For every reader interested in the European law and particularly in the European private law the revised book is an indispensable source supporting the research and practice.

Résumé

L'article propose une analyse de l'«EuropäischeMethodenlehre» éditée par Karl Riesenhuber. Ce livre impressionnant reflète le processus complexe de la transformation qualitative concernant le droit privé européen. Le patchwork des règles complétant principalement les systèmes juridiques nationaux devient de plus en plus un «système», mais ce système présente une nature plutôt spécifique. Il exige également un développement de la méthodologie de l'interprétation adaptée aux besoins spécifiques de la nature hétérogène de la législation européenne.

Le livre examiné est inspiré d'une manière caractéristique par la pensée juridique allemande. Il a une structure «pandectiste», avec des parties générales et spécifiques et un chapitre consacré aux considérations fondamentales. Avec cette approche, typique de la tradition juridique nationale particulière, il provoque la question de savoir si la méthodologie développée dans cet ouvrage peut prétendre un caractère universel ou européen. Ces problèmes peuvent être discutés, mais un livre de cette importance ne reflète pas seulement le système, mais elle le façonne aussi et le crée. Il appartient à la tradition de la pensée juridique continentale que la doctrine est un facteur important du renforcement du système.

La structure «allemande» de l'ouvrage ne signifie pas que d'autres points de vue nationaux soient abandonnés. L'inverse est juste. Les perspectives nationales d'autres traditions juridiques sont aussi profondément analysées.

Pour chaque lecteur intéressé au droit européen et en particulier au droit privé européen, ce livre est une source indispensable pour soutenir la recherche et la pratique.

Wirtschafts- und Gesellschaftsrecht
(einschl. Sonderprivatrecht der öffentlichen Hand)

Fitness and Propriety of Bank Directors in the Light of the Global Financial Crisis 2007-2009[1]

Elias Bischof, Basel

A. Introduction

The Global Financial Crisis 2007-2009 (GFC), the most serious financial turmoil since the Great Depression in 1929, is perceived to have arisen from an interplay of factors, such as insufficient national and international financial regulation, disregard of rules and standards, insufficient supervision of individual financial institutes, the financial system as a whole and a general environment of greed and personal gain in connection with other cultural, network and social factors.[2]

In the light of this crisis and the afore-mentioned factors, this article will analyse the various shortcomings in corporate governance, especially the fitness and propriety of board members of banks. It will begin (Part B) by emphasizing the fit and proper criteria which, prior to the GFC, had already emerged from international guidelines, directives of the European Union and rules of its Member States, i.e. in the UK as an example. It will then go on to analyse in Part C as to how unfitness and impropriety of board members of banks is perceived to have played a contributory role in the GFC. The author will continue by critically analysing selected post-GFC reviews of "fit and proper"-criteria (Part D) before he concludes that realistically it would seem unlikely that the instigated reforms would effectively address pre-GFC deficiencies.

B. Board Fitness Prior to the GFC

In the EU, the business of banking has been subject to authorisation since 1977 (credit institutions) and 1993 (investment firms) and required inter alia two persons, who would effectively direct the business, and who were "of sufficiently good repute" and had "sufficient experience".[3] In April 1999, the Forum of European

[1] With very special thanks to Duncan Craig LL.M. (Edinburgh), England, for proofreading.
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[2] See e.g. G Kirkpatrick, „Corporate Governance – Lessons from the Financial Crisis" (02/2009) *OECD Journal: Financial Market Trends* Vol. 2009/1, p. 63; Report of the High-Level Group on Financial Supervision in the EU chaired by Mr Jacques de Larosière (De Larosière Report) (25/02/2009), p. 6; HM Treasury, „A Review of corporate governance in UK banks and other financial industry entities: Final Recommendations (Walker Review)" (11/2009), p. 25 para 1.10.; Financial Services Authority (FSA), „The Turner Review – A regulatory response to the global banking crisis" (03/2009), pp. 5, 36.

[3] See Art. 3(2) of the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [1977] OJ L 322, 30 and Art. 3(3) of the Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [1993] OJ L 141, 27 (ISD).

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Securities Commissions (FESCO) issued minimum standards[4] which national authorities should apply when assessing fitness and propriety inter alia of key individuals within investment firms under the Investment Services Directive (ISD).[5] These standards required board members to "meet high standards of personal integrity in all respects and to be competent and capable of performing the functions or role currently performed or which it is proposed they should perform in the firm"[6] and to have "an appropriate range of skills and experience, so that, as a whole, it is able to control and direct the business of the firm effectively".[7] Factors to be assessed includes e.g. complete work history and relevant experience including directorships; professional qualifications/membership of any professional bodies; educational background and qualifications; criminal records and civil cases (including disqualification as a company director or bankruptcy), disciplinary sanctions by regulatory authorities;[8] financial integrity (personal bankruptcy; being a member of the management or on the board of a company that became bankrupt).[9]

On a national level, e.g. in the UK, the Banking Act 1979[10] stated in compliance with the First Banking Directive[11] that banks' directors and managers had "to be fit and proper persons to hold that position". The Banking Act 1987 specified that regard must be given to the individual's probity, competence, soundness of judgement and diligence.[12] The Financial Services and Markets Act 2000 (FSMA),[13] replacing the Banking Act 1987, leaves it to the financial sector supervisor (i.e. the former Financial Services Authority [FSA], replaced by the Financial Conduct Authority [FCA] and the Prudential Regulation Authority [PRA] as per 1 April 2013)[14] to set out the criteria for the assessment of fitness and propriety. These criteria are contained in the supervisor's handbook "Fit and Proper test for Approved Persons", which stated in its first version that the most important consideration will be the person's (1) honesty, integrity and reputation; (2) competence and capability; and (3) financial soundness.[15]

On a global level, it became evident in the late 1990's that rulings regarding the directorship of banks could not be left to voluntary codes[16] alone, but should be in formal legislation and subject to authoritative supervision. As a result since 1997 several worldwide recognised standards and guidelines, which aim to assist governments and banking supervisors, have been issued by the Basel Committee on Banking Supervision (BCBS)[17] and from 1999 by the Organisation for Economic Co-operation and Development (OECD)[18] and the Joint Forum.[19] The pre-GFC frameworks of these institutions contain following "Fit and Proper"-criteria:[20]

(1) Personal integrity and honesty: no doubts whatsoever should be raised either by criminal records, regulatory or judicial judgements and sanctions in banking and other similar industries, refusal of admission to or expulsion from professional bodies, previous questionable business practices, nor by the individual's financial position.[21]

(2) Individual and collective expertise: i.e. to have the necessary skills and knowledge and be experienced in banking and other business.[22]

(3) Understanding of the board's role, the bank's structure and its business and risks which require inter alia that board members remain abreast of relevant new laws, regulations, and changing commercial risks.[23]

(4) Ability to exercise objective and independent judgement by an effective number of board members: i.e. have no close relationships with the company or its management through significant economic, family or other ties and be capable of exercising judgement independent of the views of the management, large shareholders and governments.[24]

(5) To commit oneself effectively to the responsibilities of the board, in particular to devote sufficient time and participate actively.[25]

C. Board Failure and the GFC

According to the OECD the "Fit and Proper"-test was often confined to the assessment of fraud and history of bankruptcy prior to the GFC.[26] Critical reviews of the GFC[27] have since revealed

4 The Forum of European Securities Commissions, European Standards on Fitness and Propriety to Provide Investment Services (99-FESCO-A) (04/1999).
5 See fn 3.
6 See fn 4, p. 7 para 21.
7 Ibid para 22.
8 Ibid p. 7 f para 24.
9 Ibid p. 8 para 25.
10 Section 7 of Schedule 2.
11 See fn 3.
12 Section 1(2) of Schedule 3.
13 Section 61(1).
14 See the Financial Services Act 2012.
15 FSA, High Level Standard FIT (Release 01/12/2001), para 1.3.1.
16 E.g. the Combined Code and its successor, the UK Corporate Governance Code.
17 BCBS, „Core Principles for Effective Banking Supervision" (09/1997) (BCBS Core Principles 1997); BCBS, „Enhancing Corporate Governance for Banking Organisations" (09/1999) (BCBS Enhancing CG 1999); BCBS, „Enhancing Corporate Governance for Banking Organisations" (02/2006) (BCBS Enhancing CG 2006); BCBS, „Core Principles for Effective Banking Supervision" (10/2006); BCBS, „Core Principles Methodology" (10/2006) (BCBS Methodology 2006); BCBS, „Principles for Enhancing Corporate Governance" (10/2010) (BCBS Enhancing CG 2010); BCBS, „Core Principles for Effective Banking Supervision" (09/2012).
18 OECD, „Principles of Corporate Governance" (04/1999) (OECD Principles 1999); OECD, „Principles of Corporate Governance" (2004) (OECD Principles 2004).
19 Joint Forum BCBS, IOSCO and IAIS, „Supervision of Financial Conglomerates" (02/1999) (Joint Forum Principles 1999); Joint Forum BCBS, IOSCO and IAIS, „Principles for the supervision of financial conglomerates" (09/2012) (Joint Forum Principles 2012).
20 BCBS Core Principles 1997 (fn 17); Joint Forum Principles 1999 (fn 19); BCBS Enhancing CG 1999 (fn 17); OECD Principles 2004 (fn 18).
21 BCBS Core Principles 1997 (fn 17), p. 17; Joint Forum Principles 1999 (fn 19), p. 42 para 7.
22 BCBS Core Principles 1997 (fn 17), p. 17; OECD Principles 2004 (fn 18), para VI/D/5; BCBS Enhancing CG 1999 (fn 17), para 19.
23 BCBS Enhancing CG 1999 (fn 17), p. 6; OECD Principles 2004 (fn 18), para VI/D/1, 2, VI/E/3.
24 OECD Principles 2004 (fn 18), para VI/E; BCBS Enhancing CG 1999 (fn 17), p. 6.
25 OECD Principles 2004 (fn 18), paras V/E/2, VI/A, VI/E/3.
26 Organisation for Economic Co-operation and Development (OECD) Steering Group on Corporate Governance, „Corporate Governance and the Financial Crisis – Key Findings and main Messages" (06/2009) (OECD Key Findings 2009), p. 45.
27 See e.g. Kirkpatrick (fn 2); Organisation for Economic Co-operation and Development (OECD) Steering Group on Corporate Governance, „Corporate Governance and the Financial Crisis. Conclusions and emerging good practices to enhance implementation of the Principles" (02/2010)

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additional weaknesses of banks' boards, deficiencies which go beyond the financial soundness of its members.

I. Lack of Understanding

Since the 1990s the financial system has become increasingly complicated. Banks have become much larger and their structures, businesses and products more complex and opaque.[28] Boundaries have become obfuscated through technology sharing, out-sourcing and complex interconnections with the "shadow-banking" sector.[29] Incomprehension of impending dangers at board level and informational asymmetries arising from weak oversight of the management body have subsequently led to a failure to identify and thus constrain excessive risk-taking.[30]

II. Lack of Commitment

This increased complexity would have required board members to engage themselves more effectively. Especially the part-time non-executive directors (NEDs) were obviously not sufficiently involved, had not invested the time required nor had they participated actively enough in the processes to recognise the warning signs. Their focus concentrated rather on ticking boxes instead of seriously challenging the management.[31]

III. Lack of Competence

Furthermore many boards were lacking in solid expertise and sound competences, especially technical skills to understand products, control balance sheet growth and the liquidity needs in order to manage risks.[32] The inability and lack of willingness of many directors to adequately identify, understand, control and constrain the risks are considered by the European Commission to be at the heart of the origins of the crisis.[33]

Additionally, the lack of non-technical abilities (e.g. sufficient communication skills) and confidence made many NEDs deem themselves unable to ask questions and raise objections, when faced with a strong CEO.[34]

IV. Lack of Experience

Prior to the GFC the independence of NEDs in particular seemed to out-rank their expertise.[35] Post crisis it has been conceded that the degree of experience was indeed insufficient.[36] It was neither sufficiently deep to establish a risk strategy and controlling risks, nor broad and diverse enough in views to effectively challenge the management.[37]

V. Lack of Independence

The European Commission asserts that many NEDs were not in a position to form objective and independent judgements.[38] The Treasury Committee of the House of Commons even laments that "too often NEDs in the banking sector operated as members of a 'cosy club' rather than viewing their role as being that of providing effective checks and balances on executive members of boards."[39] Although some argue that the whirl of board memberships, i.e. cross directorships, could cause conflicts of interest with prevailing self-interests,[40] others point out that companies with more independent boards experienced worse stock returns.[41]

VI. Intellectual Hazard

Intellectual hazard describes the problem which arises when decision-makers in complex organisations ignore key information pertinent to a decision because of limited ability, time constraints, pre-formed ideas, or self-interests.[42] It might amount in "groupthink", where group members try to reach consensus without critically testing, analysing and evaluating ideas, or "herding", which refers to the imitation of actions of others while ignoring their own information and judgment.[43]

(OECD Conclusions 2010); De Larosière Report (fn 2); Commission, „Green Paper – Corporate governance in financial institutions and remuneration policies {COM(2010) 285 final} {COM(2010) 286 final} {SEC (2010) 669}" COM(2010) 284 final (Commission Green Paper CG 2010); Commission, „Commission staff working document – Corporate Governance in Financial Institutions: Lessons to be drawn from the current financial crisis, best practices Accompanying document to the Green Paper Corporate governance in financial institutions and remuneration policies {COM(2010) 284 final}" SEC(2010) 669 (Commission Accompanying document to the Green Paper CG 2010); Turner Review (fn 2); Walker Review (fn 2); House of Commons Treasury Committee, Ninth Report of Session 2008-09 „Banking Crisis: Reforming corporate governance and pay in the City" (15/05/2009) (House of Commons, Ninth Report).

28 See e.g. FSA, „The failure of the Royal Bank of Scotland" (12/2011), p. 50 para 20, p. 153 para 313, p. 220 para 571.

29 Ibid p. 39 para 4.6; OECD Conclusions 2010 (fn 27), para 60.

30 See e.g. EBA Guidelines on Internal Governance (GL 44) (27/09/2011) (EBA Guidelines 2011), p. 8 para 20; De Larosière Report (fn 2), p. 10 para 23.

31 Commission Green Paper CG 2010 (fn 27), p. 6; Walker Review (fn 2), p. 53 para 4.3; House of Commons Ninth Report (fn 27), p. 53 para 146.

32 A Arora, „The corporate governance failings in financial institutions and directors' legal liability" (2011) *Co Law* 32(1) (Arora, Failings), p. 5.

33 Commission Green Paper CG 2010 (fn 27), p. 6.

34 Ibid.

35 See e.g. Kirkpatrick (fn 2), p. 81.

36 See e.g. Commission, „Proposal for a Directive of the European Parliament and the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast)" COM (2011) 656 final – 2011/0298 (COD) (MiFID II Proposal), p. 118.

37 Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 8; Arora, Failings (fn 32), p. 6.

38 Commission ibid, p. 8; Arora ibid, p. 6.

39 House of Commons Ninth Report (fn 27), p. 55 para 151.

40 A Arora, „Remuneration practices in banks and other financial institutions: Part 1" (2012) *Co Law* 33(3), p. 71.

41 D H Erkens, M Hung and P Matos, „Corporate Governance in the 2007-2008 Financial Crisis: Evidence from Financial Institutions Worldwide" (04/2012) *Journal of Corporate Finance* 18(2), p. 407.

42 G P Miller and G Rosenfeld, „Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008" (2010) *Harvard Journal of Law & Public Policy* 33(2) (Miller and Rosenfeld), pp. 810, 813, 815, 817.

43 S Bainbridge, *The New Corporate Governance in Theory and Practice* (2008), p. 95.

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The problem of intellectual hazard is that it erodes the quality of decision making, which might be exacerbated in a crisis when there is an information overload and little time for thought, and when there are less sufficiently diverse backgrounds represented on a board in terms of gender, social, cultural and educational background.[44]

Some reviews of the GFC concluded that many boards tended to rely upon mathematical models, rating agencies and followed the crowd instead of applying critical and independent thinking.[45]

D. „Fit and Proper"-Criteria in Review

The inability of directors and the failure of boards themselves to fulfil their duties have led to a series of law reforms including the review of "Fit and Proper"-criteria.

In 2011 in the European Union for instance, the Commission suggested recasting the existing "fit and proper"-criteria contained in the Banking Directive[46] (credit institutions) and in MiFID[47] (investment firms). The Commission's two proposals, the CRD IV Proposal[48] and the MiFID II Proposal[49] contain inter alia revised "Fit and Proper"-provisions,[50] as the former rules were seen to have been too generic and have led to a different application in Member States.[51] The general approach is to foster boards with directors who are independent, committed, informed and diverse.[52] Such criteria should be applied to both executive directors and NEDs.[53] While the legislative procedures of MiFID II are on-going, the CRD IV reform was completed in late June 2013. The "Fit and Proper"-criteria for the management body of credit institutions are now set out in Art. 91 of the CRD IV Directive.[54]

Also in 2011, but still on the basis of the Banking Directive, the European Banking Authority (EBA) issued guidelines,[55] which deal inter alia with the composition, appointment and the qualifications of the management body including conflicts of interest and time commitment. Additionally, in 2012, the EBA published guidelines for the assessment of the suitability of members of the management body and key function holders of credit institutions.[56] These aim to be consistent with the CRD IV Proposal and are to be complied with as from 22 May 2013.[57] Nonetheless the CRD IV Directive is requiring revised guidelines by 31 December 2015.[58] With respect to the authorisation of investment firms, to which the CRD IV Directive does not apply,[59] similar guidelines are expected from the European Securities and Markets Authority (ESMA).[60] It remains questionable as to whether the ESMA will issue such guidelines before the European legislator has completed the MiFID II reform.

I. Good Repute

The CRD IV Directive[61] and MiFID II[62] Proposal continue to require directors to be of good repute and act with integrity and honesty. According to Art. 13 EBA Guidelines 2012, the assessment of good repute should take into account unlawful behaviour (criminal or civil/administrative convictions), current investigations and even non-transparent and uncooperative behaviour when dealing with supervisory authorities and even refused registration or memberships. However, there is no minimum level of good standing stated in order to obtain authorisation.

II. Competence

Directorship of a bank demands competence. This derives from the MiFID II Proposal and the CRD IV Directive which require directors to have sufficient knowledge, skills and experience, individually "to perform their duties",[63] but also collectively "to be able to understand the institution's activities and main risks" involved in those activities.[64] There is no further explanation in the Directive as to how the terms "knowledge", "skills", "expertise" should be defined nor as to how these requirements should be

44 Miller and Rosenfeld (fn 42), pp. 819 f.; Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 3.

45 R Tomasic, „The failure of corporate governance and the limits of law: British banks and the global financial crisis": Ch 3 in *Corporate Governance and the Global Financial* Crisis. *International Perspectives* (2011) (W Sun, J Stewart and D Pollard, eds.), p. 54; R Grosse, „Bank regulation, governance and the crisis: a behavioral finance view" (2012) *Journal of Economic Perspectives* 20(1), p. 15.

46 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) [2006] OJ L 177, 1.

47 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L 145, 1.

48 Commission, „Proposal for a Directive of the European Parliament and the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate" COM (2011) 453 final – 2011/0203 (COD) (CRD IV Proposal).

49 MiFID II Proposal (fn 36).

50 Art. 87 CRD IV Proposal (fn 48); Art. 9 MiFID II Proposal (fn 36).

51 Commission, „Commission Staff Working Paper Executive Summary of the Impact Assessment" SEC(2011) 1226 final (MiFID II Impact Assessment), pp. 266 f.

52 See M Conyon, W Q Judge and M Useem, „Corporate Governance and the 2008-09 Financial Crisis" (2011) *Corporate Governance: An International Review* 19(5) (Conyon et al.), p. 401.

53 MiFID II Proposal (fn 36), p. 118 para 12.6.1 and p. 267 para 19.6(a).

54 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176, 338 (CRD IV Directive).

55 EBA Guidelines 2011 (fn 30).

56 EBA Guidelines on the assessment of the suitability of members of the management body and key function holders (EBS/GL/2012/06), (22/11/2012) (EBA Guidelines 2012).

57 Ibid, pp. 4, 18, 33.

58 See Art. 91(12) CRD IV Directive (fn 54).

59 Ibid Art. 2(5)(1).

60 EBA, „Consultation Paper on draft Guidelines for assessing the suitability of members of the management body and key function holders of a credit institution (EBA/CP/2013/03)" (18/04/2012) (EBA Consultation Paper), p. 7 para 10.

61 Art. 91(1) and (8).

62 Art. 9(1)(c).

63 Art. 9(1) MiFID II Proposal (fn 36); Art. 91(1) CRD IV Directive (fn 54).

64 Art. 9(1)(b) MiFID II Proposal (fn 36); Art. 91(7) CRD IV Directive (fn 54).

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distinguished. Of little assistance in this respect is the German version of the Directive with the words "Kenntnisse", "Fähigkeiten", "Erfahrung", nor the French version with "connaissances", "compétences", "experience".

Other critical reviews require competences relevant to each of the material financial activities the bank intends to pursue (e.g. finance, accounting, lending, etc.),[65] competences in managing teams of employees, assessing the effectiveness of a credit institution's arrangements and identifying key issues based on financial information[66] or even "commonsense"[67] and the ability to "combine financial competence with leadership skills".[68]

The decision as to whether a specific person is competent enough to attain authorisation depends upon several factors:

A first factor concerns the level and profile of education and also the nature and scope of competencies, decision making powers and responsibilities in previous jobs.[69]

Secondly, the scale and complexity of the bank's business and the applicant's role in the bank's corporate governance.[70] This would mean that the supervisory authority has to assess not only the individual director but also the responsibility structures and accountability lines including subsidiaries, affiliated entities and other related entities.[71]

Thirdly, the other directors. A board member is expected to complement the competencies of the existing board and be of "additional value".[72]

This implicates that an individual considered fit for directorship within one bank may not be considered fit in another institution and conversely.[73] The question remains as to exactly which criteria a board member has to meet to be competent enough and as to what extent board members can compensate for a lower level of competence with genius counterparts on the same board or external experts. These are at the same time classical issues of company law, especially the duty of skill, care and diligence.[74]

III. Understanding

A third "Fit and Proper"-criterion concerns "understanding", which refers to the following key areas: structure, business and individual role.

Firstly, board members should fully understand the bank's operational structure, including where the bank operates in jurisdictions or through structures that impede transparency ("know your structure").[75] This understanding should encompass the group structure, including the purposes of entities, links and relationships among them, limitations, the aims of all units, all mutual relationships and refers to all risks (legally and operational) of intra group transactions under any circumstances.[76] It is expected that understanding should extend to the evolution of the structures,[77] even to include the last 40 years.[78]

Secondly, directors should understand all the types of activities the bank intends to pursue ("know your business") including the associated risks, the financial industry in general, the position of the bank including its aspirations for the future, and economics (especially markets).[79]

Finally, board members are expected to have a clear understanding of their role in the corporate governance of the bank ("know your role").[80]

The CRD IV Directive and the MiFID II Proposal are somewhat reluctant concerning this criterion only requiring directors to collectively "understand the institution's activities and the main risks".[81]

IV. Board Diversity

It is often argued that the chemistry among board members plays an important role in its effectiveness.[82] This is why the Commission not only provides for acquirable criteria (education and professional background), but also diversity with regards to gender, age, education, profession and provenance.[83] At the first reading of MiFID II and CRD IV by the European Parliament, the draft resolution even contained a gender quota of one third.[84]

It seems uncontroversial that diversity can help to alleviate individual dominance and intellectual hazard,[85] and facilitate critical challenge by contributing to openness towards different ideas, ways of thinking, and points of view.[86] Gender diversity in particular is seen to lead to a more balanced board.[87] Some com-

65 BCBS Enhancing CG 2010 (fn 17), p. 10 para 36.
66 EBA Consultation Paper (fn 60), Art. 14(6).
67 Walker Review (fn 2), p. 96 para 6.17.
68 Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 11.
69 EBA Guidelines 2012 (fn 56), p. 12 paras 5.1, 5.2, p. 13 para 7.1, p. 17 paras 14.2, 14.5.
70 MiFID II Proposal (fn 36), p. 267.
71 Commission Green Paper CG 2010 (fn 27), p. 11.
72 OECD Principles 2004 (fn 18), para VI.5; OECD Website http://www.oecd.org/document/49/0,3746,en_2649_34813_43063537_1_1_1_1,00.html (accessed 25/10/2013).
73 Joint Forum Principles 1999 (fn 19), p. 43 para 13.
74 See regarding external legal experts e.g. the German „Ision"-Case, BGH decision from 20/09/2011 (Az.: II ZR 233/09).
75 BCBS Enhancing CG 2006 (fn 17), p. 17 para 56.
76 BCBS Enhancing CG 2010 (fn 17), pp. 26-27 paras 115, 117, p. 3 para 6(5); EBA Guidelines 2011 (fn 30), p. 18 para 16.1, p. 19 paras 6.3, 7.1.
77 Ibid p. 3 para 6.5.
78 Group of Thirty, „Toward Effective Governance of Financial Institutions" (04/2012) (G30), p. 37.
79 See BCBS Enhancing CG 2006 (fn 17), para 36; BCBS Methodology 2006 (fn 17), para 13; EBA Guidelines 2011 (fn 30), paras 13.3, 13.4; EBA Guidelines 2012 (fn 56), para 14.6; G30 (fn 77), p. 36.
80 BCBS Enhancing CG 2010 (fn 17), p. 10 Principle 2; OECD Conclusions 2010 (fn 27), para 62.
81 Art. 9(1)(b) MiFID II Proposal (fn 36); Art. 91(7) CRD IV Directive (fn 54).
82 See e.g. G30 (fn 77), p. 36.
83 Art. 9(3) MiFID II Proposal (fn 36); Art. 87(3) CRD IV Proposal (fn 48).
84 See European Parliament, Report of First Reading on the CRD IV Proposal (fn 48), A7-0170/2012 (30/05/2012), Art. 87(3); and European Parliament, Report of First Reading on the MiFID II Proposal (fn 36), A7-0306/2012 (05/10/2012), Art. 9(3).
85 See above C/VI. Recital 60 of the CRD IV Directive (fn 54) explicitly mentions „groupthink".
86 G30 (fn 77), p. 35; Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 8; recital 38 of the MiFID II Proposal (fn 36); recital 60 of the CRD IV Directive (fn 54).
87 See e.g. Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 11.

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panies can allegedly provide evidence that boards and top level management with a strong female representation perform better than those without.[88] It is however highly questionable as to whether diversity should be elevated from a "best practice rule" to an authorisation criterion. In the end the CRD IV Directive did not provide for a gender quota.[89] It leaves it to the Member States to require credit institutions to have a policy promoting diversity with "a broad set of qualities and competence" in the management body.[90]

V. Independence

It is uncontroversial that at least some NEDs should be capable of objective and independent judgement.[91] However, the meaning of "independence" varies across different legal systems and even within a jurisdiction.[92]

Independence can be seen as the ability to exercise objective, independent judgement after fair consideration of all relevant information and views without undue influence from other circumstances or interests that would impair the judgement.[93] Undue influence might emerge from facts or simply from a state of mind.

Firstly, undue influence from facts can result from personal or financial ties (including business) in relation to other directors, management, dominant shareholders or the company itself. While some ties are more obvious (e.g. close family members) others are less evident and controversial (e.g. cross directorships[94]).

Secondly, undue influence from a state of mind might be very subtle and difficult to prove. Some argue that the mere length of time served on the board or under the same CEO/Chairman might impede independence and so provide for time limits on board memberships.[95] Objectivity might also be impaired if a director is unable to resist pressure[96] or to voice independent or potentially unpopular views.[97]

As opposed to the independence of mind, which is required from all directors,[98] financial independence might only concern NEDs, as executive directors with a fulltime contract can, by definition, not be independent of financial ties.[99] However, the CRD IV Directive and MiFID II Proposal only provide for independence of mind.[100]

VI. Commitment

Various review-findings that NEDs tend to participate insufficiently have led to proposals as to how they could devote more time and participate more actively on boards.

1. *Time Commitment*

(1) To limit the number of directorships: The CRD IV Directive and the MiFID II Proposal provide for a fixed number of boards on which a director may sit (subject to exceptions).[101] Additionally the EBA also provides for limited additional professional activities.[102] Critically speaking limiting directorships and other professional activities is ineffective, as any board member who spends time on other activities (e.g. private, political or charitable) could be prevent from giving the necessary time to their role as a director.[103]

(2) To require a minimum amount of working days: This approach is already known from best practice rules.[104] The EBA also states that the time commitment should be stipulated in a written document, such as the letter of appointment. The individual director should confirm that he or she can devote the required amount of time to the role, alongside their other commitments.[105]

(3) Full time NEDs: To cope with the increased complexity and duties the appointment of full time NEDs for banks has been suggested,[106] despite contradicting the principle of independence.[107]

2. *Active Participation*

A director's duty is no longer limited to merely voting at board meetings.[108] He is expected to actively participate, which means inter alia (1) gathering information from the management and other source to allow decision-making on a fully informed basis;[109] (2) preparing for board meetings, e.g. reviewing board and committee papers before each meeting;[110] (3) spending time with

88 E M Davies, *Women on boards* (2011), pp. 3, 8.
89 A gender quota remains an issue for boards of companies listed on the stock exchange. See Commission, „Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures" COM(2012) 614 final – 2012/0299 (COD).
90 See Art. 91(10) CRD IV Directive (fn 54).
91 OECD Principles 1999 (fn 18), p. 24 para V.E; BCBS Enhancing CG 2006 (fn 17), p. 7; Commission Accompanying document to the Green Paper CG 2010 (fn 27), p. 10 para 2.2.2.
92 BCBS Enhancing CG 2006 (fn 17), p. 7 fn 12; D Higgs, *Review of the Role and Effectiveness of Non-Executive Directors* (2003) http://www.bis.gov.uk/files/file23012.pdf (accessed 26/10/2013), p. 36 para 9.8. See also: Commission, „EC: Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board" [2005] OJ L 52, 51, para 13.1.
93 Joint Forum Principles 2012 (fn 19), p. 22 para 14.4.
94 OECD Conclusions 2010 (fn 27), para 58.
95 See e.g. OECD Conclusions 2010 (fn 27), para 44 box 3, para 57.
96 Higgs (fn 91), p. 115.
97 H Mehran, A Morrison and J Shapiro, „Corporate Governance and Banks: What Have We Learned from the Financial Crisis?" (2011) *Federal Reserve Bank of New York Staff Reports* no. 502 (Mehran et al.) http://ssrn.com/abstract=1880009 (accessed 26/10/2013), p. 11.
98 See e.g. Art. 91(8) CRD IV Directive (fn 54); Art. 9(1)(c) MiFID II Proposal (fn 36).
99 Higgs (fn 91), p. 35 paras 9.1 f.
100 See fn 97.
101 Art. 91(3)-(6) CRD IV Directive (fn 54); Art. 9(1)(a) MiFID II Proposal (fn 36).
102 EBA Guidelines 2011 (fn 30), p. 24 para 12.3.
103 See also FSA, „Response to Commission Green Paper: Corporate Governance in Financial Institutions and Remuneration Policies" (31/08/2010), p. 3 para 1.1.
104 See e.g. B.3.2 of the UK Corporate Governance Code 2012.
105 EBA Guidelines 2011 (fn 30), p. 24 para 12.4.
106 See e.g. Walker Review (fn 2), p. 49 para 3.23; OECD Key Findings 2009 (fn 26), p. 42.
107 OECD Conclusions 2010 (fn 27), para 59.
108 BCBS Enhancing CG 2010 (fn 10), p. 8 para 24; EBA Guidelines 2011 (fn 30), p. 24 para 12.1.
109 Mehran et al. (fn 96), p. 12; OECD Principles 2004 (fn 18), p. 59 para VI. A.
110 Walker Review (fn 2), p. 48 para 3.19.

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executives within the bank to obtain insight and understanding of how the organisation works;[111] (4) being present and voting at board meetings[112] and exercising the powers to vote;[113] (5) actively challenging and testing proposals put forward by the executive and satisfying themselves that the decision making is based on accurate information;[114] (6) behaving collaboratively on the board and engaging effectively in teamwork.[115]

Although Walker rightly points out that the "focus should be on the overall output of the board rather than time input",[116] the critical question remains as to how to decide from a supervisory point of view, whether a specific person will be able to commit him/herself sufficiently enough to obtain authorisation.

Summary

Decades before the outbreak of the GFC international and national legal frameworks made directorship of banks subject to a suitability assessment. Despite this ruling unfitness and impropriety contributed substantially to the GFC, because the provisions had neither been sufficiently clear, nor implemented in national legislation nor effectively enforced.[117]

This paper has sought to analyse some of the proposed and revised rules and concludes that the reforms are unlikely to mitigate the problem of varying national standards and ineffective enforcement. For the following two reasons it would seem that despite the law reforms more lenient approaches are still being widely allowed in order to attract business in local markets and enforcement would not be more effective.[118]

Firstly the criteria are still too generic. Examples are the Commission's proposal to refuse authorisation to investment firms "if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to the sound management, clients' interests and the integrity of the market"[119] and the licensing criteria of "knowledge", "skills" and "experience" in the CRD IV Directive.[120] In contrast to best practices,[121] supervisory laws should state minimum requirements for authorisation. A conclusive list of clear requirements would surely seem more expedient.

Secondly, rulebooks rarely state clear thresholds in order to attain authorisation. Criteria would seem to be assessed on non-transparent sliding scales. The following questions could serve as examples.

(1) What level of independence of mind is expected from a highly competent and committed director?

(2) To what extent can the contents of the criminal/administrative record of a highly qualified director with a sound understanding of financial markets be taken into account?

(3) To what extent can the cultural background of a director be taken into consideration when assessing his competencies?

(4) To what extent should the size and complexity of financial institutions be taken into account?

Unclear criteria will force supervisory authorities to continuously assess a wide range of information, requiring very high expertise and a sound understanding of the institutes – inevitably leading to high costs and resulting in arbitrary decisions.

This analysis criticises that instead of leading to clarity the main thread of the recent law reforms will rather shift the assessment of the correct functioning of boards and the decision-making in terms of its composition from the bank to supervisory authorities. Legislators and standard-setting bodies would be advised to bear in mind the distinction between supervisory law and company law (incl. best practices). The primary responsibility for ensuring that regulated entities are prudently and soundly managed and directed lies with the regulated entities themselves.[122] It is simply not possible to regulate for board competence and objectivity.[123] Authorisation procedures can neither prevent nor prohibit failings of banks, even if they are considered to be too big to fail.

Zusammenfassung

Bereits vor Ausbruch der globalen Finanzkrise im Jahr 2007 stipulierten internationale Standards (bspw. der OECD und des Basler Ausschusses für Bankenaufsicht), EU-Richtlinien und nationales Recht der Mitgliedstaaten persönliche Anforderungskriterien für Mitglieder des Leitungsorgans von Kreditinstituten und Wertpapierfirmen (sog. „fit and proper test“). Nichtsdestotrotz wurden im Rahmen der Aufarbeitung der Finanzkrise Inkompetenz und Unzuverlässigkeit von Mitgliedern der Leitungsorgane als wesentliche Krisenfaktoren identifiziert. Dieser Beitrag beleuchtet die Kriterien für „fitness“ und „propriety“, insbesondere mit Blick auf die aktuellsten Reformprojekte der EU namentlich CRD IV und MiFID II. Der Autor kommt zum Schluss, dass die „Fit and Proper“-Kriterien weiterhin zu generell, unbestimmt und unklar sind, um den Reformanliegen gebührend Rechnung zu tragen.

Résumé*

Déjà avant l'éclatement de la crise financière mondiale en 2007 (?), des critères d'exigence personnels pour des membres des organes directeurs des établissements de crédit et des entreprises d'investissement (nommée «fit and proper test») étaient stipulés par des standards internationaux (p. ex. de l'OCDE et du Comité de Bâle sur le contrôle bancaire), par des Directives de l'UE et par

[111] Ibid p. 48 para 3.19.
[112] Commission Accompanying Document to the Green Paper CG 2010 (fn 27), p. 10; Walker Review (fn 2), Recommendation 22, p. 147.
[113] Walker Review (fn 2), Recommendation 22.
[114] Ibid Recommendation 6.
[115] G30 (fn 77), pp. 30, 32.
[116] Walker Review (fn 2), p. 48 para 3.22.
[117] See e.g. OECD Key Findings 2009 (fn 26), p. 55; OECD Conclusions 2010 (fn 27), para 13; Commission Green Paper CG 2010 (fn 27), p. 18 para 5.8; EBA Guidelines 2011 (fn 30), p. 7; Arora, Failings (fn 32), p. 13; Conyon et al. (fn 52), p. 403.
[118] A Enria, Speech „Banking supervision: towards an EU Single Rulebook“ (05/12/2011) http://www.eba.europa.eu/-/the-chairperson-of-the-european-banking-authority-spoke-at-the-belgian-financial-forum (accessed 26/10/2013), pp. 8 f.
[119] Art. 9(7) MiFID II Proposal (fn 36).
[120] Art. 91(1) CRD IV Directive (fn 54).
[121] E.g. UK Corporate Governance Code.
[122] Joint Forum Principles 1999 (fn 19), p. 41 para 3.
[123] OECD Key Findings 2009 (fn 26), p. 46.
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le droit national des États membres. Néanmoins, au cours de l'évaluation des causes de la crise financière, l'incompétence et un manque de l'honoribilité des membres des organes directeurs ont été identifié comme causes principales de la crise financière. Cet article discute les effets des critères «fitness» et «propriety», et leur emploi dans les derniers projets de réforme de l'UE, notamment CRD IV et MiFID II.

L'auteur arrive à la conclusion que les critères «fitness» et «propriety» restent trop générales, indéfinis et vagues pour contribuer aux objectifs de la réforme.

Finanzmarktregulierung in der Krise oder die Krise der Finanzmarktregulierung?*

Kritische Anmerkungen zur Übertragung der Banken- und Finanzaufsicht auf die EZB

Mona Philomena Ladler, Graz

1. Einleitung

Im Rahmen der Reaktion auf die Finanzkrise wurden der EZB Aufgaben in der Banken-[1] und Finanzaufsicht[2] übertragen. Parallel zu ihrem traditionellen Mandat, der Durchführung der Geldpolitik,[3] ist sie nunmehr für die Sicherstellung von Finanzstabilität verantwortlich und agiert künftig als zentrale Aufsichtsbehörde über den europäischen Bankensektor. Im Gegensatz zur Entwicklung der Wirtschafts- und Währungsunion (WWU), deren Wurzeln auf den 1970 veröffentlichten *Werner*-Bericht zurückdatieren,[4] nahm die Reform lediglich vier Jahre in Anspruch. Die Raschheit, mit der die Kompetenzen der EZB erweitert wurden, impliziert die Fragestellung nach der Nachhaltigkeit der Reform. Wie umfassend sind die Befugnisse der EZB tatsächlich? Ist dieser Schritt förderlich für die Finanzmarktintegration in der EU oder unterstützt er vielmehr die Entwicklung eines Kerneuropa, bestehend aus den Mitgliedstaaten der WWU?

Dieser Beitrag thematisiert Herausforderungen, die sich aus der Betrauung der EZB mit Aufgaben der Banken- und Finanzaufsicht ergeben und sohin die Doppeldeutigkeit des Begriffsverständnisses von „Finanzmarktregulierung in der Krise". Ist diese als eine noch unvollendete Baustelle, die Europa auf neue Fundamente stützt und Stabilität bewirkt, zu qualifizieren? Oder „bröckelt" vielmehr das Fundament und riskieren zu rasche Aufbau- und Umbauarbeiten Instabilität und eine Kluft in den Mauern? Finanzmarktregulierung in der Krise kann einem Janus gleich als Reaktion auf die gegenwärtige Krise ergehen oder aber sich selbst in einer Krise befinden. Anhand des Beispiels der EZB soll in diesem Beitrag der Unterschied zwischen den beiden Auslegungsmöglichkeiten dargestellt und der schmale Grat zwischen nachhaltiger und überstürzter Regulierung, auf dem die EU wandelt, zur Diskussion gestelllt werden. Zu diesem Zweck werden im nächsten Abschnitt die neuen Tätigkeitsfelder der EZB dargestellt und mögliche Problembereiche aufgeworfen. Im Anschluss wird hinterfragt, ob sich die Finanzmarktregulierung diesbezüglich von einer Finanzmarktregulierung als Reaktion auf die Krise hin zu einer Krise der Finanzmarktregulierung gewandelt hat. In einem weiteren Schritt wird diskutiert, ob dies spiegelbildlich für die gesamte Reform des EU-Finanzsektors ist.

2. Aufsichtsrechtliche Aufgaben der EZB

2.1. Finanzaufsicht

Die EZB ist auf mehreren Ebenen in den Europäischen Ausschuss für Systemrisiken (European Systemic Risk Board – ESRB) eingebunden. Dieser ist als unabhängiges Gremium ohne Rechtspersönlichkeit[5] mit Sitz in Frankfurt am Main[6] eingerichtet und hat seine Tätigkeit am 1.1.2011 aufgenommen. Dem ESRB obliegt die Makroaufsicht über das EU-Finanzsystem, welches alle Finanzinstitute, -märkte, -produkte und Marktinfrastrukturen erfasst.[7] Er ist der Sicherstellung der Finanzstabilität[8] innerhalb der EU verpflichtet und fördert das reibungslose Funktionieren des Binnenmarktes.[9] Zu diesem Zweck erhebt er alle notwendigen Informationen, anhand derer potenzielle Sys-

* Dieser Beitrag wurde am 12.9.2013 mit dem Nachwuchsförderpreis der Gesellschaft für Rechtsvergleichung e. V. ausgezeichnet.

1 VO (EU) 1024/2013 des Rates v. 15.10.2013 zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank, ABl. L 2013/287, 63 („SSM-VO").

2 VO (EU) 1092/2010 des Europäischen Parlaments und des Rates v. 24.11.2010 über die Finanzaufsicht der Europäischen Union auf Makroebene und zur Errichtung eines Europäischen Ausschusses für Systemrisiken, ABl. L 2010/331, 1 („ESRB-VO"), VO (EU) 1096/2010 des Rates v. 17.12.2010 zur Betrauung der Europäischen Zentralbank mit besonderen Aufgaben bezüglich der Arbeitsweise des Europäischen Ausschusses für Systemrisiken, ABl. L 2010/331, 162.

3 Siehe Kapitel IV des Protokolls Nr. 4 über die Satzung des Europäischen Systems der Zentralbanken und der Europäischen Zentralbank, ABl. C 2010/83, 201 („EZB-Satzung").

4 Bericht an Rat und Kommission v 8.10.1970 über die stufenweise Verwirklichung der Wirtschafts- und Währungsunion in der Gemeinschaft, ABl. C 1970/136, 1, 9 *(„Werner-Bericht");* weitergeführt durch *Europäische Kommission,* Bericht zur Wirtschafts- und Währungsunion in der Europäischen Gemeinschaft, 1988, ABl. C 1989/329, 44 („*Delors*-Bericht").

5 Erwägungsgrund 15 ESRB-VO. Die mangelnde Rechtspersönlichkeit führt dazu, dass das ESRB nicht rechtsverbindlich handeln kann. Analog zu *Mayer,* Die gegenwärtige und künftige Rolle der Europäischen Zentralbank bei der Verhütung und Bewältigung von Finanzkrisen, ZBB 2011, 25 (25), der ausführt, dass nur eine mit Rechtspersönlichkeit ausgestattete EZB rechtsverbindlich handeln könne.

6 Art. 1 Abs. 1 S 2 ESRB-VO.

7 Art. 2 lit b ESRB-VO.

8 Diese wird als das übergeordnete Ziel des ESRB betrachtet: *Lehmann/Manger-Nestler,* Das neue Europäische Finanzaufsichtssystem, ZBB 2011, 2 (21).

9 Art. 3 Abs. 1 ESRB-VO.

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