Consultation Response

Draft 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

26 May 2026

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the ***DRAFT 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*** (the "Draft Guidelines"). The Association for Financial Markets in Europe (AFME) is the voice of the leading banks in Europe's financial markets, providing expertise across a broad range of regulatory and capital markets issues. We represent over 150 leading global and European banks and other significant market players. Our members play a vital role in Europe's financial ecosystem, underwriting around 90% of European corporate and sovereign debt, and 85% of European listed equity capital issuances. Importantly, AFME members are market makers, providing liquidity, which is essential for ensuring financial markets can function efficiently. We also represent law firms and other associate members which advise market participants and support AFME's legal and regulatory initiatives.

AFME is registered on the EU Transparency Register, registration number 65110063986-76. We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

We welcome the opportunity to contribute to this consultation, which plays a central role in strengthening governance standards across the EU. We support ensuring that members of the management body and key function holders meet high standards of integrity, competence, independence of mind and time commitment - core elements of effective governance, risk management and financial stability. We also recognise the value of greater supervisory convergence and clarity under CRD VI[1].

[1]CRD VI refers to Directive (EU) 2024/1619, it sets harmonised EU-wide rules for banks operating in the EU, restricting non-EU entities from providing "core banking services" directly to EU clients without a local presence.

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However, it is essential that the final Guidelines remain within the boundaries of the Level 1 framework. Several elements of the Draft Guidelines risk expanding the scope and intensity of suitability requirements beyond the mandate of Articles 91 and related provisions of CRD VI. As a matter of principle, we suggest that the final text should:

- Be driven by simplification, better regulation and supporting EU competitiveness. We support the recent consultation from the Commission on the competitiveness of the EU banking sector[2] and hope that this aim would be at the heart of other legislative, regulatory and supervisory changes.
- Preserve the principle-based nature of the CRD VI suitability regime and avoid introducing undue granularity.
- Apply proportionality effectively, reflecting the differing sizes, risk profiles and business models of institutions across the Union.
- Avoid introducing new substantive requirements not grounded in CRD VI, such as cooling-off periods or specific measures to be added for former executive directors.
- Ensure full consistency with national company law, which governs key aspects of board structure, appointments, responsibilities and internal organisation.

In relation to the specific changes proposed, we highlight the following:

- Many of the proposals go against the principle of simplification: the Draft Guidelines do not remove any existing obligations introduced by EBA ESMA in the previous guidelines and instead introduce multiple new requirements, clarifications and reporting expectations, often with no legal basis. If the core suitability requirements are already embedded in Level 1 legislation and in the fiduciary duties of directors under national law, the incremental value of further prescriptive guidance needs to be clearly demonstrated. Instead, a genuine simplification exercise would also involve eliminating obligations with no legal basis, redundant provisions, consolidating overlapping requirements and reinforcing proportionality.
- Several provisions of the Draft Guidelines appear premised on governance assumptions aligned with dual-board structures: this does not adequately reflect the characteristics of one-tier systems, where executive and non-executive functions coexist within a single board under national corporate law. The Guidelines should therefore avoid creating interpretative tensions or practical constraints that could undermine established national governance models. We also call upon the EBA to avoid requirements that undermine the principle of collective responsibility embedded in several Member States' legal frameworks.
- It would be helpful to understand whether some changes have been prompted by identified failings: For example, as drafted, the Draft Guidelines reflect a certain degree of mistrust towards management bodies and nomination committees in the exercise of their responsibility to assess the suitability of board members and key function holders, and they impose strong bureaucratic requirements in terms of documentation and procedural formalities.
- Disproportionate focus on certain individual risks goes against broad risk management principles: We note, in particular, the current focus on AML and ESG risks. While these are important, the focus may suggest that other

[2] https://finance.ec.europa.eu/regulation-and-supervision/consultations-0/targeted-consultation-competitiveness-eu-banking-sector-2026_en

applicable risks are less so. Furthermore, each of these references should be carefully reviewed to ensure consistency with Level 1 legislation and to avoid duplication or cross-referencing that may generate operational complexity without enhancing supervisory effectiveness.

- Some provisions introduce excessive detail and granularity: For example, Section 4 (Sufficient time commitment of a member of the management body) in Title III. The cumulative effect of these provisions may result in a highly formalistic monitoring framework that resembles a time-recording or "clocking-in" regime, which has been widely criticised in other contexts as an ineffective and disproportionate means of controlling professional performance. Such an approach does not necessarily enhance the quality of governance. On the contrary, it risks shifting the focus from substantive contribution and effective oversight to procedural compliance and documentation.
- We note that the revised Draft Guidelines are expected to be published after the deadline for national transposition which may limit timely consideration at national level.

Our comments aim to support the development of final Guidelines that promote supervisory convergence without exceeding the CRD VI mandate, while safeguarding legal certainty, proportionality and respect for national corporate law diversity. We have also separately commented on the accompanying Draft Regulatory Technical Standards, given their close interaction with the Guidelines and their relevance for practical implementation.

Question 1: Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?

We welcome the efforts undertaken by EBA and ESMA to clarify the suitability framework under CRD VI. However, we consider that certain aspects of the Draft Guidelines, particularly regarding their subject matter, scope and definitions, would benefit from further refinement to ensure alignment with the Level 1 framework, proportionality and consistency with national corporate law.

Additionally, the Draft Guidelines contain multiple references to the revised EBA Guidelines on Internal Governance, even though their final wording is not yet adopted. Anchoring supervisory expectations in documents still under development creates uncertainty and risks inconsistencies in interpretation. We therefore recommend that cross-references be aligned with the finalisation of the relevant governance Guidelines to avoid overlap or unintended expansion of obligations.

<u>Definitions</u>

Management body in its management function: We would recommend reinstating the following sentence, which has been removed from the Executive Summary, as it is fundamental to ensuring that the Guidelines continue to be applied in line with the applicable legal frameworks of each Member State: *"The terms 'management body in its management function' and 'management body in its supervisory function' should be interpreted throughout the Guidelines in accordance with the applicable law within each Member State".*

Furthermore, it appears appropriate to clarify throughout the document that the management body in its management function may consist of a single-person body (for example, the CEO and/or the General Manager) and not necessarily of a

collegial body. In this respect, a proposal of amendment to the text of the Guidelines could be as follows:

- *"Chief executive officer (CEO) means the person who is responsible for managing and steering the overall business activities of an entity and is part of the management body in its management function* ***or coincide with it*** ."
- Paragraph 15: *"In Member States, where the management body appoints* ***a person or*** *persons that effectively direct the business of the institutions,* ~~***those persons***~~ ***they*** *belong in accordance with Article 3(1)(8a) of Directive 2013/36/EU to the management function of the management body and are therefore be assessed for their suitability in line with Article 91 of this Directive."*

Executive Directorship: The definition needs clarification - as currently drafted it appears to associate executive dictatorship with the effective direction of the business, a concept closely aligned with a CEO-type role. However, in several Member States (particularly in one-tier systems), board members may perform executive functions without being responsible for day-to-day management. Executive responsibilities may relate to strategic, transformational, or delegated functions that do not amount to the effective management of the entity in a prudential sense. A definition that implicitly conflates executive directors with chief executive responsibilities does not reflect the diversity of national corporate law frameworks and may lead to inconsistent application.

To address this, we propose adopting a more functional and nationally contextualised definition. For example: ***"a position held by a member of the management body who performs executive functions involving the effective management of the entity or exercises delegated managerial powers, in accordance with the applicable national corporate law and the internal allocation of responsibilities within the institution".*** This approach avoids automatic assimilation to the CEO function and better accommodates different governance models, including one-tier systems.

Date of Application

We note that the date of application of the Draft Guidelines is currently stated as *"6 months after the publication of all translations of the GL, but not later than 31.12.2026."* However, in a recent meeting with the EBA, the EBA indicated that these Guidelines, along with the draft Guidelines on Internal Governance, were only due to be finalised by the end of the year, which does not suggest that there will be a sufficient period for implementation. After the publication of the translations, it will still be necessary to take into account the "comply or explain" process to be carried out by the Supervisory Authorities of the various Member States and thereafter the potential amendments to national secondary legislation. While the CRD VI transposition period has passed, making adherence to these Guidelines a priority, we do not believe that this should come at the expense of an appropriate implementation period.

The application of the final Guidelines with each Member State's CRD VI transposition date must be taken into account. Applying the Guidelines before national transposition could create inconsistencies with binding domestic law. Aligning timelines would avoid legal uncertainty and support coherent orderly implementation. In light of the above, we suggest that the date of the application is amended, for example to 31 December 2027

Question 2: Are the changes made in Title II appropriate and sufficiently clear?

Paragraph 31 – Additional duties: The Draft Guidelines propose that the time commitment of members of the management body should be reassessed not only when they take on additional directorships or activities, but also when they assume *"additional duties"*. This new reference to *"additional duties"* should be deleted, as it cannot extend to any additional duty assumed in the context of an existing executive role. Executive roles, by their very nature, are dynamic and evolving. The scope of responsibilities of executive directors, or the responsibilities associated to other executive roles undertaken by non-executive directors, may change frequently in response to business needs, organisational adjustments or regulatory developments. Introducing an obligation to reassess time commitment every time an executive assumes undefined *"additional duties"* would create significant operational burden. It would be extremely difficult to determine which additional duty should trigger a formal reassessment and which should not.

Moreover, such a broad and open-ended requirement risks leading to excessive formalism and continuous reassessment exercises, without necessarily improving the substantive assessment of time commitment. The current framework, which already requires reassessment when additional directorships or relevant external activities are assumed, provides a sufficiently objective and measurable trigger.

For these reasons, the reference to *"additional duties"* should be removed in the interest of legal certainty, proportionality and effective governance.

Paragraph 34: Please see our comments under Q8 below.

Question 3: Independent non-executive directors:
The Joint GL set out provisions on independent non-executive members of the MB. The Joint GL apply in a proportionate manner and distinguish between different types of entities (GSII, OSII and other institutions) and specify that for institutions other than significant ones only one independent director as a minimum is required. Furthermore, the Joint GL provide criteria for the assessment of "being independent". In light of the above, the EBA and ESMA would appreciate further input on the impact of the independence criteria.
Do you have any views on the provisions regarding these independence criteria? Please explain any aspects that may influence the effectiveness, clarity, or implementation of these independence criteria across different business models/types of institutions.

We support the objective of ensuring that management body members, including independent non-executive directors, contribute effectively to sound governance and oversight. However, aspects of the Draft Guidelines' independence framework require further refinement to ensure proportionality, legal coherence and practical applicability across different governance models.

Paragraph 91 – independence of mind: Point (a) provides that, in order to have independence of mind, a person must in particular be able to independently assess the decisions proposed by the other members of the management body and act independently (which might be termed "formal independence". However, CRD does not demand such formal independence and we consider that independence cannot be defined by formal independence. CRD requires members of the management body to

act with honesty, integrity and independence of mind, but does not define any notion of formal independence. Independence of mind under CRD is clearly conceived as a behavioural suitability requirement, not as a status derived from the absence of relationships or links. Independence of mind cannot be defined by formal independence. Likewise, CRD does not require, as the Draft Guidelines, a minimum number of independent members within the management body.

Furthermore, while past conduct and experience may provide useful indicators, the effective exercise of independence of mind can ultimately only be observed in practice within the dynamics of management body deliberations. Excessively prescriptive ex-ante documentation or predictive behavioural assessments risk reducing this qualitative attribute to a compliance exercise. The Guidelines should acknowledge these inherent limitations and avoid imposing disproportionate expectations.

Also, the scope of the recommendation to have independent members has been extended to all institutions (for example, per paragraph 98, 100), with no legal basis and should be amended.

Question 4: Are the changes made in Title III appropriate and sufficiently clear?

Section 4 – sufficient time commitment: At the time of initial appointment, the assessment should focus on analysing the candidate's other professional commitments and their nature, in order to evaluate to what extent such commitments may undermine the individual's ability to dedicate sufficient time to the board, or conversely, may enhance their expertise and preparedness to perform their functions, thereby potentially requiring less time to achieve an equivalent level of effectiveness. A streamlined drafting of Section 4 along these lines would preserve supervisory objectives while avoiding disproportionate operational burdens and unnecessary formalism.

Paragraph 62 and 67 – Appropriate understanding of specific areas: The Draft Guidelines add the requirement for all board members to have an appropriate understanding of all the areas listed in paragraph 77. We suggest that this addition should be removed. The current drafting already ensures that the management body collectively understands these areas. This requirement should not be imposed at an individual level for the same reasons explained in the comments to paragraph 69 below. More broadly, the requirements in paragraph 67 should be removed or made only applicable to executive directors. For non-executive directors, knowledge in specific areas should only be requested to the extent that it is compatible with the diversity of profiles that truly enhances decision-making processes.

Paragraph 68 and 69 – AML/CFT and Data Protection as specific knowledge areas: The Draft Guidelines add AML/CFT and data protection to the list of required areas of theoretical knowledge and practical experience. We suggest that these additions should be deleted. Both AML/CFT and data protection are already embedded within the broader categories of *"legal requirements and regulatory framework"* and, where relevant, *"risk management"*. Moreover, the management body is not a technical-operational body; it is responsible for oversight, strategic direction and ensuring that appropriate governance and control frameworks are in place. It should not be required that each individual member possesses specialised theoretical or practical experience in specific regulatory sub-domains. Requiring explicit expertise in AML/CFT and data protection at the individual level risks transforming the suitability

assessment into a checklist of specialised competencies, which is neither consistent with the collective responsibility of the board nor with the principle of proportionality. These areas are typically supported by dedicated control functions and subject-matter experts within the institution.

The current drafting already ensures that the management body collectively understands regulatory and risk frameworks, which adequately covers AML/CFT and data protection considerations. Therefore, the additional explicit references should be removed. Similarly, the current version of the Guidelines on AML/CFT compliance officers [3]sets out that the management body should collectively possess adequate knowledge, skills and experience to be able to understand the ML/FT risks related to the credit or financial institution's activities and business model, including the knowledge of the national legal and regulatory framework relating to the prevention of ML/TF (paragraph 11).

More broadly, the entire list in paragraph 69 should be reviewed as it is excessively focused on the banking sector, which is incompatible with fostering diversity of profiles to enrich the debate with diverse perspectives. Furthermore, paragraph 68 should make it clear that experience may be much more relevant than education to assess the knowledge and skills of a member of the management body.

Paragraph 77 – Collective knowledge: DORA: We observe an implicit expectation that independent non-executive directors individually possess detailed expertise in these technical domains. While the management body collectively should understand emerging risks, it is neither necessary nor realistic for each director to have granular technical knowledge of complex frameworks such the Artificial Intelligence Act (Regulation (EU) 2024/1689) and the Digital Operational Resilience Act (DORA) (Regulation (EU) 2022/2554), alongside detailed ESG solvency models (as referenced in Article 77).Such requirements are already encompassed within the broader concepts of "legal and regulatory framework", "risk management" and "ICT and security". The management body must collectively understand the regulatory environment and the institution's ICT and operational resilience framework. Introducing an explicit reference to specific files creates unnecessary fragmentation and risks leading to a piecemeal approach whereby each new regulatory instrument would need to be individually listed. Paragraph 77 should therefore be clarified to ensure proportionality and to clearly differentiate between collective board competence and individual expertise, so as not to unduly restrict the pool of qualified independent candidates.

As in paragraph 69, the entire list should be reviewed under the perspective that the management body is not a technical-operational body; it is responsible for oversight, strategic direction and ensuring that appropriate governance and control frameworks are in place.

Finally, we note that these additional references to specific regulations and risks runs counter to the Commission's simplification agenda[4], which the EBA and ESMA are already committed to embedding within their own activities[5]. We suggest that, unless

[3] Guidelines on AMLCFT compliance officers.pdf
[4] https://commission.europa.eu/law/law-making-process/better-regulation/simplification-and-implementation/simplification_en
[5] https://www.eba.europa.eu/sites/default/files/2025-10/b8e0ef8e-2d49-43fc-b917-dbca3423588c/Report%20on%20the%20efficiency%20of%20the%20regulatory%20and%20supervisory%20framework.pdf and https://www.esma.europa.eu/press-news/esma-news/esma-contributes-simplification-and-burden-reduction

a comprehensive list of risks is to be produced, individual risks should not be given undue prominence.

Paragraphs 86 and 233 et seq. – Extensive list of circumstances and ML/TF risk factors: The draft significantly expands the list of circumstances and risk factors that competent authorities should consider when assessing reputation and potential AML/CFT risks. This list should be substantially reduced. While it is appropriate to ensure that money laundering and terrorist financing risks are duly considered, the current drafting includes an excessively broad range of factors, many of which should not, per se, be considered indicators of lack of reputation or integrity. There is a serious risk that the inclusion of broad and loosely defined *"risk factors"* may lead to assessments based on association or exposure rather than on personal conduct, responsibility or demonstrable involvement. This would conflict with fundamental principles such as proportionality, legal certainty and the presumption of innocence. While institutions must ensure no reasonable ML/TF concerns exist, the primary responsibility for assessing such risks lies with public authorities, including AMLA and national AML supervisors. The suitability framework should not duplicate supervisory functions or introduce sectoral biases that could unfairly stigmatise certain professional backgrounds.

Reputation assessments should focus on objective and demonstrable facts directly attributable to the individual concerned. Expanding the list to include general contextual or sectoral risk factors may lead to inconsistent supervisory outcomes and overreach. A more targeted and clearly delimited list, focused on concrete misconduct or serious compliance failures, would better balance prudential objectives with legal safeguards.

Paragraphs 93/95 and paragraph 13 of the Background and Rationale – Cooling-off period: CRD VI Article 88(1) added an explicit prohibition on simultaneously holding the positions of i) Chair of the supervisory function and ii) Chief Executive Officer. These Draft Guidelines (as well as the consultation on the EBA Guidelines on Internal Governance) extend the scope of this regulatory provision by addressing the situation where the CEO or another executive takes on the role of Chair or non-executive director following the termination of their executive role. The draft introduces a recommended three-year cooling-off period for an executive director who becomes a non-executive director or chair of the board, in order to preserve independence of mind. In the absence of such a period, the draft suggests a possible conflict of interest to be mitigated in accordance with Section 11 of the Internal Governance Guidelines.

As noted in our response to the EBA's consultation on its Internal Governance Guidelines[6], the industry expressly requested the removal i) both of the requirement for a cooling-off period applicable when the CEO or another executive takes up the position of Chair or non-executive director ii) and of the specific mitigation measures concerning hypothetical conflicts of interest.

Our concerns are also relevant to these Draft Guidelines - the current drafting could disproportionately affect one-tier boards where executives may legitimately transition to non-executive roles to preserve expertise and continuity. A rigid cooling-off expectation, applied without regard to the governance model and existing

[6] https://www.afme.eu/media/uhsj5jvv/251106-afme-response-to-eba-cp-on-internal-governance-gls-final.pdf

safeguards, could effectively exclude former executives from non-executive appointment, irrespective of the broader context.

In this regard, we highlight that such a situation may indeed be relevant i) for the purposes of the *formal* independence requirement applicable to certain Directors ii) but not for the *independence of mind* requirement applicable to all Directors.

While we acknowledge that, under applicable company law, former executive directors may not be considered formally independent (e.g. under Spanish law they are considered as "other external directors") for a certain period of time, this should not be conflicted with the concept of independence of mind. Non-executive members who are not formally independent directors remain valid and legitimate figures within the governance framework and are fully capable of exercising independent judgement. Disregarding this distinction would overlook the role played by the overall board composition, including the presence of independent directors, as well as committee structures and conflict of interest policies, which collectively ensure effective oversight.

In place of the proposal included in the consultation document, it is therefore requested that it be clarified that an executive director, a senior manager of the bank, or a member of an executive committee, who at the end of their mandate takes up the position of Chair of the management body in its supervisory functions or of non-executive director, may not be qualified as an "independent director" unless at least the period provided for under national legislation on independence requirements for *fit & proper* assessments of directors has elapsed.

General safeguards for the management of specific conflicts of interest would in any case remain applicable, pursuant to the ordinary rules on disclosure and abstention, which are already extensively governed by national corporate law. A safeguards-based approach is therefore preferable, enabling proportionate risk mitigation while respecting different Member State governance models and preserving necessary flexibility in board composition.

We suggest that paragraph 13 of the Background and Rationale and paragraph 95 are deleted, along with paragraph 93(h).

Alternatively, the following wording is suggested: *"h. without prejudice to national law, where the former CEO or, where applicable, another executive director or former executive director takes on the role of chairperson or becomes a member of the management body in its supervisory function within the same entity* ***~~within a time period of three years after their position of a member of the management body in its management function ended~~, the institution shall assess and, where necessary, implement appropriate safeguards to ensure effective independence of mind, adequate oversight and the mitigation of any potential conflicts of interest, in accordance with its governance framework and applicable national corporate law****".*

In light of the above, we would encourage the EBA and ESMA to recalibrate the independence criteria to ensure that they remain principle-based, proportionate and adaptable to different business models and governance structures across the Union, while preserving the core objective of effective oversight and independent judgement.

Paragraph 99c - Independent members of the management body in its supervisory function: While not specifically consulted on, we suggest that this should be removed under a principle of simplification. The content is inherent to the role of all board members, not limited to independent directors.

Question 5: Are the changes made in Title IV appropriate and sufficiently clear?

While induction and training are essential elements of sound governance, the Guidelines introduces additional layers of prescriptiveness that are not proportionate, particularly for well-established institutions with mature governance frameworks. The Guidelines should focus on ensuring that institutions maintain effective training frameworks tailored to their risk profile and business model, without introducing implicit quantitative benchmarks or documentation expectations that may lead to supervisory box-ticking exercises. A more proportionate and streamlined approach, with just a general obligation to devote sufficient resources for that training, would be sufficient to achieve supervisory objectives.

Question 6: Are the changes made in Title V appropriate and sufficiently clear?

Gender balance at board level is already comprehensively regulated at Level 1 through Directive (EU) 2022/2381 and its national transposition measures. The proposed amendments to Title V introduce terminology and obligations that are insufficiently defined, ambiguous in scope, and difficult to operationalise in practice. In several instances, the drafting raises more questions than it resolves, creating a material risk that entities will interpret and implement the requirements in divergent ways – thereby undermining rather than advancing the harmonisation objective of the Draft Guidelines. Moreover, in the absence of clearer definitions and practical guidance, the proposed changes are likely to generate a disproportionate increase in administrative and compliance burdens without delivering commensurate benefits for enhanced diversity, the fitness of the management body and key function holders, or the sound management of entities.

For instance, the replacement of *"institutions"* with *"entities"* and the insertion of *"gender balance"* alongside *"diversity"* raise substantial questions regarding both the intended scope of application and the practical expectations placed on firms. It is unclear whether the terminological shift to *"entities"* is intended to materially widen the population of legal persons subject to these requirements, and if so, what the precise perimeter is. The term *"proportionally"* — while conceptually sound — lacks any operational definition or benchmark against which firms could assess compliance. The specific addition of *"gender balance"* as a distinct obligation alongside *"diversity"* is not accompanied by a definition of what constitutes "balance" in this context (e.g. balance relative to the broader organisation, a particular grade or level, the financial services industry, or the wider labour market), making it extremely difficult for entities to set meaningful and defensible targets. Furthermore, the shift from promoting a diverse *"pool"* of candidates to promoting a diverse *"composition"* of the management body represents a substantive change in the nature of the obligation — from one focused on the pipeline and selection process to one that appears to mandate specific outcomes — yet this significant shift is made without adequate explanation of the practical implications or the extent to which entities are expected to guarantee compositional outcomes. Finally, the use of the term *"policy"* remains ambiguous; it is unclear whether this refers to a formal standalone policy

document, a broader strategic framework, or whether integration into existing human resources or governance policies would suffice.

Paragraph 116 et seq. – Gender balance**:** It seems that the draft separates gender balance from the broader concept of diversity and replaces references to *"all genders"* with *"male and female genders"*. It also requires setting a gender balance target without legal basis, which further increases legal uncertainty, and documenting reasons for non-compliance and remedial measures. At board level, gender balance requirements are already comprehensively regulated by Directive (EU) 2022/2381 and relevant national transposition measures. Introducing parallel and potentially overlapping requirements in Level 3 Guidelines creates duplication and legal uncertainty, unless the concept of *"gender balance"* referred to herein is the one that applies in accordance with national law. These provisions should therefore be amended or deleted.

Paragraph 117 - target-setting: The introduction of a requirement that diversity policies *"ensure"* appropriate gender balance in both the management function and the supervisory function separately raises significant operationalisation concerns. The use of the word *"ensure"* implies a results-based obligation, which could be read as requiring entities to move beyond permissible positive action measures into territory that may conflict with applicable employment, equality, and anti-discrimination laws in certain jurisdictions. The term *"appropriate gender balance"* remains undefined, compounding the difficulty of compliance. Additionally, the revised drafting on target-setting - replacing the ability to break down targets by function with the formulation *"without prejudice to national law, the target may be defined for the management body as a whole"* - introduces legal uncertainty as to the interaction between these Draft Guidelines and national law, particularly regarding whether national provisions would take precedence where they diverge from the approach contemplated here, and under what circumstances.

Paragraph 118 - documentation of shortfalls: While the principle of accountability for progress toward gender balance targets is not objectionable in itself, this new paragraph lacks essential operational detail. It does not specify the expected format, medium, frequency, or level of granularity of the documentation required. Nor does it clarify to whom such documentation should be made available - whether internally to the management body or nomination committee, to competent authorities on request, or through public disclosure. The repeated use of undefined terms such as *"appropriate gender balance"* and the requirement to *"ensure"* that such balance is met raises the same concerns identified above regarding the risk of imposing outcome-based obligations that may be difficult to reconcile with applicable national law and practical recruitment constraints. Without further specification, this requirement risks becoming a box-ticking exercise that adds administrative burden without meaningfully advancing diversity objectives. Furthermore, the Guidelines should clarify that this recommendation does not introduce any additional obligations for institutions already subject to Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies, which provides for similar measures.

Paragraph 123 – Gender balance on Nomination Committees: this includes a new requirement to ensure gender balance on nomination committees, with no legal basis. At nomination committee level, extending gender balance requirements raises proportionality concerns. Nomination committees are often composed of a limited number of members selected based on expertise in governance and people matters. Imposing additional gender composition constraints on such small bodies may undermine the ability to appoint members with the most appropriate knowledge and

experience. In addition, we believe that the governance framework within which the committee operates should be the guarantor of gender equality, rather than the makeup of the committee itself. This provision should therefore be deleted, or amended to suggest that, where feasible, at least one member of the committee belongs to the less represented gender.

Question 7: Are the changes made in Title VI appropriate and sufficiently clear?

AFME has no comments in response to this question.

Question 8: Are the changes made in Title VII appropriate and sufficiently clear?

Paragraph 150 – Exceptional cases: We appreciate that the EBA takes into account exceptional cases concerning the urgent replacement of executive directors, but it would be legitimate for this also to apply to the chair of the management body in its supervisory function and to key function holders.

Paragraphs 160 and 171 – Information on suitability: The draft requires institutions to keep up to date the information on suitability of members of the management body, to review it at least annually and to inform the competent authority of any material change. It should be clarified that only changes that could affect the individual's suitability must be reported. A general obligation to report any *"material change"* is overly broad and may lead to unnecessary supervisory notifications. The reporting obligation should be clearly limited to changes that could affect the individual or collective suitability of the management body or key function holders.

Paragraph 161 – Information on suitability: Under this paragraph, the RTS on the minimum information to be submitted to the supervisor in the context of an ex-ante assessment request would apply to the assessments of the suitability of all entities. We consider that the EBA cannot rely on the mandate concerning the file relating to ex-ante suitability applications, which was granted to it by Article 91(10) of CRD VI, to frame the content of all suitability applications or all entities

Paragraphs 164 and 173: While not specifically consulted on, these requirements introduce a level of detail that risks transforming a governance evaluation into a formalistic compliance checklist. We include them as examples of simplification that could be addressed when revising the Guidelines, with the aim of avoiding duplications. The content is already included elsewhere and/or is excessively detailed, ultimately creating an unnecessary workload for institutions without improving prudential supervision.

Paragraph 166 – Assessment of suitability of individual members of the management body: We are concerned that the amended text goes against the principle of collective responsibility embedded in several Member States' legal frameworks. As noted in our response to the EBA consultation on its draft Guidelines on Internal Governance[7] we are concerned by a trend towards individual allocations that go against this principle, which is extremely common in countries with one-tier board

[7] https://www.afme.eu/media/uhsj5jvv/251106-afme-response-to-eba-cp-on-internal-governance-gls-final.pdf

structures. In addition, the Draft Guidelines introduce the recommendation to document how diversity has been considered in the recruitment process. It should be clarified whether this refers to diversity in the broad sense.

Paragraph 167 – Allocation of all material individual roles: The draft adds that entities *"should also ensure that all material individual roles and duties of the management body are allocated to a member of the management body"*. We suggest that this requirement should be deleted. The management body is a collegiate body with collective responsibility. Requiring formal allocation or mapping of duties of all material roles to specific members risks blurring the distinction between collective responsibility and individual executive functions and may be incompatible with certain governance models.

Paragraphs 34, 173 and 174 - Use of individual statements and mapping of duties for the purposes of the suitability assessment: One of the innovations introduced by the Draft Guidelines concerns the use—both for the individual assessment of suitability and for the collective suitability assessment (paras. 34 and 173) —of the two new mandatory documents describing the organisational and governance arrangements of the entity, introduced by Article 88(3) of the CRD (the so-called *"mapping of duties"* and *"individual statements"*). As is known, the content of these two documents was examined during last year's consultation on the EBA Guidelines on Internal Governance. During that process, the industry requested significant changes to the proposed regulatory framework, aimed at simplifying the obligations imposed on banks.

It is therefore considered necessary that, also for the purposes of this consultation, the observations already submitted during the previous consultation be taken into account, and in particular the request to remove the obligation to prepare a mapping of duties document for the body with strategic supervision functions, given that the roles and responsibilities of corporate bodies are already extensively described in other internal regulatory documents of banks.

Consequently, it is requested that all references to the aforementioned documents be deleted from the present consultation paper.

Paragraphs 175 and 179 – Notification of re-assessment upon new circumstances becoming known: The draft requires institutions to inform the competent authority each time a re-assessment is triggered because new circumstances *"become known"*. It should be clarified that this does not include unverified information or media leaks. In any event, this requirement should be deleted or limited to cases where suitability could be affected. Triggering a notification obligation merely because information becomes known—without any conclusion that suitability is impacted—creates disproportionate reporting burdens. If the competent authority desires further information on publicly available matters, it retains the power to request it. Automatic notification should be limited to situations where the institution concludes that suitability could be materially affected once analysed by the nomination committee.

Question 9: Are the changes made in Title VIII appropriate and sufficiently clear?

Titles VII and VIII - Assessment of Requirements by the Bank and by the Authority – Ex-ante/Ex-post

CRD VI has added significant amendments to Article 91 of the CRD, generally requiring banks to assess their corporate officers before they take up their functions (ex-ante assessment). However, taking into account the specific features of national governance systems, the Directive expressly regulates the circumstances under which the assessment may be carried out after the officers have taken up their functions (ex-post assessment), establishing that:

- Member States may allow the assessment to take place after the new members have taken up their functions *"where the majority of the members of the management body is to be replaced at the same time by newly appointed members and the application of the first subparagraph would lead to a situation where the suitability assessment of the incoming members would be carried out by the outgoing members"* (Article 91(1-a));
- Member States shall at least ensure that *"the competent authority receives a suitability application without undue delay, and as soon as there is a clear intention to appoint a member of the management body in its management function or the chair of the management body in its supervisory function, and, in any event, at the latest 30 working days before the prospective members take up their position"* (Article 91 (1-d)) and
- the provisions of Member States concerning the appointment of the members of the management body in its supervisory function by regional or local elected bodies, or concerning appointments in cases where the management body has no competence in the selection and appointment process of its members, shall remain unaffected. *"In those cases, appropriate safeguards shall be put in place to ensure the suitability of those members of the management body"* (Article 91(14)).

With regard to this matter, we first request that the text of the Guidelines should faithfully reproduce the wording of the Directive, providing - both for the ex-ante assessment and for the ex-post assessment - that these must be carried out prior to the taking up of office, rather than prior to the appointment, and accordingly aligning the wording throughout the entire document.

Furthermore, it is necessary to take into account the specific features of the ex-post assessment procedure, ensuring better coordination between paragraph 9.4 (sub paragraphs 103 et seq.) - which is dedicated to the *"additional safeguards"* applicable in cases of appointments made pursuant to paragraph 14 of Article 91 - and the provisions set out in Title VII and, in particular, Title VIII, which respectively govern the assessment of requirements conducted by the bank and by the Supervisory Authority.

In particular, within the paragraph concerning additional safeguards (paragraph 9.4 and sub paragraphs 103 et seq.), it is unclear whether the assessment process and the measures described also apply in situations where the management body has no competence in the selection and appointment of its members. It should be noted, in this regard, that in Annex 5.1 (Draft cost benefit analysis), the reference to *"additional safeguards"* is made solely with respect to the appointment of members of bodies elected at regional or local level.

Moreover, within Title VIII and the paragraphs concerning *"notifications of new appointments"* (para. 201 et seq.) and *"notifications in exceptional circumstances"* (para. 207) - which relate to situations where an ex-post assessment mechanism is regulated at Member State level - the submission deadlines for applications to the

Authority should be aligned and, in any event, set at 30 days following the assessment of the requirements carried out by the Board.

Lastly, a particularly relevant aspect concerns the process and timing for submitting the application in cases of appointment of an executive director or the chair of the board of directors, for which the application must be sent to the Authority at least 30 days before the candidates take up their functions. We would suggest ensuring consistency with national legal frameworks in order to take into consideration the specific rules applicable in ex-post jurisdictions, for example in Italy, where a slate-voting mechanism for Board members appointment is envisaged.

In this regard, it appears necessary first to take into account the high relevance of such positions for bank governance and, consequently, the need for such individuals to immediately perform their functions in order to ensure full continuity in those roles.

That said, it is requested that the requirements set out in the Directive may be deemed fulfilled through the transmission by the bank - also prior to the appointment - of a simplified set of information including personal data of the candidate proposed by shareholders and, for example, his/her curriculum vitae. On the basis of such information, the dialogue with the Supervisory Authority could then commence.

Alternatively, it is proposed to refer directly to national legislation for the transposition of art. 91 (1-d) of the Directive, allowing the Guidelines to regulate only the modalities of the dialogue with the Authority (as referred to in paragraph 24, sub paragraphs 217 et seq.).

Please find below the proposed amendments:

Rationale and objectives of the Guidelines paragraph 56: *"Where the competent authority carries out suitability assessments after the member takes up their position (ex post), in line with Article 91(1d) of this Directive, large entities in line with Articles 91(1d) and 91a(5) of the Directive 2013/36/EU should provide* ***~~a suitability application~~ documentation*** *to the competent authority without undue delay* ***~~but at the latest 30 working days before the prospective member takes up their position~~ and in accordance with national legislation including personal data of the candidates for the position of member of the management body in its management function or the chair of the management body in its supervisory function and any available information about the candidates at that time.****"*

Paragraph 201: *"Competent authorities should require entities to notify to competent authorities newly appointed members and provide the required accompanying documents. Notifications of the suitability application and the accompanying documents to the competent authority should include the information and the documentation referred to in Article 91 (1e) Directive 2013/36/EU as well as, to the extend deemed proportionate by the competent authorities in line with paragraph 161 of these Guidelines, in the RTS on the minimum content of information mandate under Article 91 (10). Such notifications include: […] b) notifications to the competent authority assessing the suitability after the appointment or taking up of the position (ex-post jurisdictions) of a member of the management body and, where applicable, a key function holder. Such notifications should be made* ***~~not later than two weeks~~ in due time and within one month*** *after the* ***~~appointment~~ assessment by the entity****."*

Paragraph 201c: *"notifications to the competent authority (ex-post jurisdictions) assessing the suitability of members of the management body in its management function or the chair of the management body in its supervisory function in large entities, as further specified in paragraph* ***~~203~~202****"*

Paragraph 202: *"Competent authorities should require large entities to submit an ex-ante suitability* ***~~application~~ documentation*** *in accordance with Article 91(1d) of Directive 2013/36/EU. This* ***~~application~~ documentation*** *should be* ***~~made~~ sent*** *without undue delay and as soon as there is a clear intention to appoint a member, or based on the appointment decision and in any case before the person takes up their position. For members of the management body in its management function or the chair of the management body in its supervisory function it should be submitted at the* ***~~latest 30 working days before the prospective members take up their position~~ and in accordance with national legislation****."*

Paragraph 204: *"Notifications should at least include the documentation* ***including the personal data of the candidates for the position of member of the management body in its management function or the chair of the management body in its supervisory function and any available information at that time. ~~and information in accordance with Article 91 (1e) of Directive 2013/36/EU for member of the management body in its management function or the chair of the management body in its supervisory function and the RTS on the minimum content of information for such members, the chairperson, the heads of control functions and the CFO.~~****"*

Paragraph 206 should be deleted.

Paragraph 207: "*In the duly justified cases referred to in the second subparagraph of Article 91(1a) of the Directive 2013/36/EU, entities should be required to provide the complete documentation and information in RTS on the minimum content of information, together with the notification to the competent authority, within one month after the member has been* ***~~appointed~~ assessed by the entity***."

Paragraphs 217-226: A specific section of the Guidelines addresses the exchange of information regarding members of Management Bodies or Key Function Holders among Supervisory Authorities, when such information is already available to those Authorities (paras. 238 et seq.) as a result of suitability assessments or because it is otherwise relevant for the suitability assessment. In this respect, it is deemed necessary to specify that, within the European Union, entities already subject to supervision by a Supervisory Authority and already undergoing a fit-and-proper assessment procedure should be exempt from providing additional documents and information relating to suitability requirements, insofar as such information is already available to the Authorities. It is therefore suggested to outline a broader exemption regime for credit and financial institutions already supervised within the European area and under the Single Supervisory Mechanism (SSM). In particular, SSM credit institutions submitting a suitability application should not be required to provide information and documentation for the purposes of the individual or collective suitability assessment of board members — such as in the context of procedures for the acquisition of qualifying holdings in financial institutions — when such information is already available to the Supervisory Authorities, in full compliance with the applicable legal framework at both national and EU levels. Information flows and the exchange of internal data should be ensured among the competent Supervisory Authorities within the European Union, including any other competent Authority of the same Member State or of another EU Member State.

With regard to the periodic assessment of the suitability requirements of Key Function Holders, it is envisaged that the outcome of the assessment is reported to the corporate body appointing them and to the management body. In order to simplify the requirements, we suggest limiting periodic reporting to the management body only in cases where significant facts occur. This solution is fully consistent with the provisions of Article 91a, paragraph 2, of the Directive.

Below are the proposed amendments.

Paragraph 182: *"The responsible function within an entity should carry out the suitability assessment of Key Function Holders before their appointment and periodically, in line with the Article 91a paragraph (2) of Directive 2013/36/EU, and should report the assessment results to the appointing function and the management body.* ***As for the periodic assessment, a report to the management body is only provided in cases of events that can materially affect the suitability of key function holders.****"*

Paragraph 30 and 233 - Reasonable ground to suspect ML/TF activities or risks

We recognise the need for robust supervisory assessment procedures, but several AML-related provisions in Title VIII are overly prescriptive and risk extending suitability assessments beyond the scope of CRD VI. Entity-level supervisory findings should not automatically cast doubt on the suitability of all current or prospective board members; assessments must remain individualised and based on objective, demonstrable evidence.

In paragraph 233 any *"reasonable grounds to suspect"* - must rely on substantiated, objective information, not unverified sources such as adverse media or investigative journalism which could introduce subjectivity and undermine legal certainty. It is also essential to uphold the presumption of innocence. AML/TF-related concerns should not lead to indirect or anticipatory consequences for individuals without concrete evidence of personal involvement. The Guidelines should therefore clarify that entity-level deficiencies do not in themselves affect individual suitability and that any reassessment must be based on specific, substantiated facts attributable to the individual.

Question 10: Are the changes made in Title IX appropriate and sufficiently clear?

AFME has no comments in response to this question.

Question 11: Are the changes made to Annex 1 and Annex II appropriate and sufficiently clear?

The Draft Guidelines provide indications for the procedure to assess the Board's collective competence and include, in a specific annex (Annex I), a template that entities may use for this purpose. Among the introductory notes to the annex, it is specified that the matrix constitutes a tool supporting the entity's assessment activities and is to be used by banks on a voluntary basis.

It should be noted, however, that the information on the professional experience and competence of board members is excessively detailed. We therefore propose simplifying the entire template through a comprehensive review of its structure, in order to facilitate banks in using the sample.

Question 12: Is the table on scope of application of the Joint Guidelines appropriate and sufficiently clear?

AFME has no comments in response to this question.

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