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Dear Mr. Farkas,

***DB response to EBA draft guidelines for assessing the suitability of members of the management body and key function holders of a credit institution***

Deutsche Bank welcomes the opportunity to comment on the EBA's draft guidelines. We fully support the EBA's work to ensure that governance practices are consistent and rigorous across the EU and consider that the draft guidelines form a sound basis for assessments by institutions and by regulators.

However, no list of criteria can ever be exhaustive and, ultimately, judgement plays an important role in appointments. We therefore suggest some refinements to support the EBA's broad, principles-based approach. In addition, in the area of key function holders we believe that regulators already have sufficient powers to ensure their suitability. Our responses to the two consultation questions are below, with more detailed comments on the draft guidelines attached in Annex 1.

When it comes to requirements for assessing the management body, DB strongly supports common standards to ensure that transparent, rigorous and consistent processes for assessments are adopted by regulators across the EU. However, in several areas, changes are needed to accommodate important principles in national law.

For example, we agree with the EBA's proposal that, where material evidence exists to suggest lack of good repute, management body members should be considered unsuitable and not appointed. At the same time, to ensure that this is not inappropriately applied, the draft guidelines should explicitly state that the regulator should give due regard to the presumption of innocence and to national or professional body rules about data confidentiality. Moreover, there are several areas where the guidelines should be refined to accommodate specific aspects of German corporate law. These are specified in our detailed comments on the draft guidelines, set out in Annex 1.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'A. Procter'.

Andrew Procter  
Global Head of Government and  
Regulatory Affairs



**Question 1:** *While the principle of proportionality is a general principle within European legislation, it may be desirable to spell out this principle in more detail for the application of the Guidelines. Which criteria could be applied by institutions and competent authorities to differentiate the assessment process and the assessment criteria regarding the nature, scale and complexity of the business of the credit institution and what should such a differentiation look like?*

We strongly support the principle of proportionality but do not believe that it is necessary to spell out its specific application in these guidelines. Articulating in too much detail the criteria which could be used to differentiate the assessment process by type of institution could discourage the exercise of judgement by supervisors as well as by firms when determining whether an individual board member is appropriate to the particular circumstances.

A more detailed list of when rules apply would also undermine the principles-based approach necessary when dealing with the range of different board structures and arrangements in the EU. Rather than more detailed criteria, we would propose a more explicit statement that the proportionality principle applies throughout the guidelines. This will also be important when replicating these guidelines to other types of financial firms.

**Question 2:** *Should competent authorities be required by the Guidelines to assess the policies of institutions for assessing the suitability of key function holders aiming to ensure that institutions have appropriate policies in place ensuring that key function holders would fulfil the suitability requirements?*

We do not believe that additional powers and requirements are necessary for regulators in the area of suitability assessments for key function holders. The setting and review of policies on recruitment, background screening and other areas relevant to suitability and oversight of senior management are properly responsibilities of the management board. National supervisors can already assess any policies in place at a financial institution as part of their supervisory reviews and raise concerns if these are not achieving the outcomes intended or delivering against regulatory requirements.

Aside from the fact that regulators already have considerable powers to scrutinise policies which ensure suitability, we believe that there is also a risk in the EBA setting detailed requirements for the assessment of key function holders, as this concept does not have an equivalent in EU law. The EBA cites Article 11(1) of Directive 2006/48/EC, that it shall draft guidelines to assess the suitability of those who “effectively direct the business of the credit institution”. As a legal basis, it can reasonably be argued that this can broaden the EBA’s mandate to all members of management body, but the concept of key function holders exists in EU-level requirements only in the EBA’s internal governance guidelines. While it is important in practice to ensure sound policies and processes are in place within institutions to ensure suitability of senior management, the lack of a sound legal basis for specific requirements for key function holders leaves firms and regulators open to legal challenge, including from employees.

In addition, the draft guidelines do not make clear that the regime for key function holders is largely left to national regulators’ discretion and will vary considerably depending on the national regime in place. The intermingling of key function holder requirements with those for management body members further confuses this. One way to remedy this would be to have a separate chapter for key function holders. This should make clear that, while national regulators may conduct assessments of key function holders, there is no EU-level requirement to do so.



## **Annex 1: detailed comments on draft guidelines on suitability assessments**

### *Role and responsibilities of the credit institution:*

DB agrees that suitability assessments are primarily the responsibility of the credit institution (Article 4). In practice, the credit institution is likely to informally contact regulators before appointments. The guidelines should encourage this early liaison.

With regard to Article 3, we agree that institutions should specify the situations in which they would consider conducting a reassessment. We recommend that the competent authority should be required to do the same, in order to enhance transparency around its process for suitability assessments. We also endorse the suggestion that members of the management body make an annual declaration of any changes in their circumstances which would affect their suitability. This process should be sufficient to ensure continued suitability, in the absence of the specific situations defined as requiring reassessments to be considered.

Under German law the nomination committee is responsible only for recommendations for appointments of shareholder representatives to the supervisory board, while a special “Chairman’s Committee” of the supervisory board is convened for appointments to the management board. In order to accommodate this, the reference in Article 4 to the nomination committee should be amended to specify “or a body with an equivalent role”.

As outlined in our response to Question 2, we do not believe that Article 7, paragraph 2 is necessary. Firms should already have in place robust policies and processes for recruitment and background screening, not only for senior management, which supervisors can already assess and challenge. In DB’s case, we perform an additional level of reputational background screening for all employees who are appointed to director or managing director. It is not clear that additional requirements, for example, to have specific experience and reputation criteria for each individual position, are necessary to ensure suitable appointments.

We do not see any basis for the distinction in Article 8 between the supervisory board and management board. In either case, one has to have regard to the precise responsibilities of the individual and in either case there must be scope for actions to ensure that the individual is able to meet his or her responsibilities. This is also important for diversity on boards, allowing those with wider industry experience or new to board positions to be considered.

We also welcome that training may be provided as an alternative to non-appointment if supervisory board members do not meet some aspects of the experience criteria. As a matter of course, DB provides all new supervisory board members with extensive training: induction to the institution, on their legal and governance responsibilities and, if needed, in financial and accounting matters.

### *Role and responsibilities of supervisors:*

DB welcomes the transparency requirement for supervisors’ assessment process for management body member suitability (Article 10). We agree that competent authorities should establish a notification procedure and suggest that it should also be made publicly available alongside the process for assessments. Regulators should also set a time period within which they must notify their objections or confirm they are satisfied.

Under German law, the supervisory board is first elected, by employees and by shareholders, before the institution (and by extension the regulator) can conduct a suitability assessment. Management board members are assessed before appointment. In order to reflect this fact, in



Article 9, as well as in Article 6, it should be specified that formal assessments and notifications may occur after appointment if necessary. In practice, in both cases the institution is likely to consult the regulator informally, in advance. The guidelines should encourage this early liaison.

In order to ensure supervisory practices are harmonised, supervisors should be required to take into account the result of a suitability assessment by another EEA regulator. Article 11, paragraph 6 should change “may” to “shall”. However, supervisors should nonetheless conduct their own suitability assessment in full.

Finally, Article 12 says that “insufficient information” may be grounds for finding a member of the management body unsuitable. In some circumstances information may not be legally available to an institution (for example, not all of the items in paragraph 4 of Annex 1 will be able legally to be disclosed in all jurisdictions) and we suggest that this article should be qualified to reflect that fact. It should also give due regard to the presumption of innocence and to national or professional body rules about data confidentiality and reiterate the principle in Article 8 that corrective measures, such as training, are alternatives to non-appointments when members of the management body do not meet some aspects of experience criteria.

#### *Reputation criteria (Article 13):*

We strongly support paragraph 1, that absence of evidence to suggest lack of good reputation should be sufficient to conclude an appointee is suitable. The stipulation in paragraph 2 that a board member “should not be considered to be of good reputation if his or her personal or business conduct gives rise to any material doubt” could, however, be interpreted as allowing very broad discretion. This should be amended to “should not be considered to be of good reputation if the information reviewed as part of the assessment gives rise to any material doubt”.

When discussing current or past investigations or enforcement actions (paragraph 6, b and c) it should be expressly stipulated that the regulator should give due regard to the presumption of innocence and to national or professional body rules about data confidentiality.

Finally, paragraph 8 on business performance and financial soundness stipulates that competent authorities should take into consideration that the appointee was a director at an entity subject to rehabilitation or bankruptcy proceedings. It may be that the individual in question fulfilled their duties as a director and was not directly responsible for a business failure and, as such, the guidelines should explicitly state that in the case of bankruptcy or rehabilitation the specific role of the individual should be taken into consideration.

#### *Experience criteria (Article 14):*

We agree with the proposal in paragraph 3 that there should be a minimum technical knowledge requirement for supervisory board members in order to ensure that they are effectively able to challenge and oversee the management board. This is the main responsibility of the supervisory board under German law.

We welcome the flexibility as to how individual board members can meet these criteria. This is particularly important with respect to the supervisory board given that its members will include both employee and shareholder representatives. This flexibility should be subject to the assessment of the supervisory board as a whole and the principle that every individual member has enough knowledge and skills to oversee and challenge senior management. The wording of paragraph 3 should avoid the implication that academic qualifications alone can suffice for appointment to the supervisory board. As it currently stands the use of “or” contradicts paragraph 1, which recognises practical experience is needed.



The status of the footnote to Paragraph 7 is unclear. If these are skills that competent authorities have assessed previously, it should be made clear that these are examples, not expectations. Not all the requirements are sufficiently defined - e.g. independence of mind - or applicable to all management body members - e.g. business strategy is the responsibility of management, not the supervisory board - to be expected in all cases.

*Governance criteria (Article 15):*

DB strongly supports the intention to ensure that the management body can conduct its duties free from undue outside influence. However, the independence requirements should allow flexibility for reasonable situations where management body members have economic links within the institution or with shareholders. For example, in the case of wholly owned subsidiaries, shareholder representatives and employee representatives, as the latter are likely to have share-based incentive plans.

It is natural where the parent company is a majority or sole shareholder for the supervisory board members to come from within the group parent, but there is potential tension between these independence requirements and their duty as shareholder representatives of the parent company. Specific potential conflicts of interest for all board members should be actively managed within the institution - for example by recusal from voting or meetings - rather than automatically prohibiting board membership.