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Secretariat to the Supervisory Board
Public consultation on the draft guide to fit and
proper assessments
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European Central Bank - Public consultation on the draft guide to fit and proper assessments

Dear Madam or Sir,

Deutsche Börse Group (DBG) welcomes the opportunity to comment on the “Public consultation on the draft guide to fit and proper assessments” issued on 28 October 2016.

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 with regulated Financial Market Infrastructure (FMI) providers.

Among others, Clearstream Banking S.A., Luxembourg, and Clearstream Banking AG, Germany, who act as (I)CSD as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are also credit institutions and are therefore within the scope of the European Capital Requirements Directive (CRD) and Capital Requirements Regulation (CRR). Clearstream subgroup is supervised on a consolidated level as financial holding group. Currently, none of our group entities are designated as significant and under direct supervision of the ECB. Nonetheless as we see this draft regulation and guide as a possible precedent for following legal initiatives and usage by NCAs also related to less significant institutions (LSI), we use the opportunity to provide our feedback on the proposed guide.

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1. General comments

In general, GDB supports the approach of the ECB to foster the harmonisation of the assessment criteria applicable to fit and proper assessments within the Union. Overall, we agree with most of the proposed elements the ECB is proposing. In particular, we agree on the 6 Principles as laid down in section 3 of the consultation document.

Moreover, we agree on the needed alignment of the ECB guide with the EBA “Guidelines on the assessment of the suitability of members of the management body and key function holders” (EBA/GL/2012/06) expected to be replaced by the future joint ESMA / ABE “Guidelines on the assessment of the suitability of members of the management body and key function holders” as currently in consultation and the EBA “Internal Governance Guidelines” (GL44). However, not only the Guidelines and draft Guidelines mentioned above (taken from footnote 4 of the consultation document) are relevant but also the Draft EBA “Guidelines on internal governance” updating GL44. In addition, we would welcome also an alignment in the respective areas with the draft ESMA “Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers”.

As such, it seems to be important not to finalise the ECB Guidelines before EBA publishes its revised “Guidelines on Internal Governance”, EBA / ESMA publish their joined (revised) “Guidelines on the assessment of the suitability of members of the management body and key function holders” and ESMA publishes its Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers”.

Furthermore, we recognise the need to cover to a broader degree and with several corrections the treatment of a **two-tier** management board structure. We have already raised similar concerns in our response to the ESMA consultation for their “Guidelines on the assessment of the suitability of members of the management body and key function holders”¹ We have taken into account the items EBA has incorporate in the draft Guide in this regards but see various needs to adjust and amend in order to reflect appropriately the rules as laid down in national rule especially in (but not restricted to) Germany.

¹ You can find our response on the ESMA homepage as follows: <https://www.esma.europa.eu/press-news/consultations/guidelines-management-body-market-operators-and-data-reporting-services>. We have also raised comments and recommendations in other areas of the draft guideline which we also would like the ECB to consider in addition to our comments raised in this document.

2. Comments on the draft guideline

Overall, the approach taken by the ECB finds our support. We in general have no comments on the sections 6 to 9 of the consultation document. However, we clearly see the need for a variety of elements to be fine-tuned with regards to assessment criteria in section 5 of the ECB proposal. We therefore raise our comments and proposals for adjustments and amendments along the sub-sections of section 5.

5.1 Experience

1. Experience versus knowledge

In our view the guide should distinguish between practical experience and theoretical knowledge. We find it difficult to state that someone has gained theoretical “experience”. Although this is mainly a formal item related to the usage of appropriate terminology, we kindly ask the ECB to consider to differentiate between experience related to practical activities on the one hand side and knowledge as being gained during theoretical education (in a broader sense). The term “skills” in this context seems to somehow in the middle.

We therefore propose to name this criterion “Experience and Knowledge” and use knowledge in combination with theory while experience (in a broader sense including skills which have been gained in practise) should be used in connection with “practical”. We recognise this topic in the first paragraph of sub-section 5.1 as well as in the second table of the stage 1 assessment. In addition, as following our proposal “experience” would be narrowed to “practical experience”, the term “knowledge” may have to be added at other places (e.g. in the first paragraph of the “Function-specific and minimum requirements”)

2. Function-specific and minimum requirements – differentiation between the executive and non-executive members of the management body

The text on “Function-specific and minimum requirements” asks for a differentiated treatment along the principle of proportionality. We completely agree to this approach. However, we are missing a differentiation also with regards to knowledge and experience between executive and non-executive members of the management body. In the text on stage 1 such differentiation is made to some extent. We nevertheless would welcome a clarifying statement e.g. added as third sentence to the introductory paragraph as follows:

“The more complex these characteristics are, the more experience and knowledge will be required. Similarly, a higher level of experience and

knowledge may be needed for executive compared to non-executive members of the management body.”

3. Definition of certain roles

The consultative document uses dedicated functions which are not or not clearly enough defined in the underlying legal texts. Moreover, they are partially not part at all of the legal framework of corporate law or are neglected in the supervisory practise.

CRD IV and its national implementation foresee on one hand a clear responsibility for the management body in its entirety, i.e. the board as a whole. Irrespective of this fact, we assume that the role of a Chairman of the Board is implemented in all EU jurisdictions. However, especially in 1 tier structures the function of a “chief executive officer” or “CEO” is not existing or at least not recognised (in full) for regulatory purposes in order to secure an “equal rights” approach for the management body in its executive function. Despite the fact that i.a. Article 88 (1) lit (e) CRD IV clearly mentions a “function of the chief executive officer”, the role as such is not described for regulatory purposes. Also the EBA GL44 refer to a CEO but does not define the responsibilities in more detail.

Related to Chief Risk Officer, the EBA GL44 goes into more detail and defines the role (as it does for the other heads of the second and third line of defence functions, i.e. Compliance and Internal Audit).

Contrary, there is no unique understanding of the role of a CFO. A legal definition is not existing at all.

The EBA “Draft Guidelines on internal governance” (EBA/CP/2016/16) contain a definition session where at least the terms CEO and CFO are defined. Although we disagree to some extent to the definition of the CEO as proposed by the EBA (the role of the CEO is at least to some degree depending on the national corporate law), we clearly agree to the EBA approach to define the named functions. We also see the need to harmonise the understanding and to use the same definitions throughout EU financial markets legislation and supervision. As such, we kindly ask the ECB to align with ESMA and EBA and issue a harmonised set of definitions for supervisory purposes in the context of corporate governance in general and the fit and proper test in particular.

4. Necessary practical experience for a CEO

The requirements laid down in the first table of Stage I related to “significant proportion of senior level managerial positions” for a CEO is referring to experience “one level below the management body in its management function”. Footnote 13 here refers only to the CEO role and not the general role as director.

While we would agree to that requirement as a presumption for any Director role (the footnote should also be shown on the right side of the table), we disagree to the too restrictive wording of the footnote for the CEO which we assume is not done on intention. The current wording would exclude Director positions held as an executive Director in the management body of a credit institution from counting as a “senior management position”. We assume, this is not intended. In any case, we clearly ask to include the time as an “ordinary” executive member of the management board within the expected practical managerial expertise. A possible amendment of the footnote could be as follows: *“Senior level managerial positions is understood as one level below the management body in its management function or – in the case of the CEO – an Directorship as an ordinary member of the management body in its management position.”*

5.2 Reputation

1. (Pending) legal proceedings

In general, DBG supports the elements as proposed by ECB.

The list of items shown as information to be provided is reflecting only pending legal proceedings and they do not fit to proceedings already concluded. As such, the requirements should be split into those for to the pending and for the already concluded proceedings and a list of information required for concluded proceeding should be added.

Furthermore, a clear rule with regards to information of past items which are already time-barred should be included in order to make clear that (certain) items of the past are not relevant any longer. Even in criminal law most of the offences become time-barred at some point in time. As such, ECB needs to consider to limit the items for a dedicated period of time, e.g. within the last 5 years.

5.3 Conflicts of interest and independency of mind

1. Materiality

The allocations of items in table 1 between the categories of conflict “Personal” and “Professional” to some degree seems to be random and not precise. The last two points of the “Personal” category (“is a party in legal proceedings against the supervised entity or against the parent undertaking/its subsidiaries” and “conducts business, in private or through a company, with the supervised entity or with the parent undertaking/its subsidiaries”) as well as the first point in the category “Professional” (“The appointee or a close personal relation holds at the same time a management or senior staff position in the supervised entity or any of its competitors, or in the parent undertaking/its subsidiaries”) could well be either in the other category or in both. As such, ECB should review the allocation and the need to have categories or segregate the items into the categories.

In addition, we do want to point out that being a party of a legal proceeding against the supervised entity etc. is not a conflict of interest per se as there may be legal proceedings which go against the supervised entities and in addition against its legal representatives being in this case the members of the management body. As such, it is necessary to also take the circumstances into account.

5.4 Time commitment

1. Qualitative and quantitative restrictions

While GDB agrees to the principles as proposed by the ECB, we see the need for some clarifications:

- There are in general multiple possible circumstances or personal commitments, which may use resources of a (potential) member of a management body that are consequently not available for the tasks as a member of the management body. Any such should be substantial and material and the guidance given by ECB should make this clear. However, we assume the example given as potential misleading and only showing a negative assumed item. We encourage the ECB to enhance the list of examples by a few more to better indicate what kind of commitments or circumstances the ECB is thinking of. We could assume items like “substantial activities for a charity”, etc.
- Needed time commitment for any given role in the management body of a supervised institution varies over time. Business expansions, financial market changes, technology developments, Compliance threats, etc. may or may not require time. It is therefore not really

possible to assume exact commitment needs in advance. In addition, nobody can allocate his time looking backwards in a very granular manner on tasks performed. As such, the (assumed) ex ante commitment requirement should be clearly addressed as “expected”, “available on average”, “minimum” or in any other suitable way. This is true for the list of minimum set of information required as stated on page 16 of the consultation paper as well as related to the list of additional information possibly be required on page 17.

- Members of the management body (and also other (senior) employees) may have positions in the management body of other companies (not being part of the “group”) in order to represent the interest of the company (major clients, major vendor, market infrastructures, etc.) or in other words which are taken “on behalf” of the supervised institution. Also there can be an estimate given on the time committed or spent for such a mandate, the time is also spent for the position within the supervised institution. Even within a “group” context under the “privileged counting” the counting for time committed / spent for mandates in other group entities “on behalf” of the supervised institution requires clarification. As such, ECB should give clear guidance, how such situations are to be treated. In our view such times spend on behalf of the supervised institution should – at least also – count towards the time commitment for the role in the supervised institution which may lead to the fact that the time spent / committed for such mandates is counted twice and the total time spend for all mandates may be more than 100 %.
- We assume that the condition (i) to limit additional information is meant as to be read “(i) the appointee holds one executive directorship with up to two non-executive directorships or up to four non-executive directorships, ...”. Without the hint of an upper boundary the condition is to be read as being exactly the number of mandates named and as such a lower number of mandates would not qualify for the simplified treatment. We kindly ask the ECB to adjust the wording accordingly.
- The reference point for the third item in the list of required additional information on page 17 is unclear to us. The term “more” requires a comparison with a given “standard”. As such we propose to rephrase the point in the final guide to reflect a “dedicated high amount of time”

2. Counting of directorships (including “privileged counting”)

CRD IV defines a privileged treatment inter alia for directorships held within a “group”. However, CRD IV does not define what is meant by a group. The rules for the adequacy of the management body and explicitly the dedication of sufficient time for directorships is also implemented with MiFID II

(Directive 2014/65/EU). Here, the term “group” is clearly defined in Article 4 (1) point 34 with a reference to Article 2(11) of Directive 2013/34/EU (Accounting directive). In our view the definition of MiFID II is suitable and should be used for CRD IV purposes as well. However, national law has implemented the term in different ways and e.g. the German implementation in §§ 25c and 25d of the German Banking Act (KWG) is deviating from that definition. We therefore ask the ECB to define the content of the term for the purpose of the ECB guide and making clear – not only for the term group but also for the whole “privileged counting” – that national rules where existing prevail and are not overruled by the ECB guidelines. The ECB should in this regards strongly align with the guidelines and standards to be issued by ESMA and EBA in this context and should also address a proposal for harmonised rules within the current CRR II package legislative process in order to assure a harmonised rule set within the EU. We therefore refer also to our comments on the recently closed ESMA consultation (see above).

In more details, we oppose the proposed restrictive approach of ECB related to the counting of mandates within a group and at companies where the supervised institution holds a qualifying holding in. The wording of CRD IV (and MiFID II in this regards) is not precise. However, in order to harmonise the treatment for MiFID II Article 9 and 45 and CRD IV Article 91, also the slightly different wording of Article 45 MiFID II should be taken into account. In order to avoid diverging interpretations in the EU, we once more ask in this regards to reach out for clarification in the CRR II package legislative process.

We hope our comments are seen as a useful contribution to the discussion and will be considered in future issuances.

Yours faithfully,



Jürgen Hillen
Executive Director



Christian Süttmann
Regulatory Specialist