new requirement not provided for by CRD IV. As CRD IV only requires the independence of

mind of the members of the management body. Point 18 of the Guidelines results in adding a new requirement to level 1 provisions which is not acceptable. **EBA shall not go beyond CRD IV provisions and shall not define independence criteria.**

Requesting systematic appointment of "independent members" under a restrictive approach[3] in all regulated entities of a group, could be difficult to implement with little benefit: difficulty to find adequate profiles or to apply in case of limited number of board members, costs induced, additional burden, slow decision processes, etc...

For fully owned subsidiaries of groups, the notion of independence should be adapted; an " independent member" could for instance, be a Parent company employee who does not report to the Business Line of the subsidiary in which he/she is appointed. The restrictive approach may only be efficient and appropriate, for heads of groups or listed entities.

The Guidelines provide for a list of situations where a member of a CRD-institution's management body should not be considered as independent. It should be noted that such list does not completely match with the independence criteria provided for by the French AFEP-MEDEF corporate governance code to which the main French banks refer for listed entities, and in particular:

- The minimum period of time between ceasing to be an employee in a position at the highest hierarchical level or a member of the management board in its management function is three years in the Guidelines versus five years in the AFEP-MEDEF code.
- The Guidelines provide that a member of the management body cannot be considered as independent within a three-year period after having been a principal of a material professional adviser or a material consultant to the institution or another group entity. The code AFEP-MEDEF does not address the specific case of material professional advisers or material consultants and only requires that an independent member shall not be a material customer, supplier, investment banker or commercial banker without providing any cooling-off period.
- The Guidelines also provide for a one-year cooling-off period for a material supplier or customer of the institution or another entity of the group which does not exist under the AFEP-MEDEF code.
- Regarding the situation where a member should not be considered as independent due to the fact that he/she has served as member of the management body within the group for 12 years or more, it should be specified that the management body referred to is the management body in its supervisory function, as provided in the AFEP-MEDEF code. Furthermore, the AFEP-MEDEF code only prohibits a directorship within the corporation and not within any group entity.

Such discrepancies could be detrimental as a same member of the management body in its supervisory function could be considered as an independent member pursuant to the AFEP-MEDEF code but not pursuant to banking regulatory law. The definition of independence criteria should be a matter for national law or national professional guidance.

Paragraphs 123 & 124: Concerning the "sufficient number of independent members" that "are not employed by any entity within the scope of consolidation and are not under any other undue influence or conflicts of interest…", the guideline is too restrictive. The independence criteria of members should rely on national legislation or rules.
In our view, the independence requirements shall not apply to all regulated entities of a Group, especially to non-listed entities or entities under exclusive control. If the notion is maintained in the Guidelines, only the top entity of a Group and significant entities whose shares are listed on a regulated market, should be concerned.

[3] Such as definitions provided by some national laws or soft-laws, which are mostly provided for listed entities. See AFEP-MEDEF corporate governance Code to which main French banks refer.

The notion of independence should be adapted for fully owned subsidiaries: an independent member could be a parent company employee, who does not report to the Business Line of the subsidiary in which he is appointed.

Q 11: Are the guidelines within Title VI regarding the assessment of suitability by institutions appropriate and sufficiently clear?

Paragraph 127: in the first sentence, the terms "this information" must be clarified. The information provided to the shareholders should not be the full content of the assessment (which includes confidential information involving personal data protection issues). Furthermore, the text in the box should be included into the main text of the Guidelines in order to avoid the institution's liability vis-à-vis candidates who have not already taken up their position.

Paragraphs 133 & 134: These paragraphs deal with the suitability assessment by the institution and should therefore be moved into Title VII.

Paragraph 141 b): as already mentioned, any reference to Annex II "Skills" should be deleted as the Annex should be removed from the Guidelines or it should be made clear that such Annex only provides an indicative list of skills.

Q12: Are the guidelines with regard to the timing (ex-ante) of the competent authority's assessment process appropriate and sufficiently clear?

We believe that it is crucial to maintain a neutral approach leaving the competent authorities the choice of implementing ex-ante or ex-post assessment processes.

An ex-ante assessment would make the recruitment process of members of the management bodies longer and much more difficult.

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.

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 nomination committee or 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 provided for by national law.
With regards to some French cooperative regional banks, national law provides for specific requirements regarding the composition of their supervisory boards. Shall sit on the supervisory board, 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 bank.

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. **EBA guidelines shall comply with national company law.**

Q13: Which other costs or impediments and benefits would be caused by an ex-ante assessment by the competent authority?

In addition to the modification of the French monetary code and the one of the standard approval forms, the generalization of the ex-ante assessment would imply to transmit more assessment files. Indeed there should be at least 3 candidates in order to avoid that the candidate favored by the supervisor be pre-appointed. Such an intrusion of the supervisor on the bank governance should be avoided.

Such a tripling number of files compared to ex-post assessment would arise from the higher complexity of the proceedings:

- the supervisor shall give its approval on at least 2 files before the election of the candidate by the General meeting ;
- the General meeting shall have the choice between at least 2 candidates and shall be still free to appoint a Board member at its own discretion.

In addition to such a complexity, an ex-ante approach may give rise to:
- issues as regards confidentiality of the discussions within the board of directors and confidentiality of the Institution's strategy
- personal data protection issues.

The Guidelines must therefore comply with national options made by the legislator and admit both ex-ante and ex-post assessment by the supervisor.

Q14: Which other costs or impediments and benefits would be caused by an ex-post assessment by the competent authority?

No answer

Q15: Are the guidelines within Title VII regarding the suitability assessment by competent authorities appropriate and sufficiently clear?

Regarding the fit and proper decisions issued by the ECB, it seems not advisable that a positive decision may be deemed to be taken by silent, where the maximum period for the assessment is reached and the competent authority has not taken a negative decision.

From a practical point of view, experience has taught us that, in the majority of the fit and proper processes, the assessment period does not start before the competent authorities have received additional information requested on one or more occasions, so that its starting

date may be postponed several times, and the end of the maximum period for the assessment may not be easily determinable.
For instance, forms for the appointment of new board members or renewal of the board members are sent within the 15 day-period to the French regulator. A month later, French regulator sends a first set of clarifications (sometimes even on directorships not mentioned in the forms because they are not accurate anymore but seem to still be on the FIBEN database used by ACPR) and additional information. The institution reverts on this request. Another 15 days later, ACPR reverts with another set of clarifications on a different topic. The institution reverts to ACPR and receives confirmation it is now with ECB. ECB then sends a new set of questions, including those already answered by the Institution to ACPR…

Q16: Is the template for a matrix to assess the collective competence of members of the management body appropriate and sufficiently clear?

Such template does not appear manageable from a practical point of view.

Q17: Are the descriptions of skills appropriate and sufficiently clear?

As already mentioned, we believe that descriptions of skills are sufficiently clear but **should be non-binding** (only as a recommendation or examples).

Otherwise, Annex II should be removed from the Guidelines as it would be a matter which belongs to the nomination committee by drawing an outline of the standard candidate profile.

Q18: Are the documentation requirements for initial appointments appropriate and sufficiently clear?

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

Paragraph 1.2: Is it meant to include members of the management body? It should not be the case as there is no such a letter, contract or offer of employment. This point should be clarified because the said letter/contract/offer will not be sent for each key function holders (please refer to our comment on the assessment of key function holders).
Therefore, point a) should be modified as follows: "If applicable, the letter of appointment, contract, offer of employment or respective drafts"

Paragraph 1.3: The list of reference persons should be provided only for the first appointment as member of a management body of an institution.

Paragraph 4.2: For the sake of clarity, this paragraph should be amended to reflect that the only legal proceedings involving legal entities that are to be taken into account are those that are based on facts that occurred at the time the appointee was a member of a management body of such entity (see Q7).

Paragraph 6.1a): the information of the minimum of time that will be devoted to the performance of the person's functions within the institution should be given annually (a monthly indication does not seem relevant).

Q19: What level of resource (financial and other) would be required to implement and comply with the Guidelines (IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? If possible please specify the respective costs/resources separately for the assessment of suitability and related policies and procedures, the implementation of a diversity policy and the guidelines regarding induction and training. When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

The implementation of the Guidelines will probably involve additional training costs and staff costs. However, such costs are currently hardly predictable as there are still pending questions as regards the level in which the assessment shall be carried out.