EBA EUROPEAN BANKING AUTHORITY

EBA BANKING STAKEHOLDER GROUP

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Response on the EBA on the "Consultation Paper Draft joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU"

EBA and ESMA mandate

In accordance with the requirements introduced by Directive 2013/36/EU as amended by Directive 2019/878/EU and Directive 2014/65/EU, the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) jointly issue Guidelines on the notions of suitability, as required by Article 91 (12) of Directive 2013/36/EU and Article 9 (1) of Directive 2014/65/EU1, and on the assessment of suitability by institutions and competent authorities.

A mandate is given to the EBA to issue Guidelines on the notions of suitability jointly with ESMA in line with Article 91(12) of Directive 2013/36/EU and Article 9(1) of Directive 2014/65/EU. The joint adoption of these Guidelines is related to the relevant competences of the EBA and ESMA.

The Guidelines take into account the changes introduced by Directive 2019/878/EU with regard to the consideration of money laundering and terrorist financing risks and criteria for assessing the independence of mind of members of the management body. The EBA and the ESMA invite comments being restricted to the amendments of the existing Guidelines.

Main reasons for changes in the Guidelines

The Guidelines provide already common criteria to assess the individual and collective knowledge, skills and experience of members of the management body as well as the good repute, honesty and integrity, and independence of mind.

The EBA and the ESMA highlight that the Guidelines aim to further improve and harmonise the assessment of suitability within the EU financial sector, and to ensure sound governance arrangements. The directives aim to remedy weaknesses that were identified during the financial crisis regarding the functioning of the management body and its members.

Some changes in the Guideline further encourage institutions to take measures to ensure that gender balance is taken into account when selecting members of the management body.

Position of the BSG

The BSG supports revising the guidelines to include specific references to AML risks and knowledge and competence, as EBA has proposed, given the importance of effective management of AML and CFT risks in the institutions covered by the Guidelines, and the complexity of the challenges such institutions may face.

The BSG is thankful for the opportunity to comment on the proposed revisions to the Guidelines. The BSG has the following comments on the specific questions that have been raised by the EBA.

Question 1: Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?

In relation to credit institutions and investment firms, the scope is clear. However, payment institutions and e-money firms are also subject to obligations in relation to suitability of directors and managers, and many are subject to AML obligations.[1]

The BSG is aware that considering that the Level 1 legal source of the draft Guidelines the BSG is commenting are Directives 2013/36/EU and 2014/65/EU, the scope of these Directives is limited to credit institutions, financial holding companies, mixed financial holding companies and investment firms. Despite this, the BSG deems it important to urge the EBA to adopt, within the limits of the powers conferred on it by the European legislator, rules similar to those object of the consultation in question, with adjustments as needed on specific aspects, to payment institutions and e-money firms given that there are potentially significant AML/CFT risks in the provision of payment services.

Question 2: Are the changes made in Title II appropriate and sufficiently clear?

In paragraph 27(c) there is a danger that the current drafting is disproportionate and could potentially give rise to the need to review the management body suitability on any occasion when a SAR is submitted. The BSG proposes that this should be clarified to prompt a review where there is evidence of material and systematic money laundering/CFT being carried out or attempted.

The BSG is generally open to various ideas on how best to achieve this; one possibility could be to amend the wording as follows:

(c) where there are reasonable grounds to suspect that money laundering or terrorist financing has been or is being committed or attempted or there is an increased risk thereof in connection with that institution and in particular in situations where information available suggests that the institution

i. has been used **systematically** for ML/TF purposes;

ii. has been found to be in breach of its AML/CFT obligations in the home or host Member State or in a third country;

iii. has materially changed its business activity or business model in a manner that suggest that its exposure to ML/TF risk has significantly increased; or

Otherwise, yes

Question 3: Are the changes made in Title III appropriate and sufficiently clear?

The BSG suggests clarifying the scope of the responsibility attaching to the members of the management body in paragraph 58 as follows:

[1] See Directive (EU) 2015/2366 Article 5(1)(k) and (n) and Article 3(1) of Directive 2009/110/EC as amended.

Members of the management body that are responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2015/849 **within the institution** should have adequate knowledge, skills and experience regarding ML/TF risk identification and assessment, and AML/CFT policies, controls and procedures. They should have a good understanding of the institution and its business model, and the extent to which this exposes the institution to ML/TF risks.

Otherwise changes are appropriate and clear.

Question 4: Are the requirements in section 12 sufficiently clear; are there additional measures that should be required to ensure that diversity is appropriately taken into account by institutions and that the principle of equal opportunities for all genders is appropriately reflected?

It is helpful that the aim of gender balance is explicit alongside other aspects of diversity. It would be helpful to support this with a prompt to competent authorities to consider requiring periodic reporting of progress.

Question 5: Are the changes made in Title VI appropriate and sufficiently clear?

It would be helpful to define the term 'offshore financial centre' given that this is not defined in CRDV.

Otherwise, yes.

Question 6: Are the changes made in Title VII appropriate and sufficiently clear?

In Annex 3 the BSG proposes making explicit that consideration should be given to how the appointment contributes to ensuring appropriate diversity as well as breadth of experience, by adding the words in bold to paragraph 7.2:

This should include a description how the overall composition of the management body reflects an adequately **diverse composition and** broad range of experience and the identification of any gaps or weaknesses and the measures imposed to address these.

Otherwise yes.

Question 7: Are the changes made in Title VIII appropriate and sufficiently clear?

Yes

Question 8 : Are the changes made in Title IX appropriate and sufficiently clear?

It is unclear whether the proposed drafting of paragraphs 202-207 is fully consistent with the following part of Art 28 BRRD: "The appointment of the new senior management or management body shall be done in accordance with national and Union law and be subject to the approval or consent of the competent authority."

Paragraph 207: we suggest replacing "should perform the suitability assessment" with "may conclude the suitability assessment" to ensure that NCAs are not precluded from starting the assessment before the appointment is confirmed, even if it is not finalised until afterwards.

The BSG also has the following additional comments:

Title 1: application of the proportionality principle.

It would be useful to be more explicit that the significance of AML risks within an institution may be much greater than the prudential risk posed by the scale or nature of its activities. The BSG suggests adding a new sentence in paragraph 20 as follows:

"Institutions should note that the size or systemic importance of an institution may not, by itself, be indicative of the extent to which an institution is exposed to risk."

For example, an institution, which is conducting a significant proportion of business in jurisdictions with higher risk of money laundering or terrorist financing, or with clients from such jurisdictions, may need more sophisticated AML controls than a larger institution which does not conduct such business. To identify those jurisdictions, the reference is to the official lists published by the European institutions or other international public bodies. Furthermore, credit institutions having branches and subsidiaries in countries where do not exist a supervisory system equivalent - according to the list published by the European Commission – to those adopted by the European countries may need sophisticated AML controls"