Template for comments

Consultation on the draft ECB guide to fit and proper assessments

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General comments

For general remarks that cannot be included in the specific comments table

[Comment regarding Foreword (p. 3)]

According to the foreword, the draft guide is a practical tool to be updated regularly and should not prejudice applicable national laws. It has been prepared in order to facilitate the conduct of the fit and proper assessments of the management body members and to reach, where possible, common, best and harmonised practices within the scope of the Single Supervision Mechanism. Such approach brings clarity, but on the other hand, enough flexibility to the supervised entities to ensure its application to different business and governance models. EACB welcomes these principles, as the core company legislation of co-operative banking sector stems from national cooperative laws and well-established principles of co-operative business forms. Moreover, EACB member organizations are committed to maintain and develop robust and well-functioning governance models, in order to create added value to their customer members, as well as to foster the local economies.

In order to clarify the importance and precedence of the Member States' national laws, EACB suggests including a mention that in the event there is a conflict, a contradiction or a discrepancy between the Guide and applicable national laws the latter will always prevail. As we understand the ECB's intention to harmonize the supervision practices, more emphasis should, however, put into the Member States' national legislation. The reason behind this is that the EU level 1 legislation does not harmonize the core aspects of the company laws. Moreover, the CRD IV gives some discretion to the national legislators when implementing it into the national level. Therefore, fully harmonized approach is not possible in all cases.

On the further parts of our response, we will bring to your attention some specific issues in which we see possible conflicts with the Guide and the Member States' national legislation, among other comments we have.

Template for comments

#REF!

Please enter all your feedback in this list.
When entering your feedback, please make sure:
- that each comment only deals with a single issue;
- to indicate the relevant article/chapter/paragraph, where appropriate;
- to indicate whether your comment is a proposed amendment, clarification or deletion.

Deadline: 20 January 2017

ID	Chapter	Paragraph	Page	Type of comment	Detailed comment	Concise statement why your comment should be taken on board	Name of commenter	Personal data
1	1 - Framework	1.2	4	Amendment	The Guide should expressly recognize that the competent authorities must also follow the national legislation beyond the scope of CRD IV	This subchapter describes the relation of the Guide to the CRD IV and CRD IV based national legislation. As the CRD IV requires minimum harmonization EACB welcomes the recognition of the differences between various member states' legislation regarding implementing the CRD IV. The Guide should expressly recognize that the competent authorities must also follow the national legislation beyond the scope of CRD IV. The core aspects of the organization of different business entities are covered by national laws, including well-established legal principles and legal traditions. Very much of such legislation is not harmonized by the CRD IV or other EU legislative instruments. National company laws set many core requirements for the governance structure and its functioning, which the supervised entities are obligated to follow. We would like to highlight that company legislation is not necessarily codified in details, but it may stem from principles, based on flexible statutes, developed through case law or recognized otherwise. Not only expressly codified provisions of the national laws, but also such principles should prevail the Guide. The Guide also recognizes that the ECB has the power to establish certain supervisory practices. EACB member organizations support the ECB's goal on creating uniform supervisory practices within the SSM as it has many benefits, including institutions' equal treatment. As we have explained above, there are many variations in implementing CRD IV as well as in the national company laws. Supervisory practices should not de facto interfere with the national company laws and especially hamper the applicability of the proportionality principle. Moreover, establishing uniform supervisory practices cannot be used for de facto harmonizing the legislation beyond the level 1 legislation. EACB members find that the Guide would go too far beyond what is stated in the level 1 legislation.	#REF!	Publish
2	1 - Framework	1.2	4	Deletion	EACB suggests the sentence in brackets "(e.g. the choice between ex ante supervisory approval of an appointment or ex post notification of an appointment to the supervisor)" should be omitted.	Possible introduction of ex ante suitability assessment procedure and requiring the competent authority's approval prior to the nomination of the management body members would go beyond the mandate of the competent authorities. Ex ante assessment requirement or preference is not included in the CRD IV, nor it is introduced in many national company laws or other applicable legislation either. As the CRD IV remains silent in this sense, the EU legislator's intention has been to leave this question under the discretion of each member state. Ex ante assessment requirement is unfamiliar in many Member States' legislation and not in line with the well-established corporate governance culture. Even though ex ante assessment procedure is seen as merely supervisory procedural matter, it de facto interferes with the level 1 legislation and its purpose, but very likely also the national laws. De facto it could inappropriately narrow the legal powers of the annual general meeting (or similar forum) by creating a prejudice for nominations based on democratic vote. A pressure to select nominees only from an established pool of candidates could be created. Our view is there fore that ex ante assessment procedures and requiring an a priori approval cannot be introduced without amending the level 1 legislation in the EU or Member State level. Ex ante assessment obligation should not prejudice any nominations by the general meetings. Furthermore, ex ante fit and proper assessment procedure, as briefly referred in the subchapter 1.2 and introduced in more detail in the EBA Draft Guidelines, would not be feasible for the following practical reasons: • The number of fit and proper assessments will likely increase significantly. From the practical perspective, some institutions have indicated that they should prepare at least three assessment file per open position, instead of one. This would be necessary in order to anticipate possible refusals by the competent authorities and give to the general meeting a choice between the rest of the two candidates. • Under the circumstances explained above, it is very likely that the competent authorities have no sufficient resources to deal with a significant increase of assessment files. This is especially true in the co-operative banking sector, where there are hundreds or thousands of independent co-operative banks that have their own management bodies and key function holders. For the reasons above, EACB suggests the sentence in brackets "(e.g. the choice between ex ante supervisory approval of an appointment or ex post notification of an appointment to the supervisor)" should be omitted. EACB will also give its remarks on this matter to the European Banking Authority in the context of the ongoing public consultation.	#REF!	Publish
3	1 - Framework	1.3	5	Clarification	ECB Draft Guide is intended to comply with the EBA Guidelines. As the final EBA Guidelines are not published, we find that the ECB should have launched the public consultation on its own Draft Guide only after the adoption of the first. Thus, the stakeholders, including the financial industry must give their comments on based incomplete information. EACB members find it important that the ECB should give the opportunity for the stakeholders to give comments on the second draft version of the ECB Guide that is revised once the EBA final Guidelines have been published.		#REF!	Publish

4	1 - Framework	1.4	5	Clarification	The Guide should clearly include a mention that ECB does not intend to prefer any particular governance structure through the Guide or any supervisory practices, and the Guide applies to all types of governance arrangements as defined by national company laws. Explicit references to the recitals 55 and 56 of CRDIV should be included in the Guide.	Recital 55 of CRD IV: “Different governance structures are used across Member States. In most cases a unitary or a dual board structure is used. The definitions used in this Directive are intended to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aimed at a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competences in accordance with national company law.” Recital 56 of CRD IV: “A management body should be understood to have executive and supervisory functions. The competence and structure of management bodies differ across Member States. In Member States where management bodies have a one-tier structure, a single board usually performs management and supervisory tasks. In Member States with a two-tier system, the supervisory function is performed by a separate supervisory board which has no executive functions and the executive function is performed by a separate management board which is responsible and accountable for the day-to-day management of the undertaking. Accordingly, separate tasks are assigned to the different entities within the management body.”	#REF!	Publish
5	2 - Organisation	2.1	6	Clarification	It is likely that the notification forms throughout the SSM will be harmonized to some extent. If this was the case, and as the notification forms and their content play a significant role in the fit and proper assessments, EACB suggests that the ECB would give stakeholders the opportunity to comment on such forms once the final EBA Guidelines have been published.		#REF!	Publish
6	3 - Principles	Principle 1	7	Amendment	"All information necessary": ECB should introduce clarification and practical tools in order to avoid uncertainties regarding "all information necessary".	As EACB fully understands that the competent authorities should be provided with all relevant information, a broad power for requesting additional information may create severe obstacles and uncertainties in the assessment process, especially in the context of ex ante assessments. For this part, we refer to the para. 166 of the EBA Draft Guidelines of suitability assessment (EBA/CP/2016/17), according to which the time limit for the competent authority’s assessment process should be no less than three (3) months, and not to exceed four (4) months, and such time limit starts when the “complete” documentation is submitted to the competent authority. When the authority has a broad discretion on deciding on the completeness of the assessment file, the supervised entities would have to deal with major uncertainties regarding when the suitability decision would be expected. This creates major difficulties in organizing and setting up the annual general meetings and other arrangements in order to nominate the management body members. The worst case scenario is that the institutions might have to reschedule already decided annual general meetings in order to have the fit and proper decisions on time before the nominations. Therefore, we suggest that the ECB would introduce practical tools in order to avoid such uncertainties. The number of competent authority’s additional information requests should be limited during the above-mentioned time frame. Furthermore, in order to ensure that the assessment decisions will be available when the official nomination takes place, the time limit should begin as of the date when the supervised entity submits its initial application.	#REF!	Publish
7	4 - Scope		9	Amendment	EACB suggests that the Guide should expressly state that it does not intend to give guidance on the allocation of tasks between different legal and organizational bodies. It should rather underline that the governance structure should result in an efficient system of “checks and balances”. Therefore, the words “(executives)” and “(non-executives)” should be removed from the texts. Otherwise the wording may lead to too far-reaching interpretations regarding allowed governance structures.	The second paragraph of the chapter 4 indicates that the management body’s supervisory function consists of non-executive members, and in turn, management function of executive members. On page 11 (under the headline “Stage 1 Assessment against thresholds”) the table indicates that the management body in its management function consists of CEO and directors. This might lead to an interpretation that the supervised entities should clearly divide the tasks of the supervisory and executive functions into separate legal bodies (that consist of directors). Any such interpretation must be avoided. In many cooperative banking groups as well as other financial institutions it is very common that the management function consists of CEO and some senior management key persons. Such organizational function is often called, for example, management team. This is not a statutory (legal; regulated by the law) body of the institution, but established by internal governance arrangements. Under the leadership of CEO, such function is responsible for implementing the decisions made by the board of directors. The board of directors, in turn, is responsible for the supervisory function, including making strategic decisions. This governance arrangement is characteristic particularly in models where there is only one statutory management body. However, in some governance systems, both board of directors and supervisory board exist. Such management bodies are also statutory organizational bodies according to the applicable national cooperative and other company laws. There are many variations regarding the allocation of supervisory and management functions of these bodies. The board of directors may consist of executives. Where proper checks and balances are established, the Board of Directors may have somewhat broader powers than a management team (as explained above). Supervisory board monitors the effective management by the board of directors, but it also may have some duties regarding strategic decision-making or approving the risk appetite framework. Furthermore, we believe that the dichotomy between executive function and supervisory function, established by the CRD and maintained in these guidelines, leads to an uncomplete picture. In fact, it does not mention other central roles of statutory bodies, like the competence for the company strategy. However, such other roles are very important for the understanding of the specific governance system: While in some jurisdiction the company strategy is more in the hand of the executive function and the supervision of its implementation in the hands of the supervisory function, the company law in other jurisdiction may stipulate that it is the supervisory function which has the decisive role regarding the company strategy. Other jurisdiction may even have a specific body to define and monitor the implementation of the company strategy. The guidelines also have to reflect this. In particular, the management body in its supervisory function should not be understood all cases as mere monitoring and overseeing body. Due to the different variations of the governance models among the Member States, EACB suggests that the Guide should expressly state that it does not intend to give guidance on the allocation of tasks between different legal and organizational bodies. It should rather underline that the governance structure should result in an efficient system of “checks and balances”. Therefore, the words “(executives)” and “(non-executives)” should be removed from the texts. Otherwise the wording may lead to too far-reaching interpretations regarding allowed governance structures.	#REF!	Publish
8	5 - Assess crit	5.1	10, 11	Amendment	Management body’s collective experience should be emphasized instead of individual member's experience.	According to the Article 91(7) of the CRD IV, “The management body shall possess adequate collective knowledge, skills and experience to be able to understand the institution’s activities, including the main risks.” However, the ECB Guide introduces an extensive list of factors of knowledge/skills/experience that every board member is expected to possess (see pages 10–11). As the EACB understands the importance of highly skilled management body, the emphasis should put into the collective knowledge, skills and experience instead of focusing on each and every board member individually, as clearly provided by the CRD IV. Otherwise the ECB Guide would go beyond the provisions of applicable legislation. Furthermore, it would not give enough room for sufficient diversity of the management body.	#REF!	Publish

9	5 - Assess crit	5.1	11, 12	Amendment	ECB should introduce concepts that streamline the fit and proper assessments in the local bank level.	EACB welcomes Introducing presumptions on the management body members' sufficient experience. To some extent this will reduce the administrative burden imposed on both banks and competent authorities. We find that such presumptions mainly apply to the management body members of larger commercial banks and central institutions of co-operative banking groups, whereas in the local bank level more detailed assessment might be still needed. As the fit and proper assessments in the local level would comprise the most significant part of the workload both for the banking groups and authorities, the original purpose of the presumptions are likely to be annihilated without introducing streamlining guidance that applies to the local level. Therefore, EACB encourages the ECB to take more proportionate approach in this part, and in particular, introducing presumptions or other streamlining means which would be applicable in the local bank level. From the proportionality perspective, in the local level the size and complexity of the banking business cannot even be compared to the large international corporate and investment banks. Moreover, co-operative banks belonging in a co-operative banking group often receive remarkable support, in particular regarding risk and liquidity management, as well as offering products and services, from the central bodies or central credit institutions of the group. For these reasons, among others, more proportionate approach, especially at affiliated local bank level or subsidiary level, would be necessary. Moreover, in order to ensure the level playing field with larger and more complex commercial bank peers and to reduce the unnecessary administrative work within the competent authorities the ECB should also pay attention in introducing concepts that streamline the fit & proper assessment process of the local banks as well.	#REF!	Publish
10	5 - Assess crit	5.1	12	Clarification	It should be clarified in the Guide how fit and proper assessment criteria is applied to employee representatives.	In many Member States the national legislation requires appointing certain employee representatives to the management body. In some states such nominations will be made by others than shareholders, such as the respective labour unions, for which reason the institutions themselves do not necessarily have a possibility to influence the nominations. Therefore, the Guide should express how the fit and proper assessment should be conducted these cases.	#REF!	Publish
11	5 - Assess crit	5.2	13	Clarification	Presumption of innocence should be recognized clearly. / Only relevant legal proceedings should be considered. / Legal proceedings against entities should be considered only if the appointee had an actual role in such entity.	ECB should clarify in the text that the presumption of innocence as recognized in the national laws and constitutions as well as Article 6 (2) European Convention of Human Rights should be respected. Therefore, the Guide should indicate that not the pending legal or administrative proceeding or prosecution (etc.) itself, but the possible undisputed facts in connection with it may be taken into account in the suitability assessment. Also, pending proceedings should be taken into consideration only when these are relevant enough for the suitability assessment. While there may also be a reputational risk for the bank in certain cases, the ECB should only presume such a risk, where there is very manifest evidence that a pending court case could severely damage the reputation and thus have a relevant impact. Legal proceedings involving legal entities should only be taken into consideration if they are based on facts that occurred at the time when the appointee had an actual role regarding alleged misconduct in such entity.	#REF!	Publish
12	5 - Assess crit	5.3	14-	Amendment	The Guide should address how the criteria will be applied to different group structures.	EACB supports the ECB's approach regarding formal independence ("independent directors") according to which such matter is left solely to the national legislation. ECB should limit its approach only to the independence of mind criteria, as suggested in the draft Guide. The CRD IV or other applicable legislation does not give a mandate to the competent authorities to give further guidance on formal independence. Moreover, the corporate governance principles and traditions vary among member states, for which reason harmonization in this field would not be even feasible. We very much regret that, unlike the Basel Committee's Corporate Governance Principles for Banks (July 2015), the Guide does not explicitly address the application of the Guide to different group structures (see Principle 5 of the BCBS publication). Especially the levels of the affiliated local bank/subsidiaries and the parent/central institution have to be seen in different light. The preference should be given to a strong governance of the entire group. One reason for this is that there are group policies that have to be implemented and respected at the level of subsidiaries and other affiliated institutions. Emphasis on independence at local bank/subsidiary level would be contrary to a strong group governance.	#REF!	Publish
13	5 - Assess crit	5.3	14	Clarification	The Draft Guide requires that the institutions must have governance arrangements in place for disclosing, mitigating, managing and preventing conflicts of interests. In terms of disclosing conflicts of interests, it should be clarified that only such conflicts of interests are subject to disclosure that are material and cannot be mitigated or otherwise managed. Also, it should be made clearer that disclosures in this extent means communication to the competent authority, as expressed on the page 15 regarding "Conflict of Interest Statement".		#REF!	Publish
14	5 - Assess crit	5.3	14	Amendment	"Adversely affects the interests of the supervised entity" should be deleted.	The definition of conflicts of interest is imprecise and lacks clarity, as the meaning of 'adversely affect the interests' is not explained. The national legislation already provides clear definitions of conflict of interests situations (and also of related parties) as well as of the different measures available to mitigate or manage the conflicts. Therefore, such definitions should not be included in the ECB Guide. The ECB Guide also contains a list of material conflicts of interest notwithstanding national legislation.	#REF!	Publish
15	5 - Assess crit	5.3	14 -	Clarification	ECB and EBA should use same terminology and structure regarding "independence of mind".	EACB notes that the ECB and EBA have a diverging approach regarding independence of mind. Whereas the EBA Draft Guidelines indicate that the conflicts of interest would be one factor in independence of mind criteria, but in the ECB draft Guide a distinction is made between conflicts of interests and independence of mind. For this reason, EACB suggests that the ECB and EBA would use the same terminology and structure, as divergences in this extent likely creates undesired vagueness and inaccuracy.	#REF!	Publish
16	5 - Assess crit	5.3	14-	Clarification	ECB Guide should contain a definition of a "conflict of interest". ECB should use the same definition than used in EBA Guidelines.	ECB Draft Guide does not contain a definition of "conflict of interest" although this is one of the core concepts of the Guide. In order to avoid any misconceptions, EACB suggests that such definition should be expressly clarified. EBA Draft Guidelines on internal governance (EBA/CP/2016/16) already contain a definition of conflict of interest ("a situation of conflict between the duty of a person and private interests of an individual, which could improperly influence the performance of his or her duties and responsibilities", see p. 14). ECB Guide should use the same definition or reference to the corresponding part of the EBA Guidelines should be included.	#REF!	Publish

17	5 - Assess crit	5.3	14	Deletion	EACB suggests that words “perceived (i.e. in the mind of public)” should be deleted.	The perceived conflicts of interest which only exist in the mind of the public should not be a factor in fit and proper assessments. A perceived conflict of interest refers to a situation where no competing interest (or conflict) exists but the circumstances, for some reason, give the public the impression of a conflict. In addition, the perceived conflicts of interests are not predictable and cannot be prevented in advance. EACB finds that such factors may be taken as a part of assessing the nominee’s reputation, but not as a part of conflicts of interests. As conflicts of interests assessments should be based on facts, EACB suggests that words “perceived (i.e. in the mind of public)” should be deleted.	#REF!	Publish
18	5 - Assess crit	5.3	14, 15	Deletion	The detailed examples of material conflicts of interest should be deleted from this draft guide. The matter should be left to national discretion.	The detailed examples of material conflicts of interest should be deleted from this draft guide. This matter should be left to the application of national laws (i.e. MIFID directive based legislation) and other guidance and regulations (internal control reviewed in the context of CRDIV) already implemented by the EU banks. There are already many measures, policies and procedures in place at the level of the management bodies to mitigate conflicts of interest (such as disclosure requirements and abstention from voting requirements).	#REF!	Publish
19	5 - Assess crit	5.3	15	Clarification	ECB should clarify that the conflicts of interests as stated in the Table 1 can be mitigated.	EACB welcomes the ECB’s approach regarding that the conflicts of interests may be mitigated. EACB finds that Table 1 is too categorical. Many possible conflicts of interests that arise in the circumstances mentioned in the table can be cured through mitigating measures. This should be clearly stated in the Guide. Compliance policies in the institutions already provide strong mitigating measures to prevent any potential conflicts of interest within the management body (duty for the board member to disclose possible conflicts of interests, abstention from voting requirements, etc.). This conflict of interest prevention mechanism may be included in articles of association, internal regulations and policies, and/or director’s charter.	#REF!	Publish
20	5 - Assess crit	5.3	14, 15	Clarification	Clarification needed regarding approval of certain commercial transactions.	In some jurisdictions it is regulated that certain business transactions with the management and related parties do require the approval of the management body. Pursuant to Chapter 1.4 the NCAs have agreed to interpret and develop national law in line with these policies. Therefore the requirements of Table 1 concerning material personal and commercial relationships have to be adopted in such a manner that they are in line with the national legislative requirements regarding the obligatory approval of certain transactions by the body.	#REF!	Publish
21	5 - Assess crit	5.3	15	Deletion	EACB suggests that the shareholding threshold of 1% should be omitted from the Guide. At least, it should be explicitly stated that such threshold does not prevent member credit institutions’ representation in the banking groups’ central institutions or parent entity’s representative’s nomination in the subsidiary institution.	EACB welcomes clear guidance that the shareholder representatives in the management body are accepted (on page 15). However, such principle should not be annihilated by introducing additional guidance, in particular setting shareholding threshold of 1% as a factor that could constitute a material conflict of interest. This would lead to unintended consequences in the governance of different banking groups and parent institution’s control over its subsidiaries. Shareholders/owners and their representatives represent the common interest of the ownership community, which should not lead to an interpretation that ownership creates a conflict between the member’s private interests and the institution. EACB does not believe that shareholding or other ownership interest itself would be a decisive factor in the light of conflict of interest assessment, but possible conflicts can be mitigated. Based on the draft Guide, it would be unclear whether relevant owners’ representatives of the institutions would be allowed to be nominated to the management body of the institution. It should be made clear in the Guide that such ownership threshold does not prevent member co-operative banks’ or parent institutions’ representatives nominations to the management bodies of subsidiaries or affiliated institutions. In co-operative banking groups it is essentially important for the governance of the entire group/network that the member credit institutions or their representative organizations or entities are well represented in the central organization’s management body, despite of the ownership or other economic ties between such institutions. Central institutions and their subsidiaries often provide core functions and services for the entire banking group, for example risk and liquidity management, product management and development, and ICT. Many cases the strategy of the entire banking group is decided in the bodies of the central institution. If the member credit institutions’ representation in the decision-making process and supervision of the central institution were interrupted it would have significant negative impacts of the coherence of co-operative banking groups. Moreover, the parent entity’s representatives in the subsidiaries’ management bodies is necessary for the robust and efficient governance of the groups. Efficient group governance is highlighted in the Basel Committee Guidelines on Corporate governance principles for banks (July 2015). Therefore, the Guide should not prevent the parent entity’s representatives taking part in the management and governance of the subsidiaries. Owners’ and shareholders’, particularly majority shareholders’ and other parent entities’ right to nominate appropriate number of their representatives in their subsidiaries’ management bodies should be respected. According to the Accounting Directive (2013/34/EU), consolidated financial statements are required when the entity “has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking” (see Article 22 (1)(b)). This emphasizes a parent entity’s control over its subsidiaries. As the proposed guidance regarding shareholder representatives would significantly limit the parent entity’s right to nominate members to its subsidiary’s management body, such rule would likely be in conflict with binding accounting legislation and lead to unintended consequences. Moreover, setting a shareholding threshold would likely interfere with the national law regarding formal independence criteria (“independent directors”). EACB’s understanding is that shareholding and other investments are criteria to be taken into consideration in determining formal independence instead of independence of mind or conflicts of interests. As the Guide provides that matters of formal independence criteria are left to the national legislation, ECB should not introduce any shareholding thresholds in its Guide. Mere shareholding does not constitute a situation where the management body member and the institution have a material conflict of interest in terms of the his/her duties as a management body member and private interests of such individual. This is the case particularly in co-operative banks, where the voting rights of members as well as the profit expectations are relatively limited. Co-operatives, corporations and other business entities, including financial institutions, are required to create value for their shareholders, owners and members. Therefore, the mere ownership interest represents the common interest of the entire owner community, but not the interest of such private individual. EACB highlights that a conflict of interests arises when there is a conflict between the management body member’s duties towards to the institution and his or her private interests (see page 14 of the EBA Draft Guidelines on internal governance). Possible private conflicts of interests between the shareholder and the institution arise from other factors than mere ownership interest, and they can be mitigated through that the management body member abstains from voting and decision-making in matters where such member and the institution have conflicting interests regarding the member’s private interests. Therefore, EACB suggests that the shareholding threshold of 1% should be omitted from the Guide. At least, it should be explicitly stated that such threshold does not prevent member credit institutions’ representation in the banking groups’ central institutions or parent entity’s representative’s nomination in the subsidiary institution.	#REF!	Publish
22	5 - Assess crit	5.3	15	Amendment	Table 1/Loans: It should be expressly stated that a “personal loan” contains not only housing and other consumer credit but also loans granted for professional purposes (such as loans for entrepreneurs/sole proprietors). EUR 100.000 threshold is too low for performing loans. More appropriate level would be, for instance, EUR 500.000. Instead of setting amount thresholds for loans, the emphasis should be given to creditworthiness.	A co-operative society’s members’ sufficient representation is a core principle of the management of a cooperative. For example, the Statute for a European Cooperative Society (Council Reg. 1435/2003) Art. 42 provides that “Of the members of the administrative organ, not more than one quarter of the posts available may be filled by non-user members.” Independence of mind / conflicts of interests test should not focus on factors in a way that would disqualify too many (otherwise) qualified people from appointing as members of management bodies. The core idea of the co-operative banking business and governance model is that the users of bank’s services should be allowed to take part in the governance of the co-operative bank to supervise the daily management of the bank. This ensures that the members of the management bodies share the co-operative values, but also have sufficient knowledge on the local economies and other circumstances. A co-operative bank membership may be a prerequisite for becoming a member of a management body, according to the national laws or the charters (bylaws) of the co-operative banks. In this context, loans (including the 100.000 EUR threshold) become relevant. Even though most housing and consumer loans would not constitute a material conflicts of interest, there are still following uncertainties and possible unintended consequences to which the current wording may lead: • The definition of a “personal loan” is unclear. Loans granted for professional purposes should not be discriminated in this sense. Therefore it should be expressly stated that a “personal loan” contains not only housing and other consumer credit but also loans granted for professional purposes (such as loans for entrepreneurs/sole proprietors). • EACB finds that EUR 100.000 threshold is too low for performing loans. More appropriate level would be, for instance, EUR 500.000. • Instead of setting amount thresholds for loans, the emphasis should be given to the creditworthiness of the debtor, as customers with high creditworthiness do not have difficulties in refinancing their loans through other institutions available in the market. Therefore, such customers are not likely to have lack of independence of mind, as they will not be under economic pressure.	#REF!	Publish

23	5 - Assess crit	5.3	15	Clarification	Table 1: "Non-preferential" must be clearly defined.	The meaning of “non-preferential loan” should be clarified in the Guide. According to the current wording, it is unclear whether “non-preferential” relates to possible preferred pricing of the loans, or whether it is a question of priority order of debts. If a “non-preferential loan” relates to pricing, it should be made clear that the same pricing as provided for the employees is not a “preferential treatment” as granting the same loan pricing as for employees is a very widespread procedure in Europe which hardly can be changed. In turn, if “non-preferential loan“ is related to the priority order of debts, the Guide should clearly indicate this. Also, it should be made clear that a secured loan does not in every case fall into the category of “preferential loans”.	#REF!	Publish
24	5 - Assess crit	5.3	15	Clarification	The Guide should clearly provide that national requirements regarding certain representatives in the management bodies must be respected.	In some Member States the national laws require a presence of representatives directly elected by local or regional authorities or public bodies. Therefore, the Guide should clearly provide that it does not prevent to comply with such national requirements.	#REF!	Publish
25	5 - Assess crit	5.3	15	Amendment	In the light of proportionality, political factors should be adjusted in order that the political power should be taken into consideration, when the political mandate or political activity has an impact on or is related to the bank (institution) itself.	The draft Guide takes too categorical approach on political factors overall, as it does not give further description on “high political influence”. This may lead to interpretation that political influence would cause a material conflict of interests, even if the political mandate does not have an impact on the bank or its business or risk management. In the light of proportionality, political factors should be adjusted in order that the political power should be taken into consideration, when the political mandate or political activity has an impact on or is related to the bank (institution) itself.	#REF!	Publish
26	5 - Assess crit	5.4	16 -	Amendment	Synergies on use of time should be taken into consideration.	The ECB Guide should also take into consideration that the mandates hold within the same banking group generate synergy – not time burden and allow consistent control within the group. These cases time burden of each directorship should not be over-emphasized. According to the ECB the supervised entity needs to deliver a detailed assessment of time commitment. Due to the possible connection of the mandates of the appointee within a banking group a lot of information is exchanged in several meetings. Thus some mandates are less time-consuming than others because some information is already known in advance by the appointee. It is not always feasible to make a distinct allocation of the time commitment of the appointee.	#REF!	Publish
27	5 - Assess crit	5.4	17	Deletion	Bullet point "confirmation that ongoing learning, development, and crisis buffers have been provided for“ should be deleted.	ECB draft Guide (as well as EBA Draft Guidelines) require that an appropriate time buffer should be taken into consideration in time commitment assessment. However, circumstances such as unexpected court cases or crisis situations are nearly impossible to be considered in advance. Therefore, requirement on time buffer should be deleted.	#REF!	Publish
28	5 - Assess crit	5.4	17, 18	Deletion	Mandates both in qualified holdings and groups should be counted together as one. It should be clarified that the counting rules do not prevent persons from becoming members of the management bodies of central institutions within the same IPS scheme.	According to privileged counting rule the ECB is counting directorships in undertakings in which the institution has a qualifying holding and directorships within the group of undertakings separately without any further explanation (see figure 2). Such privileged counting rule would not be reasonable, taken into consideration the group governance and Member States' national legislation. It is a central responsibility of a management body member of the parent undertaking to control the subsidiaries and the undertakings in which the parent undertaking holds a qualifying holding. In practice many employees of the parent undertaking delivers input for those members of the supervisory board that the parent undertaking has nominated in these undertakings. There is no difference made whether the parent undertaking holds 51% or 49% of the shares. Privileged counting rule may inappropriately interfere with national laws. For example, Austrian legislation treats mandates both in subsidiaries and qualified holdings “in the same bucket”. The separate counting as proposed in the ECB draft guide leads to severe distortions. For example, an executive director of the parent undertaking would have to withdraw from a directorship he rightfully held in a former subsidiary only because the parent undertaking sells some shares and loses the majority in another undertaking. ECB should clarify that the guide does not prevent persons from becoming members of the management bodies of central institutions within the same IPS scheme whose mandates are otherwise privileged by CRD IV (see Art 91 (4) CRD IV).	#REF!	Publish
29	5 - Assess crit	5.5	18, 19	Amendment	ECB should amend 5.5 to underline an assessment of the appointee on the basis of the collective experience and skills of the management body and not a case by case assessment for all areas of expertise mentioned for each appointee.		#REF!	Publish
30	5 - Assess crit	5.5	19	Amendment	The Guide should not explicitly require nomination committee’s approval in every case, or at least it should be clarified that nomination committee’s involvement is not possible in every situation.	The draft Guide states that the supervised entity should provide a short reasoned statement on how the appointee will contribute to the collective suitability needs and specify that in significant institutions such statement should be drafted with the involvement of the nomination committee (see footnote 30). EACB notes that nomination committee’s involvement is not possible when a candidate, who is not proposed by the nomination committee, is nominated to the management body. Another example is an employee representative who has been nominated by the respective labor union or by employees, as defined in the national laws. Nomination committee does not necessarily have a role or even authority to prepare a nomination proposal these cases. Therefore, the Guide should not explicitly require nomination committee’s approval in every case, or at least it should be clarified that nomination committee’s involvement is not possible in every situation.	#REF!	Publish
31	6 - Interviews	6.5	21	Deletion	Subchapter 6.5 should be deleted. Alternatively, this subchapter should be amended so that the appointee has the right to choose the language (among the official languages of the EU) to be used in the interviews, without setting any language as a presumption.	Subchapter 6.5 sets a presumption of using English language in the interviews if the supervised entity has agreed to English as the language of formal communications with the ECB. We would underline that if the appointee wanted to use another language, especially his mother tongue, he should be allowed to do so. The wording of the draft Guide could be interpreted in a way that the appointee should actually take some proactive steps in order to be interviewed in other language. That should not be necessary. EACB emphasizes that the language the institution has agreed to use with the ECB in formal communications cannot be a decisive factor or even a presumption to be used in the interviews with a particular appointee. Especially the management body members of banks, which are not operating in an international environment may not practice English to a degree which allows them to stand a test in English. Non-native English speakers could be severely disadvantaged. Moreover, all official languages of the EU must be put in the same position, and the appointee's right to use his/her own language should be appropriately protected. Therefore, subchapter 6.5 should be completely deleted. Alternatively, this subchapter should be amended so that the appointee has the right to choose the language (among the official languages of the EU) to be used in the interviews, without setting any language as a presumption.	#REF!	Publish
32	7 - Assess proc			Clarification	It should be clarified that any new appointment, change in role, or new fact does trigger the assessment obligation only regarding those members that are affected, but not to the entire management body.	EACB welcomes the ECB’s approach regarding factors that trigger the suitability assessment. According to the Guide, the changes in the management body (changes of roles and renewals) trigger the suitability assessment obligation only if required and defined by the national law. Thus, the focus of suitability assessments is in new appointments. Such approach, that respects the national laws, should be retained in the final Guide. EACB welcomes the proportionate approach taken by the ECB (the last paragraph “A proportionate approach is applied to most of the smaller entities…” before headline “Change in the management body”). It should be clarified that any new appointment, change in role, or new fact does trigger the assessment obligation only regarding those members that are affected, but not to the entire management body.	#REF!	Publish

33	7 - Assess proc	7.1	22, 23	Amendment	It should be clarified that where there is a change of role in the management body, the new assessment should only be limited to the areas in where higher suitability requirements apply compared with the previous role.		#REF!	Publish
34	7 - Assess proc	7.1	23	Deletion	sentences on exit interviews ("An exit interview may be held…") should be omitted as there is no legal basis and need for exit-interviews or other actions regarding fit and proper assessments in case of resignation. A resignation itself should not trigger interview obligations or any other obligations, unless there are other reasons for conducting suitability assessments, such as major changes in the management body members' roles.	Guidance regarding resignations should be omitted to the extent it does not deal with the suitability assessment of the members of the management body. Therefore, sentences on exit interviews ("An exit interview may be held…") should be omitted as there is no legal basis and need for exit-interviews or other actions regarding fit and proper assessments in case of resignation. A resignation itself should not trigger interview obligations or any other obligations, unless there are other reasons for conducting suitability assessments, such as major changes in the management body members' roles. Guidance regarding resignations would also go beyond of the scope of the guidelines as such interviews do not actually deal with the suitability assessment of management body members or key function holders.	#REF!	Publish
35	8 - Decision	8.1	26	Amendment	EACB suggests that bullet point "probationary period below the level of the management body" should be amended as follows: "qualified training period below the level of the management body".	EACB welcomes that the ECB takes a decision after every fit and proper assessment. According to the Draft Guide, a probationary period below the level of the management body could be used as a condition for appointment. There are some uncertainties of the substance of this "probationary period": • EACB would like to note that probationary periods are always subject (and not always foreseen in national legislation) . • Moreover, we believe that in a majority of cases it is not a probationary period that allows to obtain sufficient knowledge and experience but a "qualified training period below the level of the management body". Once such training period is done, the condition would be fulfilled. Therefore, EACB suggests that this bullet point should be amended as follows: "qualified training period below the level of the management body".	#REF!	Publish
36	8 - Decision	8.1	26	Clarification	Regarding "failure to comply with a condition", the ECB Guide should provide substantially more clarity on the legal aspects of the conditions	For more complex cases the ECB Guide lacks a clear legal analysis of the nature of the conditions. The indication that "Failure to comply with a condition that either the ECB decision never becomes valid or is no longer valid" brings no legal certainty to the banks and the appointees. It must be considered that the appointee will have fiduciary duties as stipulated in the applicable regulation since he/she is appointed, so the ECB Guide should provide substantially more clarity on the legal aspects of the conditions.	#REF!	Publish
37	8 - Decision	8.2	27	Clarification	EACB supposes that the meaning of the first paragraph is that the decision taken by the Governing Council should be treated under the same process than such decision would be taken by a national competent authority. Current wording may lead to an impression that some additional implementation steps regarding Governing Council's decisions should be taken. Therefore, the first paragraph needs clarification.		#REF!	Publish
38	9 - Removal	9	28	Deletion	Chapter 9 should be deleted.	According to Chapter 9, the ECB would have the power to remove at any time members from the management body. However, such authority is not granted to the ECB or other competent authorities in some Member States' national legislation. Neither the CRD IV contains such provisions. Due to the lack of sufficient legal background, this part of the Guides should be omitted, or at least clarified that ECB's power to dismiss the management body members and the dismissal process is subject to the national corporate laws. For example, in some Member States the competent authorities have the power to call a (extraordinary) general meeting in order to bring the dismissal upon the general meeting's consideration. In some Member States the competent authorities can give a recommendation regarding the removal of a member from the management body.	#REF!	Publish
39							#REF!	Publish
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