



The European Federation of Investors and Financial Services Users  
Fédération Européenne des Épargnants et Usagers des Services Financiers

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## Joint ESMA & 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

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The European Federation of Investors and Financial Services Users, going by the brand name « BETTER FINANCE », is an independent organisation of public interest and centre of expertise advocating and defending the interests of retail investors, private shareholders and users of financial services vis-à-vis the European authorities and lawmakers.

Better Finance welcomes the joint initiative of EBA and ESMA for this consultation. The 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 mean a step forward in the EU construction.

**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?**

Better Finance believes that the relationship between the rights of the candidate member of the Management Body (innocent until proven guilty) and the right of the institution to protect itself from damages it would suffer in case the candidate is exposed to a future conviction while having joined as a member of the Management Body.

Moreover, the management body in its supervisory function oversees and challenges the management body in its management function and provides appropriate advice. For this fact to be true the roles should be more clearly defined and both separate it from each other to maintain a certain degree of independence.

Furthermore, we support the initiative to extend the guideline requirements to heads of control functions due to the fact that we support an EU framework for institutions to follow when analysing the suitability of their staff, and not leaving this process only for institutions. Internal guidelines have proven to be either non-existent or very inadequate in numerous cases.

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

Our organization believes that the difference among members of the Management Body in its management function and the members of the Management Body in its supervisory function should be revised and clarified since the concepts as explained in the document could be misleading.

In some EU States the recent model is based on a two tiers executive management body and an independent supervisory board. This issue is not included in the criteria and procedures used for the assessment of individual and collective suitability.

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

Better Finance is concerned that this Guideline does not respect the scope of Level 1 texts (CRD IV & MiFID II) and the mandates that were given to EBA and ESMA. An example where the guidelines go beyond the scope of Level 1 is when it talks about individual knowledge, skills and experience of members of the Management Body. However, MiFID II just provides a mandate to issue Guidelines on notions of adequate collective knowledge, skills and experience.

EBA and ESMA should, not only respect the scope of MiFID II and CRD IV, but also to ensure that the Guidelines are aligned with requirements laid down in other pieces of EU regulation.

Furthermore, it is mentioned (in point 23) that “the initial and ongoing assessment of the individual suitability of the members of the management body should primarily be the responsibility of institutions, although the assessment is also carried out by competent authorities for supervisory purposes”. In this

respect, Better Finance believes that this guideline should clarify who is responsible for this.

**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.**

Better Finance believes that this Guidelines contradicts in some cases the requirements posed by national company law or national codes of conduct. Therefore, some institutions might have to violate the national rules in order to be able to follow the Guidelines. In this respect, it is clear that EBA and ESMA need to clarify that in these cases the existing national rules should prevail. Thus, is evident that the power of the Guidelines to harmonize the assessment is limited.

Moreover, institutions might be obliged to have representatives or shareholder representatives among the members of the Management Body in its supervisory function. Better Finance would like EBA and ESMA to clarify which institutions will be responsible for ensuring the members fulfil suitability requirements.

Furthermore, institutions might be obliged to comply with provisions that they do not have to comply with according to national company law (e.g. regarding the independence of members of the Management Body).

**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**

Better Finance believes that the role of the Chairman of the Management Body has not been defined clearly enough in the Guidelines. As the Chairman's role is a crucial one in ensuring the collective and individual suitability of members of the Management Body, our association thinks that the definition of this role needs to be deeply developed.

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

The calculation of the number of directorships is clear. However, Better Finance would like the two European Authorities which created this consultation (EBA and ESMA) to adequately explain in the document the mean that National Competent Authorities (NCAs) have to face an institution which is not able to present candidacies that meet the NCAs suitability criteria (with a especial attention to members of the Management Body in its management function).

Moreover, Better Finance believes that a clearer definition of the commitments from the members of the management body as well as a deeper definition of executive and non-executive responsibilities could help to recognize the appropriateness of a directorship.

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

The provisions should be applied proportionally. This is because complex institutions require refined processes. In this respect, it is not sufficiently clear how this principle of proportionality should be applied in practical terms to small investment firms and subsidiaries.

Better Finance is concerned that the proportionality principle is too open for interpretation, leading therefore to confusion. In this sense, NCAs could be even more restrictive than institutions when interpreting the text. This will mean that members of the Management Body could be suitable for the institutions but rejected by the NCAs.

Moreover, as it is mentioned in the text, “the differences in national criminal and administrative laws (...) limit the achievement of the harmonization of practices when assessing this particular aspect of suitability”. In this respect, we would like to see reflected in the document solutions to this problem.

**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?**

The guidelines within Title III are far from clear in certain aspects. Firstly, it would be useful to reassess the timeframe. More particularly, for members of the Management Body in its management function a timely replacement is required by law. In this respect, if an institution has to wait for the assessment by the NCA the continuity of management will be threatened.

Secondly, the Guidelines do not reflect the principle-based approach combined with the case-by-case assessment that EBA and ESMA use when approaching the cost-benefit analysis. Moreover, our organization finds too prescriptive regarding the criteria to be used for assessing the specific suitability of the members of the Management Body. This fact may imply an unintended result of limiting the pool of suitable candidates.

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

As it is stated in MiFID II the Management Body should ensure the promotion of the integrity of the market and the interests of its clients.

Long-term interests of clients are served by a correct integrity of the market. Moreover, the decisions taken by the management body which refer to short-term interests will not promote the market integrity. EBA and ESMA should make this point clearer and determine how institutions are motivated to take decisions which do not put at risk the financial sector in the EU. In addition to this, the institutions also need to take into account the systemic challenges that the financial sector is facing in this period.

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

Better Finance recommends EBA and ESMA to take sufficient account of other national, regional, and global initiatives related to the assessment of suitability of members of the Management Body of financial institutions.

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

Yes, we think the draft Guidelines reflect the processes already regularly applied to the periodic assessment of board effectiveness by many institutions and represent good practice.

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

Our organization supports the Guidelines' suggestion that competent authorities should establish a service standard setting a time limit for the completion of their assessment (three months should be adequate).

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

The ex-ante assessment benefits the extension of the elongation of the appointment period. This can be alleviated by a reasonable service standard for the completion of the competent authority's assessment process.