



# **Consultation Paper on 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**

## **Polish Bank Association's comments**

### **Title I - Scope of suitability assessments and proportionality**

#### **Section 4 Application of the proportionality principle**

##### ***Paragraph 36***

In our opinion it is necessary to align the criteria for the application of the proportionality principle set out in paragraph 36 with the criteria regarding the proportionality principle contained in *EBA Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013*.

### **Title II – Notions of suitability listed in Article 91(12) of Directive 2013/36/EU**

#### **Section 5 Sufficient time commitment of a member of the management body**

##### ***Paragraph 40***

*[Comments concern also paragraph 42]*

Obligations set out in paragraph 40 of the Guidelines as regards the expected time commitment are problematic when they are applied to members of bank's management board who are employed on the basis of a managerial contract (and not on the basis of an employment contract). In this context it should be noted that the members of the management board are assessed not on the basis of their working time but on the basis of the effects of their work. As a result, it also seems problematic - if not impossible – to implement the provisions of paragraph 42 of the Guidelines according to which institutions should monitor that the members of the management body commit sufficient time to perform their functions.

##### ***Paragraph 42***

See comments for paragraph 40.

#### **Section 7 Adequate knowledge, skills and experience**

##### ***Paragraph 62***

*[Comments concern also paragraphs 65, 67 and 116]*

Paragraph 62, 65, 67 and 116 include provisions on challenging the decisions of the management body in its management function, namely:



Paragraph 62: *“A member of the management body in its supervisory function should be able to provide constructive challenge to the decisions and effective oversight of the management body in its management function (...)”*.

Paragraph 65: *“Members of the management body in its supervisory function should collectively be able to effectively challenge and monitor decisions made by the management body in its management function (...)”*.

Paragraph 67: *“(...) the supervisory function of the management body should collectively have sufficient management skills to organise its tasks effectively and to be able to understand and challenge the management practices applied and decisions taken by the management body in its management function”*.

Paragraph 116: *“(...) an institution’s management body in its supervisory function should be able to effectively challenge the decisions of the management body in its management function and to effectively oversee and monitor the management body’s decision-making”*.

In our view, the abovementioned provisions cause uncertainty as they do not explain what exact kind of actions would be meant by such a challenge of management body’s decisions.

It should be noted that according to article 375<sup>1</sup> of the Polish Commercial Companies Code, *“the general meeting and the supervisory board may not issue to the management board binding instructions as to the running of the affairs of the company”*. Furthermore, § 9 section 2 of the „Principles of Corporate Governance for supervised institutions” issued by the Polish Financial Supervision Authority states that *“shareholders may influence the functioning of a supervised institution only through the decisions of the General Meeting, without infringing upon the prerogatives of the other bodies. Unauthorised exertion of influence on the management body or supervisory body should be reported to the Polish Financial Supervision Authority”*.

It therefore seems that the provisions of paragraphs 62, 65, 67 and 116 of the Guidelines - concerning actions which the supervisory board can take in relation to the management board – should be more precise and take into account the relevant provisions of national legislation and recommendations of national financial supervision authorities as quoted above.

## **Section 8 Collective suitability criteria**

### ***Paragraph 65***

See comments for paragraph 62.

### ***Paragraph 67***

See comments for paragraph 62.



### **Title III – Human and financial resources for training of members of the management body**

#### **Section 12 Induction and training policy**

##### ***Paragraph 85***

It is highly possible that adopting and putting into place policies and procedures concerning the training of the members of the management board could eventually turn out to be just an additional formal requirement not bringing much added value. It should be noted that in practice all trainings organized for the members of banks' management boards are already fitted to their actual needs and professional duties.

### **Title IV – Diversity within the management body**

#### **Section 13 Diversity policy objectives**

##### ***Paragraph 92***

As indicated by some of our Members, the subject matter described in paragraph 92 of the Guidelines forms part of their suitability policy. Having that in mind, as a general observation it might be suggested that creating a separate, highly-detailed document – like the one described in paragraph 93 of the Guidelines– seems to be more adequate for bigger, global entities rather than for local or regional ones.

### **Title V – Suitability policy and governance arrangements**

#### **Section 16 Nomination committee and its tasks**

##### ***Paragraph 111***

According to paragraph 111 of the Guidelines, „*significant institutions must have a nomination committee that fulfils the responsibilities and has the resources as set out under Article 88(2) of Directive 2013/36/EU*”.

At the same time, article 9cb section 1 of the Polish Banking Act states that a significant bank must have a remuneration committee and a risk committee but does not provide for the obligation for a significant bank to have a nomination committee. According to the same provision of the Polish Banking Act, members of remuneration committee and risk committee are persons selected among the members of the bank's supervisory board.

Therefore, according to the Polish legislation a significant bank is not obliged to have a nomination committee. Having that in mind, we propose to modify the current wording of paragraph 111 of the Guidelines in order to make it aligned with the national legislation, for example in the following manner:



“Significant institutions must have a nomination committee **or other relevant body** that fulfils the responsibilities and has the resources as set out under Article 88(2) of Directive 2013/36/EU.”

## **Section 17 Composition of the management body and the appointment and succession of its members**

### ***Paragraph 116***

See comments for paragraph 62.

## **Section 18 Independent members of a CRD-institution’s management body in its supervisory function**

### ***Paragraph 124***

*[Comments as regards paragraph 124 g in connection with paragraph 5.1 c of Annex III]*

The notion of a “*close family member*” (paragraph 124 g of the Guidelines) and “*close relatives*” (paragraph 5.1 c of Annex III) should be more precise and aligned with each other.

## **Title VI – The assessment of suitability by institutions**

### **Section 19 Common requirements for the assessment of the individual and collective suitability of members of the management body**

#### ***Paragraph 127***

*[Comments concern also paragraph 129]*

In our view the provisions of paragraph 127 and 129 of the Guidelines may be problematic as regards the possibility to conduct the suitability assessment after the appointment:

Paragraph 127: “(...) *Where, in duly justified cases (e.g. if shareholders nominate members that have not been proposed by the institution), members were appointed by shareholders before an assessment of suitability was made, institutions should assess the suitability of the members and the composition of the management body as soon as practicable and at the latest within three weeks after the appointment of the members (...)*”.

Paragraph 129: “(...) *In duly justified cases, the assessment of suitability may be performed after the appointment. This should be done as soon as practicable but at the latest within three weeks from the date of appointment (...)*”.

Although the draft “Recommendation Z on internal governance in banks” prepared by the Polish Financial Supervision Authority includes the possibility of an *ex post* suitability assessment (immediately and in all cases at the latest within six weeks after the appointment), such a possibility is not provided for by the Polish Banking Act. In accordance with the relevant provisions of the Polish Banking Act, the suitability assessment should be always



performed before the appointment. For example, according to article 22 section 2 of the Polish Banking Act, members of the supervisory board are appointed and recalled by the general meeting, taking into consideration the assessment of fulfilling the requirements set out in article 22aa of the Banking Act. As provided for by article 22a section 1 of the Polish Banking Act, the members of the bank's management board are appointed and recalled by the supervisory board, subject to article 22b of the Banking Act; when appointing or recalling the members of the management board, the supervisory board takes into consideration the assessment of fulfilling the requirements set out in article 22aa of the Banking Act.

Since the possibility to conduct the suitability assessment after the appointment is not provided for by the Polish Banking Act, we would like to highlight that the indicated provisions of paragraphs 127 and 129 of the Guidelines differ from the Polish legislation.

### ***Paragraph 129***

See comments for paragraph 127.

## **Section 22 On-going monitoring and re-assessment of the individual and collective suitability of the members of the management body**

### ***Paragraph 145***

In accordance with paragraph 145 of the Guidelines, significant institutions should perform a periodic suitability re-assessment at least annually.

It should be noted that the Polish legislation does not provide for such an obligation concerning significant institutions.

### ***Paragraph 149***

According to paragraph 149 of the Guidelines, significant institutions should inform the competent authority at least annually of any reassessments of collective suitability made, including their outcome and any measures taken as a result of the reassessment.

It should be noted that the Polish legislation does not provide for an obligation for significant institutions to inform the competent authority at least annually of any reassessments of collective suitability made.

## **Section 23 The suitability assessment of key function holders by CRD institutions**

### ***Paragraph 151***

Paragraph 151 of the Guidelines states that significant institutions should inform competent authorities of the assessment results regarding heads of internal control functions and the CFO, where they are not part of the management body.

We would like to highlight that such obligation is not included in the Polish legislation.



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***Paragraph 152***

According to paragraph 152 of the Guidelines, concerning the situation in which a CRD-institution's assessment concludes that a key function holder is not suitable, significant institutions should inform the competent authority accordingly with regard to the heads of internal control functions and the CFO, where they are not part of the management body.

Such obligation is not included in the Polish legislation.