Deutsche Börse Group

Response

to EBA/CP/2016/17

“Consultation Paper:

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”

issued on 28 October 2016

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A. Introduction

Deutsche Börse Group (DBG) welcomes the opportunity to comment on joint ESMA and EBA consultative document "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" issued in October 2016.

DBG operates 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 is mainly active with regulated Financial Market Infrastructure providers.

Among others, Clearstream Banking S.A., Luxembourg and Clearstream Banking AG, Frankfurt/Main, who act as (I)CSD[1] as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are classified as 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 a financial holding group. In addition, Eurex Repo GmbH, Eurex Bonds GmbH and 360 Treasury Systems AG which are operators of multilateral trading facilities (MTFs) and according to the wording of Article 4 paragraph 2 (c) CRR are classified as CRR-investment firms.

The document at hand contains our general comments to the guidelines on internal governance and dedicated response to selected questions raised in the consultative document in Part C.

[1] (International) Central Securities Depository;

B. General comments

In general, DBG agrees and welcomes the proposals made by ESMA and EBA. We are pleased that ESMA and EBA have introduced dedicated definitions within the Guidelines to provide further clarification on functions and terms used.

DBG would appreciate a further harmonisation across the different guidelines on internal governance of financial service providers currently prepared by EBA, ESMA and ECB[2]. We therefore ask for a comprehensive rule book, e.g. a joint ESMA / EBA rule book which is also used as an anchor by the ECB. Therefore, we kindly ask the ESMA and EBA, to align with ECB and issue a harmonised set of guidelines on internal governance. We acknowledge in this regards that the ECB may set tighter rules for significant institutions within or in addition to the general common framework.

Related to the different internal governance rules between the Member States, we in general observe the proposal as a good approach to deal with both, 1-tier and 2-tier structures. However, we see some need for adjustments. We have raised similar concerns and to a much broader degree in our response to the ESMA consultation for their *"Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services provider"* as well as the ECB consultation on the *"Draft guide to fit and proper assessments"*. We also refer to our comments to the parallel running EBA consultation paper *"Draft Guidelines on internal governance".*

While we agree in general – despite our wish for a consolidated corporate governance guideline for the financial sector – with the proposals made by ESMA and EBA, we see the need for certain adjustments or clarifications. As we in general agree with the proposal we have put our remarks in this regards into our answers to the questions below.

[2] We refer to the guidelines currently consultated: ESMA consultation on the *"Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services provider"*, ECB consultation *"Draft guide to fit and proper assessments"* and the EBA consultation paper *"Draft Guidelines on internal governance"* and our comments on those.

C. Response to selected questions raised in the consultative document

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?

Compared to the other regulatory consultations and the broader area of Corporate Governance, we have only a few comments related to the appropriate dealing with the different tasks of the management body in either its supervisory or executive function. Beside the few hints below, we also have taken up some further adjustments with the dealing of either the executive or the supervisory function in our answers to question 6.

In particular, we see the need to insert a hint of different levels of expectations on the knowledge and experience to be considered according to paragraph 56 of the draft guidelines depending on an executive or non-executive role in the management body. Having said this, we clearly honour the differentiation made in this regards in paragraphs 61 and 62 of the draft guidelines.

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

While the scope of application in paragraph 8 of the draft guidelines also covers financial holding companies, those are not included as addresses in paragraph 7 of the draft guidelines. We kindly ask to align the two paragraphs.

The draft guidelines define responsibilities and tasks for dedicated functions. Beside the management body as a whole, in its supervisory or executive function, this is true especially for the three control functions and their heads (Compliance, Internal Audit and Risk Management [including the Chief Risk Officer]). In addition, the CEO and the CFO are named. We have concerns related to the inclusion of the latter two and in particular with the CFO function in the draft guidelines. As paragraph 12 of the draft guidelines states, the usage of the two roles is not intended to introduce them but for functional aspects only.

CRD IV and its national implementation foresee a clear responsibility for the management body **in its entirety**, i.e. the board as a whole (partially being broken down to the executive or supervisory function respectively). Irrespective of this, we assume that the role of a Chairman of the Board is implemented in all EU jurisdictions. However, the function of *a "chief executive officer"* or *"CEO"*

is not mandatory 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 Article 88 paragraph 1 lit. e CRD IV clearly mentions the "function of the chief executive officer", the role as such is not defined or described for regulatory purposes.

We appreciate the ESMA and EBA approach to define the CEO and CFO function as a good step. However, we disagree to the definition for the CEO and we fail to understand the definition of the CFO and the need to introduce a CFO function in the context of the proposed guideline.

A CEO role in a 2-tier structure is usually the role as the chairman of the management board and as such responsible to co-ordinate the work of the management board and the dialogue with the supervisory board. According to the common responsibility of the board as a whole, he is however not *"providing steer to the manage the overall business activities"*. This in our view is too strong for the role of a CEO in a 2-tier structure. On the other hand, this may be true in a 1-tier structure. Overall, the details of the role are irrelevant for the purpose of the guideline and we propose to frame the role as follows *"means the person who is chairing the management body in its executive function or who is acting as the responsible person to co-ordinate the work of the persons who effectively direct the business of an institution."*

The tasks described for a CFO in case not being under the responsibility of one or more dedicated members of the management body in its executive function may be under the responsibility of one or more senior managers. There is no clear definition of a *"CFO"* in the regulatory legislative framework to our best knowledge. Furthermore, it is unclear to us, why the artificial function of one "CFO" is addressed while there is no clear role of the function defined and it is specifically stated in paragraph 12 of the draft guidelines that no need to appoint a CFO is intended to be introduced. Like for a CFO, also the function of the Chief Treasurer, the Head of the *"Human Resources Function",* or other functional position holders with a high likelihood to be a risk taker or key function holder could be named.[3] We cannot see any reason for a dedicated treatment of a vague defined function. On top of that we also assume that the CFO

[3] The CFO function is used as a reference e.g. in paragraphs 26, 44, 46, 104, 151, 152, 158, 159, 160, 164, 165, 173 and 178 of the draft guidelines. As stated, we fail to understand the background to add

function to a large degree will reside within the management body in its executive function anyway. As such, we clearly propose not to define rules on a theoretical function (as the CFO) without also clearly defining the roles and responsibilities assumed for such a function. As we currently do not see the need to define dedicated tasks, roles and responsibilities of a CFO-function, **we clearly favour to take out any reference to the CFO in the proposed guidelines**.

Having said this and in case our proposal is not followed, we fail to understand why "record-keeping" is listed as a dedicated task of the CFO and what exactly is meant by this in the given context.

We explicitly welcome the definition of "group" in line with MiFID II and other financial sector regulations. Unfortunately, this definition which is used for the purpose of determining the number of mandates is not defined in CRD IV. Moreover, the current proposal for CRD V includes a definition of "group" which however is different from the ESMA/EBA proposal and seems not to be targeted for the above mentioned purpose. We therefore encourage ESMA and EBA to request back to the EU-Commission to anchor the "group" definition for the purposing question within the CRD going forward.

The draft guideline is using the term "officer" at various places without giving a definition in paragraph 13. Especially, if continuous to be used in paragraph 124 (see our response to question 10) we see the need to define what is meant with this term.

Finally, as national law may or may not include members of the management body in either of the two functions as an employee of the institution it needs to be defined for the purpose of the draft guideline whether or not members of the management body should be included if the term "employee" or the phrase "is employed" is used (e.g. for the purpose of paragraph 123 of the draft guidelines).

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this artificial role at these instances, while other functions are only named generically.

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

We do not understand why a material change on a group level is assumed a (mandatory) trigger for a reassessment of the suitability on institution level without verifying any material impact on the institution. Consequently, we ask to be more specific on the reassessment needs as defined in paragraph 26 of the draft guidelines related to the group level impact in section (i).

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.

No specific comment.

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.

No specific comment.

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

In our understanding it is common that the member of the management body in its executive function is only working for the institution in question. In those cases, the time commitment related to professional activities is assumed to be 100 percent. We therefore wonder how on top of 100 percent of the time additional buffers could look like. Consequently, we ask ESMA and EBA to sharpen the wording of paragraph 38 of the draft guidelines to also foster for such circumstances.

For members of the management body in its supervisory function the attendance of meetings seems not to be an appropriate measure for the purpose of paragraph 39 (a) of the draft guidelines. Depending on business activities and extraordinary events, the number of meetings or their duration may increase

during the year. On the other hand, meetings are to be set up bringing together a variety of persons which do not exclusively work for the company. As such, time conflicts cannot be excluded and not participating in a meeting can have several causes (such as illness or conflicting arrangements). This however cannot be seen as a proof for not looking into the topics and contributing to the discussion e.g. by handing in written comments or raising concerns upfront to the meetings including sending a proxy to support or oppose proposed decision. Furthermore, for members of the management body in its executive function business activities require a variety of tasks which include business travel, client meetings and also other urgent activities which may conflict here and there with the participation to regular and frequent board meetings. We assume this as being ordinary course of business. Taking also holidays and illnesses into account, we also doubt that the attendance of meetings would be an appropriate measure for sufficient time commitment of members of the management body in its executive function. Finally, we find it difficult to record and measure the "active involvement" of members of the management body in board meetings and as such regard this also as being not appropriate to measure time commitment.

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.

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 interests of the company (major clients, major vendor, market infrastructure, 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, ESMA and EBA 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 spent for all mandates may be more than 100 %.

The above mentioned items should be used to rethink paragraphs 40 – 44 of the draft guidelines which in our view are already a good framework and some additions and gradual adjustments to take up some of the points raised above may be sufficient to round up the approach.

Calculation of the number of directorships

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". We therefore appreciate the definition of "group" in the definition section of the draft guidelines.

We strongly disagree to the requirements out of paragraph 49 of the draft guidelines that directorships held within undertakings in which the institution holds a qualifying holding, but that are not subsidiaries included within the same group, cannot be taken together with directorships hold within the group to be eligible for the privileged treatment. The segregation of mandates under the privilege as group mandates on the one hand side and "qualified holding mandates" on the other hand in our view seems not to be intended. We acknowledge that the wording of Article 45 paragraph 2 lit. a sentence 4 MiFID II for Exchange operators and Article 91 paragraph 4 CRD IV is different and that the wording of CRD is more directing into the proposal of the draft regulation. However, we assume that the rules of MiFID II and CRD IV have been set up with the intention of the same content and as such, there should be a clear rule in the level 1 texts which would not make interpretation necessary. Therefore, beside expressing our understanding from the rules below which is different form the one expressed by ESMA and EBA, we also encourage ESMA and EBA within the current CRR II package discussion to reach out for a harmonised a clear rule set for CRD / CRR and MiFID / MiFIR purposes.

The directorship within the group as well as a directorship to be combined with the undertaking in which institution holds a qualifying holding should count as only one single directorship. However, we clearly support the ESMA and EBA

approach on the way directorships in qualified holdings are proposed to be counted according to paragraph 50 sentence 1 of the draft guidelines.

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

Although this is mainly a formal item related to the usage of appropriate terminology, we kindly ask the ESMA and EBA 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 be somehow in the middle. We therefore propose to revise paragraph 60 of the draft guidelines as follows: *"When assessing the knowledge, skills and experience of a member of the management body, consideration should be given to theoretical knowledge and practical experience (…)"*.

Furthermore, we disagree to the inclusion of "terminations" of a business as being a factor to be considered in the assessment of reputation, honesty and integrity as requested by paragraph 73 (b) of the draft guidelines. Termination per se does not differentiate between a voluntary and well-founded decision or a forced action and as it has been put in a row with other acts of closing a business which are forced action, this gives termination a (most likely not intended) negative smell. We therefore propose to take out "termination" in the list of point b of the draft guidelines as the other topics clearly indicate the intention of the point in a sufficient manner and the term "termination" is therefore not needed.

Our argumentation in this regards is also true for Annex III chapter 4.3 (b) of the draft guidelines.

Finally, we clearly welcome the reference of ESMA and EBA to "periods of limitation in force in the national law" as stated in the context of the need to consider any relevant criminal or administrative records (paragraph 69 of the draft guidelines). Compared to the recent consultations by ESMA and ECB in the same context, this is a clear step into the right direction. However, similarly this also should be taken into account related to the items taken up in paragraphs 70 and 72 as well as Annex III of the draft guidelines and ESMA and EBA

should consider to set – independent from legal periods of limitation – maximum periods to be considered for certain items (which of course may be shorter in individual cases if required by 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?

No specific comment.

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

No specific comment.

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

We do not see the need to define within the suitability policy "the person in charge of liaising with competent authorities" as requested by paragraph 103 of the draft guidelines. The person or function liaising with the authorities may be different depending on the item to be liaised and we also understand the role of a policy rather on a less granular level. As such, point d of paragraph 103 of the draft guidelines should be taken out of the final guidelines as we feel this as being on a too granular level in this case.

Furthermore, DBG strongly disagrees to the requirements to define an "independent" member of the management body (in its supervisory function). Paragraph 123 and 124 seem to be very restrictive and will make it extremely difficult to combine the necessary knowledge and experience with the independence criterion.

The criteria of paragraph 124 of the draft guidelines are more or less excluding all major candidates or only leaving over knowledgeable persons not having **any** relationship to the supervised entity or another group entity and not being clients or service providers of the supervised entity or a group entity (the non-existing relationship most likely will have good reasons) and – if a candidate can be found at all - allowing therefore persons insight into the company, which from a competition or business secrecy perspective should not have insight. While we appreciate ESMA's and EBA's approach to ensure independent advice by excluding persons with a close relationship to the supervised entity or entity within the scope of prudential consolidation, we do not see the need for

extending the limitation to any person within the wider group. In order to allow for a sufficient number of adequate candidates for independent members of the management board in its supervisory function, ESMA and EBA should therefore reconsider the requirements for independence and especially (i) add in paragraph 123 of the draft guidelines the term *"prudential"* within the phrase *"are not employed by an entity within the scope of prudential consolidation*", (ii) replace any reference to a "group entity" in paragraph 124 of the draft guidelines by *"entity within the scope of prudential consolidation"* and (iii) take out or substantially change point d of paragraph 124 of the draft guidelines. Furthermore, beside our general understanding of the need for independent advice and supervision, also the interest of the investors / shareholders needs to be secured and as such, the degree of independent members needs to find its natural boundary where shareholder interests may be impacted in an inappropriate manner. Having said this, DBG proposes to insert a definition of *"sufficient number"* of fully independent members bearing in mind that the management body in its supervisory function not only takes care for the fit and proper status of the company from a regulatory point of view but is also involved in decisions of substantial commercial importance for the company and its shareholders. E.g. under German national law the supervisory board may decide on the use of parts of the profits and can implement a list of strategic or other important business decisions that require its consent. *"Sufficient"* should therefore not exceed 1/6 of the total members of the management body in its supervisory function. We derive that number from a common number of at least six members of the supervisory board under German national law.

Furthermore, the exclusion of substantial shareholders and their representatives from the consideration of being independent, is valued as being critical. ESMA and EBA should therefore reconsider this approach and potentially take out paragraph 124 (a) of the draft guidelines.

In addition, in this context, we miss a clear guidance how (mandatory) staff representation is to be seen in the context of independence and moreover, how ESMA and EBA view the role of the independent director in the context of management bodies in its supervisory function where by law 50 % of the members are staff representatives. Taking this into account, even a minimum requirement as proposed above will substantially impair the shareholders' rights in their representation of the management body in its supervisory function. This

may only be surpassed in case our proposal to make representatives of the shareholder or the wider group not being in scope of the prudential consolidation eligible as independent directors.

Finally, the notation of *"officer"* in paragraph 124 (e) of the draft guidelines is unclear and need precision. This is as well necessary for the term *"employed by"* in paragraph 123 of the draft guidelines where it needs to be clarified if this includes members of the management body or not.

Q11. Are the guidelines within Title VI regarding the assessment of suitability by institutions appropriate and sufficiently clear?

The draft guidelines are inconsistent to some extent. While paragraphs 127 and 153 of the draft guidelines conclude that if a (possible) member of the management body (or a key function holder) is assessed as not being suitable (at that point in time), it should not be appointed or be dismissed, paragraphs 156 – 158 of the draft guidelines describe contrary to that the process of possible corrective measures to be taken in order to appoint or keep the respective member instead. As such, ESMA and EBA should better link the above mentioned provisions.

GDB regards a sharp deadline of three weeks to deliver all necessary documents for the assessment of suitability of (proposed) members of the management body for ambitious and challenging and to some extent unrealistic. Our experience shows that the collection of the criminal record or statement of good reputation can take quite a long time especially if request from a country which is either not the home country of the (potential) member of the management body or the country of residence of the institution. This is even valid within the EU and based on different processes and underlying understandings of the different (Member) States and their administration. We therefore strongly recommend to rephrase *"at the latest within three weeks"* by *"in general within three weeks"*.

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

While ESMA and EBA grant institutions a maximum period of 3 weeks according to paragraph 127 of the draft guidelines to prepare, check and deliver the necessary assessment documents, they grant the competent authorities much

more time (3 to 4 month) in paragraph 166 of the draft guidelines. This mismatch does not seem logical and while we in general ask for a less strict deadline for institutions (see above) we clearly ask for a shorter period as a general rule for the competent authority. In both cases the necessary time needs to be given to perform a thorough assessment. We therefore propose to limit the standard period for the competent authority – subject to the receipt of the full set of documents – to 6 weeks with the option to extend to a maximum period of 3 months.

Moreover, as there may be urgencies to fill a vacancy, which has occurred unplanned, institutions should be allowed to appoint and install a new member of the management body on an interim approval of the competent authority in order to allow the appropriate corporate governance and control framework to be in place.

We also see the need to differentiate between the appointment of members of the management body in the supervisory function – which could be done rather on an ex-post basis as a standard rule – and the appointment of members of the management body and other key function holders (if required by national law).

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

No specific comment.

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

No specific comment.

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

No specific comment.

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

No specific comment.

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

No specific comment.

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

While we have no concrete criticism to any particular point of the documentation requirements, we value the overall requirement as very demanding and overloading. Taking the tight timeline given in paragraph 127 of the draft guidelines, we clearly ask for a substantial reduction of documentation requirements.

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.

No specific comment.

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We are at your disposal to discuss the issues raised and proposals made if deemed useful.

Yours faithfully,

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