

“Draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2012/03)”

A. Introduction

Deutsche Börse Group (DBG) welcomes the opportunity to comment on EBA’s Consultation Paper “Draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2012/03)” issued on 18 April 2012.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active through regulated Financial Market Infrastructure providers.

Among others, Clearstream Banking AG, Frankfurt/Main and Clearstream Banking S.A., Luxembourg, who act as (I)CSDs¹, are classified as credit institutions according to German Banking Act and are therefore within the scope of the European Capital Requirements Directive (CRD). Furthermore, Eurex Clearing AG as the leading European Central Counterparty (CCP) is also implicitly affected by the CRD as it is currently treated as a credit institution under German law and, as the future need for a banking license is currently also seen as being necessary in the context of EMIR, it will be within the full scope of CRD most likely also in the future. Finally, some of the group entities are classified as financial holding companies and are also intended to be in scope of the proposal.

B. General comments

We have analysed the draft Guidelines and are in general supportive of the content of the proposal. However, we have comments and see the need for clarification in five particular areas as detailed below:

1. Persons, who effectively direct the business need to be included

We recommend to clarify, that “persons who effectively direct the business” of “credit institutions” as defined in Article 3 (1) of the proposal are to be treated like members of the management body regardless if they are members of the management body or not. In that regard, we also recommend to include the term “senior management” as defined in CRD IV. In our opinion such persons (as referred to in Article 11 (1) of Directive 2006/48/EC) are closer to the management body than to “key function holders”.

¹ (International) Central Securities Depository.

2. *Application of the assessment to staff representatives*

The requirements of Article 4 to 8 of the draft Guidelines apply to all members of the management body regardless of the legal process to appoint or elect them. While we in principle agree to apply the proposed rules to such members of the management body which are either appointed by the board of directors, supervisory board etc.² or are elected by the shareholders we see difficulties to apply those principles – at least in the same manner - to members of the management body in its supervisory function which are elected by staff as part of staff representation. An assessment by the company (represented by the executive management or the management body in its supervisory function) of the suitability of candidates being nominated for election as staff representatives is putting staff representation ad absurdum. It should therefore be clarified that the company's responsibility to assess the suitability of staff representatives is limited to assess after the election of a representative and close any existing gap **in knowledge** with adequate measures. Judgement of personal suitability (Article 5 (2) of the draft Guideline) should be made by the competent authority only.

As a consequence, we recommend

- To add a paragraph in Article 6 clarifying the scope of the applicability of the assessment to staff representatives (assessment only after election and limited to topics as listed in Article 5 (1) and 7 (1) c).
- To exclude staff representatives from the "selection policy" in Article 7 (1).
- To adjust the application of Article 8 (2) with regard to elected (and subsequently appointed) member being staff representatives. Those need to be appointed, detected knowledge gaps need to be closed.
- To adjust the criteria in Article 14 (3) to reflect realistic expectations to staff representatives. This is also true for Article 14 paragraphs (4) to (7).
- To adjust Article 15 (2) with regard to staff representatives.

² Depending on national corporate law and one or two tier structures.

3. Clarification of the right persons being addressed with the obligations of assessment and implementing an assessment policy

Article 4 puts the responsibility to assess the suitability of the members of the management body to the “credit institution”. Likewise, Article 7 provides that “credit institutions should have a policy for selecting and assessing members of the management body...”. However, the “credit institution” as such cannot act. It acts via its executive management or its employees or, to a limited extent, its management board in its supervisory function. Based on that, the problem arises to whom in person the obligations are directed. The executive management should not be obliged to assess itself or possible future new executive managers. Depending on national law, the appointment of executive managers either falls to the management body in its supervisory function or the shareholders. The appointment of shareholder representatives in the management body in its supervisory function falls to the shareholders.

As a consequence of this, we see the need to specify, at least within national implementation, more precisely who exactly is responsible.

In this context, the proposed provision in Article 7 (1) b is not sufficient. This provision only requests to clarify in the policy (or policies as the case may be) who is in charge to perform the assessment.

As a consequence, we see three levels of responsibility to be addressed:

- The selection and assessment policy for members of the management body in its supervisory function approved by the management body in its supervisory function or a nomination committee, if any. The selection part of the policy is not to be applied to staff representatives,
- the selection and assessment policy for executive managers approved by the management body in its supervisory function, and
- the selection and assessment policy for key function holders under the responsibility of the executive management.

The potentially three levels of approval need to reflect national law and responsibilities and might nevertheless lead to a unique policy and process and even one single function performing all assessments.

The problem addressed above also applies to the wording of the first sentences of Article 7 (1) and (2).

“Draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2012/03)”

4. *Nomination Committee*

In addition, we see further need for explanation, how Article 4 (2) of the draft Guidelines conducts to national corporate law. There is no unique definition of the term as such and the roles of any nomination committee and even the rules in supervisory EU directives / regulations have different meanings and different tasks allocated to a “Nomination Committee”. A Nomination Committee in Germany as a sub-committee of the Supervisory Board does not have the legal power to decide on key function holders and the EBA Guideline should not set recommendations which might be contradictory to existing (national or EU) corporate law. It is therefore necessary to align the rule with national law and at least add “to the extent possible under national law” or any similar phrase.

5. *Miscellaneous*

From a formal point, chapter IV of the guideline is not limited to the assessment by supervisors (chapter III). However, content wise it is referring at various places to competent authorities. It needs to be clarified, if chapter IV is applicable for the assessment by competent authorities only (than it should be part of chapter III) or is also valid – at least in parts – for the assessment by institutions.

As a final remark, we want to point out with regard to paragraph 8 of chapter III of the consultation paper (“Background and rationale”) that the management body in its supervisory function in many countries including Germany does not bear the responsibility to develop the business strategy. We therefore clearly ask to adjust this for the final Guidelines.

C. Responses to the questions for consultation

Question 1:

While the principle of proportionality is a general principle within European legislation, it may be desirable to spell out this principle in more detail for the application of the Guidelines. Which criteria could be applied by institutions and competent authorities to differentiate the assessment process and the assessment criteria regarding the nature, scale and complexity of the business of the credit institution and how should such a differentiation look like?

In our opinion, the principle of proportionality is adequately reflected in the proposal, especially in Articles 5 (1), 7 (1) and 14 (4) of the draft Guidelines. We do not see the need to add more.

“Draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2012/03)”

Question 2:

Should competent authorities be required by the Guidelines to assess the policies of institutions for assessing the suitability of key function holders aiming to ensure that institutions have appropriate policies in place ensuring that key function holders would fulfil the suitability requirements?

We do not see the need for competent authorities to assess any policy of institutions as a general rule. The checking of policies during the first time authorisation request or in the course of on-side inspections or audits should be allowed but not be a mandatory requirement. Inclusion in audit instructions for the statutory auditors however, including a short summary requirement to give an assessment statement on the policy as such as well as its proper application in the audit report might be a suitable approach.

We hope we have given useful input for the finalisation of the Guideline and possible future standards and are happy to discuss our comments if deemed useful.

Eschborn

16 July 2012

Jürgen Hillen

Matthias Oßmann