

BNP PARIBAS RESPONSE TO THE EBA CONSULTATION PAPER ON DRAFT GUIDELINES FOR ASSESSING THE SUITABILITY OF MEMBERS OF THE MANAGEMENT BODY AND KEY FUNCTION HOLDERS OF A CREDIT INSTITUTION

The European initiatives on corporate governance are very relevant.

Different works were conducted on this issue: the European Commission Green paper on corporate governance in financial institution, the European Commission Green paper on the EU corporate governance framework, corporate governance aspects mentioned in the CRD IV proposal, European Commission studies on the future of the European company law.

In this moving context, we recommend that the draft guideline for assessing the suitability of members of the management body and key function holders be left open to revision until the CRD IV is adopted.

1. First of all, the principle of assessment by a competent authority currently applies only to the two suitable persons as defined by the article 11(1) of Directive 2006/48/EC and not to the board members or key functions holders, two concepts that are either heterogeneous in their legal reach or simply undefined.

In that respect, the scope of these recommendations should concern only the two suitable persons as set by the article 11(1) of Directive 2006/48/EC.

Furthermore, a particular attention has to be carried on the coherence between the legislative texts and the draft recommendation, in particular concerning definitions and scope which, right now, are different from those envisaged in the CRD IV proposal. The EBA guidelines have to be in line with the adopted CRD IV .

2. Competent authority should not interfere with the shareholders' rights and, hence, with the Board's decision making and behaviour

According to French law (Commercial code), listed companies are obliged to submit an annual report to the general shareholders meeting. This document is publicly available and thus accessible to the Competent authority. Among other contents, this report describes the functioning and the assessment of the Board and its different committees. More specifically, the Chairman of the Board reports on the Company's Corporate Governance to the General Meeting; this report is attached to the annual report.

The appointment of board members is the competence of the shareholders general meeting which has detailed information on each candidate.

The Board of Directors must assemble diversified competencies with regard to strategy, management, distribution, etc. The profile of board member must be defined by the Board of Directors in consideration of the characteristics of the institution and the balance of its composition at the time it decides to launch the process of recruiting a new board member.

When an appointment committee exists, this one must also determine the desired necessary profiles without excluding a case-by-case assessment.

We are strongly supportive of the French legislative framework as well as the associated practices that achieve a good and effective balance between flexibility and responsibility.

In this context, we find that the notification requirement to the Competent authority is unclear. Does this notification procedure take place before or after the vote of the shareholders? In the first case, the spontaneous board member appointment at the general meeting would be not allowed? In the second case, we consider that the Competent authority should not interfere with the shareholders' rights and, hence, with the Board's decision making and behaviour.

There is no need, nor relevance, nor legitimate grounds for supervisory authorities to go beyond basic and objective criteria to be met by board members and key function holders.

3. The recruitment policy must be set up in general terms

One of the lessons of the financial crisis is that the companies that resisted best are those that had the most competent and committed directors. Above all, priority should be given to competence, experience and integrity in recruitment policies.

Appointment committees must determine the necessary profiles, but this assessment can be done only on a case-by-case basis. In addition, since those skills must be appreciated in the long term, it is essential to develop information sessions or if needed, training activities. For example, directors must have a good knowledge of the reforms that have an impact on their activity: Solvency 2, Basel III, changes in IFRS standards, etc. The intensity and depth of the dialogue with the executive management, particularly on the occasion of the specialized committees of the board may also significantly contribute to the development of the Board members' expertise as well as representing a most welcome challenge for the management.

Recruitment policies have to be set up in general terms. It is neither possible nor desirable to determine too specific criteria in order to keep the indispensable flexibility requested by unexpected situations.

4. Competent authority should not interfere with the Board organization and decision making while the Board must be fully cognizant of their assessment of the bank's strengths and weaknesses

Competent authority and Boards fulfill distinct missions. We are strongly convinced that clear separation of duties is much more efficient than any interference with the Board's life to take into account the wider societal interest.

It is unquestionable that the Board should be informed of the supervisory authority opinion of the bank's soundness and, in particular, of any significant shortcoming in risk management this authority may have identified in the course of its permanent monitoring and field examinations. This authority is surely entitled to have its own assessment of the governance of financial institutions, which is however not limited to the Board's role and organization.

The role of supervisory authorities is already defined in the CRD through its provisions addressing the Basel Committee recommendations on the Pillar II process. Its assessment of the bank's internal governance contributes to its global judgment of the institution's strengths and weaknesses and, eventually, of its final regulatory capital requirements.

Extending the supervisory authority role regarding the suitability assessment of members of the management body and key function holders would certainly be inappropriate. The Board of Directors must assemble diversified competencies with regard to strategy, management, distribution, etc. The profile of directors must be defined by the Board of Directors in consideration of the characteristics of the institution and the balance of its composition at the time it decides to launch the process of recruiting a new director.

While we are in favour of an effective and powerful supervision which means expertise, adequate resources and proper field investigations, any involvement in the shareholders' prerogatives would just be confusing and would distract the supervisor from its main responsibility.

Question 1 for consultation :

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?

The corporate governance rules must be principle based and flexible. Common sense and experience may help to bring out a few basic directions for future guidance on this sensitive and complex matter.

Any regulation in that field should be circumspect, balanced and adequately flexible to reflect different national cultures, legal contexts, firm structures and business models.

In particular the concept of proportionality must be emphasized. Although its importance is acknowledged in the Consultative Document, its reach may appear to be underestimated each time the contemplated rules appear to be detailed and binding. The corporate governance framework must be workable for small banking institutions as well as for large ones, which means designing rules that are simple and open to the indispensable devolution of authority within large firms.

Question 2 for consultation :

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?

Banks must be managed by competent officers. It is the responsibility of the Board to nominate them. Their actual success or failure to deliver what is expected from them should show up easily and quickly from the firm's performance that is assessed by the Board with the help of the control framework that include the supervisory bodies.

This cannot be just a matter of policy compliance and we do not see what exactly the suggested guidelines intent to mean or achieve.

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