

POLISH FINANCIAL SUPERVISION AUTHORITY (KNF)

Mr Wojciech Kwaśniak, Vice President

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To Management Boards and Supervisory Boards of domestic banks

Ladies and Gentlemen,

On 22 November 2012 the European Banking Authority (“EBA”) published the *Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders* (“**Guidelines**”).¹ That document specifies procedures, criteria and minimum requirements applicable to assessments of suitability of members of the management board and supervisory board and of key function holders of a credit institution (bank). **Pursuant to the Guidelines the regulations they contain should be implemented by supervision bodies and credit institutions, on a *comply or explain* basis, by 22 May 2013 at the latest.**

The scope of application of the Guidelines is extensive and not limited to the assessment of members of a credit institution’s management bodies (management board of a bank in Polish realities), but it also includes the assessment of persons responsible for the supervision of management at a credit institution (i.e. the supervisory board of a bank) and also the assessment of individuals who have a significant role in day-to-day management of a credit institution (e.g. heads of a bank’s units responsible for risk management, liquidity management, controlling or internal audit).

The ‘suitability’ that is subject to assessment under the Guidelines refers to the reputation of individuals being assessed and their professional qualifications. The Guidelines also determine the detailed criteria of assessment of the specified aspects of suitability for members of the supervisory board and management board. The Guidelines are addressed, in principle, to the relevant supervision authorities of Members States, albeit some regulations they contain are aimed at both such authorities and credit institutions they oversee (banks). It should be noted that the current KNF supervisory practice as regards the issues regulated by the Guidelines, as far as it is allowed by Polish national laws and regulations in force, is basically in compliance with the Guidelines, especially in respect of the procedures, criteria and minimum requirements applicable when deciding whether or not consent should be given to the appointment of the president (member) of a bank’s management board. Under Poland’s law the KNF has at present no authority to assess the suitability of members of supervisory boards and key function holders of banks, however in view of draft regulations planned for implementation at the Community level (CRD IV) it is likely that this status will change in the future. Those regulations from the Guidelines that are addressed to banks will be formally implemented by the KNF in the relevant recommendation concerning good practices for prudent and stable management of banks, which – in addition to the subject document – will also cover the *EBA Guidelines on Internal Governance – GL 44*. That recommendation should be issued in the second half of 2013 and, in accordance with an established practice, will be preceded by consultations with the banking sector.

Before the planned recommendation comes into force, banks should pay particular attention to the key issues described below, and regulated by the Guidelines, which apply to internal governance solutions used by banks to ensure prudent and stable management of a bank.

The Guidelines emphasise that it is a bank that is primarily responsible for the assessment of suitability

¹ Below we use the term “odpowiedniość” in place of “kwalifikacje” as it better reflects the meaning of the English term “suitability” and the contents of the Guidelines, under which suitability assessment includes assessments of reputation and professional qualifications. In addition, the English “management body” is replaced with the “management board and supervisory board”, in accordance with the contents of the Guidelines and Poland’s realities.

of members of its management board and supervisory board, and key function holders, provided that the suitability of members of the management board and supervisory board should be assessed both individually for each member of those bodies and collectively for the management board or supervisory board taken as a whole. A bank should also ensure the appropriate identification of key functions, for which candidates for their holders should be subject to suitability assessment, and identify assessment criteria for those functions. Such assessment should be made both at the stage of selection of members of the management board and supervisor board and key function holders (appointment, hire, entrustment of duties etc.) and in the course of performance of their duties. In addition, such assessment should be made in accordance with the principles and procedures determined in relevant internal regulations (policies) of a bank.

Suitability assessment should be decisive in selecting members of the management board and supervisory board, and key function holders. This means that a given individual should be assessed before he or she is appointed as a member of the management board or supervisory board, or a key function holder, and also that such appointment should not happen if the result of such suitability assessment is negative. For a person who is already a member of the management board or supervisory board or a key function holder at a bank a re-assessment should be made every time circumstance justify the verification of suitability of such individual, especially when his or her scope of responsibility is to change or any information that may adversely affect his or her reputation has been revealed or an amendment to internal or external regulations that determine the minimum scope of qualifications required for a given function have been implemented. If the outcome of suitability re-assessment of a member of the management board or supervisory board or a key function holder is negative, the bank should promptly notify the supervision authority and take steps necessary to restore the status where all the members of the management board and supervisory board and all the key function holders meet the suitability criteria. Every bank is obliged to ensure that the bodies that appoint or dismiss members of the supervisory board (i.e. the general meeting of shareholder or the assembly of representatives in case of a co-operative bank, where such body is a substitute for the general meeting) are informed on the suitability requirements applicable to members of the supervisory board.

As indicated above, suitability assessment should cover both professional qualifications and reputation of individuals being assessed. The assessment of professional qualifications should take into account the current characteristics of a bank, i.e. its profile, as well as scope and scale of operations. In addition, the levels and characteristics of professional qualifications may differ for members of the management board and the supervisory board. And reputation assessment is absolute, which means that any member of the management board or supervisory board and any key function holder should have a good reputation, irrespective of the current status of a bank and the characteristics of a given position or function.

This letter is addressed to management boards and supervisory boards of all domestic banks; however the remarks contained herein should also be delivered, at your earliest convenience, to so called owner's representative bodies of those banks, i.e. general meetings or assemblies of representatives. Parent banks of co-operative bank unions are asked for distribution of this letter among their associated co-operative banks.

I also ask you for information (to be submitted by 22 May 2013) on the solutions used or planned (together with implementation schedule) by your banks to implement the regulations provided for by the Guidelines, as described above, or for an explanation of the reasons of non-implementation of such solutions.

Yours faithfully,

Wojciech Kwaśniak

Vice President of KNF

Guidelines

on the assessment of the suitability of members of the
management body and key function holders



Guidelines on the assessment of the suitability of members of the management body and key function holders

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1. Executive Summary

The Guidelines set out the process, criteria and minimum requirements for assessing the suitability of members of the management body and key function holders of a credit institution.

Article 11(1) of Directive 2006/48/EC provides that a credit institution shall only be authorised when there are at least two suitable persons who effectively direct the business and asks the EBA to develop guidelines for the assessment of the suitability of the persons who effectively direct the business of a credit institution.

Weaknesses in corporate governance, including inadequate oversight by and challenge from the supervisory function of the management body in a number of credit institutions, have contributed to excessive and imprudent risk-taking in the banking sector which has led in turn to the failure of individual credit institutions and systemic problems. Hence the scope of these Guidelines is not limited to members of the management body acting in its management function, but extends to the members of the supervisory function in order to ensure appropriate oversight over the management of a credit institution, including its risk taking decisions. This is consistent with the EU Commission's proposal of 20 July 2011 for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV). The ongoing suitability of all members of the management body is crucial for the proper functioning of a credit institution. The Guidelines also specify requirements for the assessment of key function holders, who have a crucial role in the day to day management of the business. These measures are considered to be necessary and proportionate to ensure robust governance arrangements in credit institutions, as required by Article 22 of Directive 2006/48/EC. As financial and mixed financial holding companies are also required to have suitable persons who direct the business and those companies have a significant influence over credit institutions, the scope of the Guidelines encompasses them as well.

Credit institutions should assess the suitability of members of the management body prior to or immediately after their appointment and notify the competent authority of appointments. Some competent authorities may require prior approval. Competent authorities will themselves assess the suitability of proposed or appointed members of the management body. The Guidelines set out several criteria which should be considered in this assessment. In cases where a member of the management body is not suitable, the credit institution and, if necessary, the competent authority should take appropriate action.

The EBA has conducted a high-level impact assessment of the proposals included in the guidelines that is presented in section 4. This impact assessment should be read together with the impact assessment done by the European Commission in the context of the proposed Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (proposed CRD IV, published 20/07/2011). The proposal of the European Commission contains the requirement that the suitability of all members of the management body shall be assessed. The Commission analysed the impact of an assessment process for all board members and concluded that although such a requirement would

trigger costs, such costs would be insignificant compared to the benefits.^[1] The guidelines proposed in this document will not create any significant additional costs and help to realise the benefits identified in the European Commission's impact assessment.

The Guidelines should be complied with by competent authorities and credit institutions by 22 May 2013.

^[1] The impact assessment of the European Commission can be accessed under the following link:
http://ec.europa.eu/internal_market/bank/docs/regcapital/CRD4_reform/IA_directive_en.pdf

2. Background and rationale

1. Article 11(1) of Directive 2006/48/EC entrusts the EBA with the task of ensuring the existence of guidelines for the assessment of the suitability of the persons who effectively direct the business of a credit institution. This follows on from the provision's requirement that competent authorities shall grant an authorisation to credit institutions only when there are at least two persons who effectively direct the business and shall not grant authorisation if these persons are not of sufficiently good repute or lack sufficient experience to perform such duties.
2. Whilst the assessment of the suitability of persons who effectively direct the business is only mentioned explicitly by Directive 2006/48/EC in the context of the authorisation process, Article 17 of Directive 2006/48/EC makes clear that all of the conditions for authorisation need to be fulfilled on an ongoing basis.
3. Weaknesses in corporate governance in a number of credit institutions have contributed to excessive and imprudent risk-taking in the banking sector which has led in turn to the failure of individual credit institutions and systemic problems. To remedy weaknesses that were identified during the financial crisis regarding the functioning of the management body and the qualifications of its members and to further harmonise the assessment of suitability within the EU banking sector in line with the proposals contained within CRD IV, these Guidelines include provisions on the assessment of members of the management body, both in its management and supervisory function.
4. Furthermore Article 22 of Directive 2006/48/EC provides that Home State competent authorities shall require every credit institution to have robust governance arrangements in place. According to Article 16 of its founding Regulation the EBA shall issue guidelines addressed to competent authorities and financial institutions to ensure common, uniform and consistent application of Union law, including Directive 2006/48/EC. The present Guidelines aim to establish harmonised criteria for the assessment of the suitability of the members of the management body as part of such governance arrangements. For the same reason the Guidelines set out uniform criteria for the mandatory assessment of key function holders by credit institutions and their discretionary assessment by competent authorities. It is important to ensure also the suitability of key function holders as those persons are responsible for the day-to-day management of the credit institution under the overall responsibility of the management body.
5. In summary, in order to achieve the necessary and desirable degree of harmonisation in this area these Guidelines are deliberately broader in scope than Article 11 of Directive 2006/48/EC in the following three respects: a) the Guidelines look beyond authorisation to ongoing suitability; b) the entities within scope include financial holding companies, and c) the persons within scope are not limited to those who effectively direct the business, but include all members of the management body as well as key function holders.
6. The Guidelines should also be applied to financial holding companies. This approach is consistent with Article 73 paragraph 3 of Directive 2006/48/EC which states that competent

authorities shall require parent undertakings and subsidiaries subject to the directive to meet the obligations laid down in Article 22 on a consolidated or sub-consolidated basis, and with Article 135, which states that Member States shall require that persons who effectively direct the business of a financial holding company or a mixed financial holding company be of sufficiently good repute and have sufficient experience to perform those duties. Since holding companies often exercise a significant influence on the management of credit institutions, it is important to ensure that members of their own management body are suitable in terms of their reputation and experience.

7. The EBA Guidelines on Internal Governance emphasise, in line with other international governance documents, the crucial role of e.g. the internal control functions. The Guidelines on Internal Governance (B.1, 8.2e) require that the management body should have a policy on selecting, monitoring and planning the succession of key function holders. These Guidelines set out more detailed requirements on credit institutions' policies for the assessment of key function holders.
8. In some jurisdictions legal persons can be members of the management body. In such cases the Guidelines should as far as possible be applied to that legal person and to the natural person who represents the legal person as a member. Because laws regulating the governance of companies and practices differ considerably in Member States regarding this matter, specific provisions have not been included in the actual Guidelines.
9. The Guidelines apply to all credit institutions regardless of their governance system, which is set out in national company laws. Member States usually provide for either a unitary or a dual board structure. The management function sets the direction for the credit institution and is responsible for the day-to-day running of the credit institution. The supervisory function oversees the management function and provides appropriate advice and challenge. The oversight role includes reviewing the performance of the management function and the achievement of objectives, and ensuring the integrity of financial information as well as effective risk management and internal controls.
10. In a one-tier board structure the assessment of the suitability in terms of fitness and propriety required by these Guidelines will be applied to all board members. In the two-tier board structure, the same holds true for all members of the management body in its management and its supervisory function. As the members of the management body of the different functions have specific roles, the assessment process and criteria can differ.
11. Generally, suitability means the degree to which something or someone has the right qualities for a particular purpose. The suitability of the members of the management body of the credit institution is the degree to which such persons have good repute and sufficient experience to fulfil their duties as member of the management body.
12. While all members of the management body need to be of good repute, regardless of the nature, scale and complexity of the credit institution or the position of the member within it, the

experience requirements differ depending on the credit institution's nature, scale and complexity of its activities and the position concerned.

13. The experience of a person consists of educational and practical aspects. The level of the experience of a given person is a synthesis of both aspects. It is important that a member of the management body has in fact acquired sufficient experience, including skills and knowledge, which cannot merely be expressed in terms of a period of duty in a certain position or a specific educational degree.
14. Credit institutions are responsible for ensuring that members of the management body fulfil the suitability criteria on an ongoing basis. Events with the potential to affect a person's reputation or required experience can lead to the need to re-assess the suitability of that person.
15. Credit institutions need to take into account within their assessment also the overall composition of the management body in its management and its supervisory functions to ensure that robust governance arrangements are in place.
16. Whilst the assessment of the suitability of key function holders is best practice expected from all credit institutions to ensure robust governance arrangements, the practices regarding the supervisory assessment differ. While some competent authorities assess the suitability of key function holders within their supervisory reviews or during on-site inspections, other authorities leave this completely to the credit institution. However if, because of unsuitable key function holders, a credit institution fails to ensure robust governance arrangements, competent authorities would have the power to take appropriate measures.
17. Most competent authorities assess the suitability of members of the management body, when a credit institution is authorised, new members are appointed and as appropriate. Most competent authorities have already implemented specific processes for the appointment of new members. Some competent authorities require a formal prior application, other require pre or post notification from the credit institution of the intention to appoint or nominate members for appointment. Some competent authorities grant an explicit approval of members of the management body whereas others raise objections or otherwise give their silent consent.
18. When assessing the suitability of members of the management body competent authorities need access to specific information about them. The Guidelines set out the information to be provided for initial assessments. However, competent authorities are not limited to this information; e.g. within the supervisory tasks, a competent authority can also gain information on the suitability of members of the management body. Relevant information can also come from other sources like internal whistle blower processes or from external sources. All this information will be followed up by competent authorities and can be used in the assessment of the suitability.

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19. It is important to ensure that credit institutions and competent authorities intervene effectively in cases where a member of the management body is not considered to be suitable. This applies to existing members of the management body and also persons who are not yet appointed as members. The appropriate corrective measures will depend on the circumstances taking into account measures already taken. Measures may differ between member states depending on the laws regarding the governance of companies, the banking act and administrative rules. Measures can range from ordering actions to improve the knowledge of a member or to shift responsibilities, the prohibition to continue performing tasks, temporary ban or replacement of single members of the management body to ultimately the withdrawal of the credit institution's authorisation.
20. These guidelines set out the requirements for the assessment of the suitability of members of the management body and key function holders from a prudential perspective and do not aim to intervene with other legislation concerning the position of members of the management body or key function holders (such as social, company or labour law).
21. Investment firms are not included in the scope of these Guidelines, as the proposed Markets in Financial Instruments Directive (MiFID) contains similar requirements for the assessment of the suitability of persons who effectively direct the business of investment firms. Corresponding standards will be developed by the European Securities and Markets Authority in cooperation with EBA.

3. EBA Guidelines on the assessment of the suitability of members of the management body and key function holders

Status of these Guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC ('the EBA Regulation'). In accordance with Article 16(3) of the EBA Regulation, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set out the EBA's view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. The EBA therefore expects all competent authorities and financial institutions to whom guidelines are addressed to comply with guidelines. Competent authorities to whom guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting Requirements

3. According to Article 16(3) of the EBA Regulation, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by 22 January 2013. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form provided at Section 5 to compliance@eba.europa.eu with the reference 'EBA/GL/2012/06'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities.
4. Notifications will be published on the EBA website, in line with Article 16(3).

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Title I - Subject matter, scope and definitions

1. Subject matter

These Guidelines set out the criteria and processes that credit institutions and competent authorities should respect when assessing the suitability of proposed and appointed members of the management body of a credit institution in both its management and supervisory functions. The Guidelines set out provisions for the assessment of key function holders. The Guidelines include measures applicable in cases where such persons are not suitable for the position concerned.

2. Definitions

For the purposes of these Guidelines, the following definitions apply:

- a. 'management body' means the governing body (or bodies) of a credit institution, comprising the supervisory and the management function, which has ultimate decision-making authority and is empowered to set the credit institution's strategy, objectives and overall direction;
- b. 'management body in its supervisory function' means the management body acting in its supervisory function and overseeing and monitoring management decision-making;
- c. 'member' means a proposed or appointed member of the management body;
- d. 'key function holders' are those staff members whose positions give them significant influence over the direction of the credit institution, but who are not members of the management body. Key function holders might include heads of significant business lines, EEA branches, third country subsidiaries, support and internal control functions.

3. Scope and level of application

3.1. These Guidelines apply to competent authorities and credit institutions as defined in art. 4(1) of Directive 2006/48/EC, to financial holding companies as defined in article 4 (19) of Directive 2006/48/EC, and to mixed financial holding companies as defined in article 2 (15) of Directive 2002/87/EC in case of a financial conglomerate whose most important sector is banking as defined in article 3 (2) of Directive 2002/87/EC, all referred to here as "credit institutions". The role of holding companies differs from the role of credit institutions, therefore the process and the criteria for the assessment of the suitability should be applied in a proportionate way, taking into account the nature, scale and complexity of the financial holding company and the particular relationship of the member of the management body or key function holder with the credit institution.

3.2. Credit institutions should assess the suitability of members of the management body in the following situations:

- a. when applying to be authorised as credit institution;
- b. when new members of the management body have to be notified to the competent authorities; and
- c. whenever appropriate, in relation to appointed members of the management body.

3.3. Credit institutions should identify key function holders and assess their suitability in line with the policy on the nomination and succession of individuals with key functions.

3.4. Competent authorities should assess the suitability of a member of the management body in the following situations:

- a. when an application to authorise a credit institution is received;
- b. when a notification or application regarding the appointment of a new member of the management body is received; and
- c. whenever appropriate, in relation to appointed members of the management body.

Title II- Requirements regarding the assessment of the suitability

Chapter I - Responsibilities & general assessment criteria

4. Responsibilities

4.1. Assessing the initial and ongoing suitability of members of the management body and key function holders should primarily be the responsibility of the credit institution.

4.2. If a nomination committee or equivalent exists, it should actively contribute to fulfilling the credit institution's responsibility for adopting appropriate internal policies on the assessment of the suitability of members of the management body and key function holders.

5. General assessment criteria

5.1. The assessment of the experience of members of the management body and key function holders should take into account the nature, scale and complexity of the business of the credit institution as well as the responsibilities of the position concerned. The level and nature of the experience required from a member of the management body in its management function may differ from that required from a member of the management body in its supervisory function.

5.2. Members of the management body and key function holders should in any event be of good repute, regardless of the nature, scale and complexity of the business of the credit institution.

5.3. Where there is a matter which casts doubt on the experience or good repute of a member of the management body and key function holders, an assessment of how this will or might impinge on that person's suitability should be undertaken. All matters relevant to and available for the assessment should be taken into account, regardless of where and when they occurred.

Chapter II - Assessment by credit institutions

6. Credit institutions' suitability assessment

6.1. Credit institutions should assess the suitability of members of the management body on the basis of the criteria set out in paragraphs 13 to 15 and in accordance with the EBA's Guidelines on Internal Governance at Chapter B.2 and record the assessment and the results. Whenever possible the assessment should be done before the member takes up his or her position. If this is not possible the assessment should be completed as soon as practicable, but in any event within six weeks.

6.2. Credit institutions should re-assess the suitability of a member of the management body when events make a re-assessment necessary in order to verify the person's ongoing suitability. This can be limited to examining whether the member remains suitable taking into account the relevant event.

6.3. When assessing the suitability of members of the management body, credit institutions should assess whether the management body is suitable collectively. Weaknesses within the overall composition of the management body or its committees should not necessarily lead to the conclusion that a particular member is not suitable.

6.4. The credit institution should assess the suitability of key function holders before they are appointed, re-assess their suitability as appropriate and record the assessments and their results.

7. Credit institutions' policies on suitability

7.1. Credit institutions should have a policy for selecting and assessing members of the management body which takes into account the nature, scale and complexity of the business of the credit institution and sets out at least:

- a. the individual or function responsible for performing the suitability assessment;
- b. the applicable internal procedure for the assessment of the suitability of a member;
- c. the necessary competencies and skills of a member of the management body needed to assume that the member has sufficient expertise,
- d. the information and evidence that a member of the management body should provide to the credit institution for an assessment;
- e. if the member is to be appointed by the shareholders the measures taken to ensure that shareholders are informed about the requirements for the position and the relevant profile of persons before they are appointed; and
- f. the situations where a re-assessment of the suitability should be performed, together with measures to identify such situations. These should include a requirement that members of the management body should notify any material change to the credit institution and may include annual notifications of any changes affecting their compliance with the relevant requirements.
- g. ways in which the credit institution will provide training opportunities, in case there are specific learning and development needs of the members of its management body.

7.2. Credit institutions should have a policy in place for assessing the suitability of key function holders, which takes into account the nature scale and complexity of the business of the credit institution and sets out at least:

- a. the positions for which a suitability assessment is required;
- b. the individuals or function responsible for performing the suitability assessment; and
- c. the criteria for reputation and experience to be assessed for the specific position.

7.3. Credit institutions' policies should consider the different experience needed for the specific management body positions, including positions necessary to comply with national laws on employee representatives.

8. Credit institutions' corrective measures

8.1. If a credit institution's assessment concludes that a person is not suitable to be appointed as a member of the management body that person should not be appointed or if the member has already been appointed, the credit institution should take appropriate measures to replace this member unless the credit institution takes appropriate measures to ensure the suitability of the member in a timely manner.

8.2. If the credit institution's re-assessment concludes that a member of the management body is no longer suitable, the credit institution should take appropriate measures to rectify the situation and inform the competent authority accordingly.

8.3. When a credit institution takes measures it should consider the particular situation and shortcomings of the member; appropriate measures might include, but are not limited to, adjusting responsibilities between members of the management body; replacing certain persons; and training single members or the whole of the management body to ensure that the collective qualification and experience of the management body is sufficient.

8.4. If a credit institution's assessment concludes that a key function holder is not suitable, the credit institution should take appropriate measures.

Chapter III - Assessment by supervisors

9. Application or notification

9.1. Competent authorities should establish an application or notification procedure applicable to appointments and re-appointments of a member of the management body. Competent authorities should impose rules as to when such applications or notifications need to be made.

9.2. At the request of the competent authority credit institutions should provide all written information necessary to assess the suitability of the members of the management body, including the information contained in Annex I. For any re-appointment this information can be limited to relevant changes and additional information.

9.3. The member of the management body concerned should verify that the information provided is accurate. The credit institution should verify that the information provided is accurate to their knowledge.

9.4. Credit institutions should notify the competent authority when the appointment of a member of the management body is terminated, explaining the reasons.

10. Assessment process

10.1. Competent authorities should ensure that the process applicable to the assessment of the suitability of members of the management body is publicly available.

10.2. Competent Authorities may distinguish between the process applicable to members of the management body in its management function and in its supervisory function, as well as between the initial authorisation of a credit institution and subsequent assessments according to national specificities, the size and structure of the banking sector and national laws concerning the governance of companies.

11. Assessment technique

11.1. Competent authorities should evaluate the information provided by the credit institution, require further evidence of reputation or experience as appropriate and assess the suitability of members of the management body on the basis of the criteria set out in paragraphs 13 to 15 of these Guidelines.

11.2. When assessing the suitability of members of the management body after a credit institution's authorisation in the circumstances described in paragraphs 3(4b) and 3(4c) above, competent authorities may use a selection of these criteria and accord them different weight, taking into consideration relevant national law as well as the result of the review of the specific policies and procedures established by the credit institution for the assessment of these persons' suitability. In the case of paragraph 3 (4c) the re-assessment of suitability should in particular be related to the circumstances that prompted the re-assessment.

11.3. In accordance with national law, competent authorities may, on a risk based approach, interview persons when assessing the suitability of members of the management body. Where appropriate, the interview process may also serve to re-assess the suitability of a member of the management body when facts or circumstances raise doubts about the suitability of this member. The interview process may be used to assess a proposed candidate's knowledge, experience and application of skills in previous occupations, as well as how the qualities of the proposed candidate relate to the skills and experience of the existing members of the management body. The skills assessed may include decisiveness, strategic vision, judgment on risks, leadership, independence of mind, persuasive power, and the ability and willingness to engage in continuous learning and development.

11.4. The assessment under paragraph 3 (4b) by the competent authority should be completed as soon as practicable; the competent authority should set a maximum time period for its assessment which should not exceed than six months. The period for assessment should start on receipt of the complete application or notification.

11.5. Where a competent authority has previously assessed a member's suitability, the relevant record should be updated as appropriate.

11.6. A competent authority may take into account suitability assessments from other competent authorities. For this purpose competent authorities should exchange relevant information on the suitability of persons when requested.

11.7 The competent authority should inform the credit institution of the results of the assessment.

11.8. Competent authorities may assess the suitability of key function holders and should ensure that the applicable process is publicly available.

12. Supervisory corrective measures

12.1. Where a member or credit institution fails to provide sufficient information regarding the suitability of a member to the competent authority, the competent authority should object to or not approve the appointment of that person.

12.2. If a member of the management body is not considered to be suitable, the competent authority should require the credit institution either to not appoint the member or if the member is already appointed to take appropriate measures to replace him or her.

12.3. In cases where a credit institution's measures taken according to paragraph 8 are inadequate, competent authorities should themselves adopt appropriate corrective measures.

Chapter IV - Assessment criteria

13. Reputation criteria

13.1. A member of the management body should be considered to be of good repute if there is no evidence to suggest otherwise and no reason to have reasonable doubt about his or her good repute. All relevant information available for the assessment should be taken into account, without prejudice to any limitations imposed by national law and regardless of the state where any relevant events occurred.

13.2. A member of the management body should not be considered to be of good repute if his or her personal or business conduct gives rise to any material doubt about his or her ability to ensure the sound and prudent management of the credit institution.

13.3. Any criminal or relevant administrative records should be taken into account, considering the type of conviction or indictment, the level of appeal, the punishment received, the phase of the judicial process reached and the effect of any rehabilitation measures. The surrounding, including mitigating, circumstances and the seriousness of any relevant offence or administrative or supervisory action, the time period and the member's conduct since the offence and the relevance of the offence or administrative or supervisory action to the proposed role should be considered.

13.4. The cumulative effects of more minor incidents, which individually do not impinge on a member's reputation but may in sum have a material impact, should be considered.

13.5. Particular account should be taken of the following factors, which may cast doubt on a member's good repute:

- a. conviction or prosecution of a criminal offence, in particular:
 - i. offences under the laws governing banking, financial, securities, insurance activity, or concerning securities markets or securities or payment instruments, including laws on money laundering, market manipulation, or insider dealing and usury;
 - ii. offences of dishonesty, fraud, or financial crime;
 - iii. tax offences;
 - iv. other offences under legislation relating to companies, bankruptcy, insolvency, or consumer protection;
- b. relevant current or past investigations and/or enforcement actions relating to the member, or the imposition of administrative sanctions for non-compliance with provisions governing banking, financial, securities, or insurance activities or those concerning securities markets, securities or payment instruments, or any financial services legislation;
- c. relevant current or past investigations and/or enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions.

13.6. Attention should be paid to the following factors regarding the propriety of the member in past business dealings:

- a. any evidence that the member has not been transparent, open, and cooperative in its dealings with supervisory or regulatory authorities;
- b. refusal of any registration, authorisation, membership, or license to carry out a trade, business, or profession; or revocation, withdrawal, or termination of such registration, authorisation, membership, or license; or expulsion by a regulatory or government body;
- c. the reasons for any dismissal from employment or any position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position; and
- d. disqualification by competent authority from acting as a person who directs the business.

13.7. The following situations regarding past and present business performance and financial soundness of a member with regard to their potential impact on the member's reputation should be considered:

- a. inclusion on the list of unreliable debtors or any negative records on this kind of list conducted by recognised credit bureau if available;
- b. financial and business performance of the entities owned or directed by the member or in which the member had or has significant share with special consideration to any rehabilitation, bankruptcy and winding-up proceedings and whether and how the member has contributed to the situation that lead to the proceedings;
- c. declaration of personal bankruptcy; and
- d. civil lawsuits, administrative or criminal proceedings, large investments or exposures and loans taken out, in so far they can have a significant impact on the financial soundness.

14. Experience criteria

14.1. The assessment of a member's experience should consider both, the theoretical experience attained through education and training and the practical experience gained in previous occupations. Credit institutions should take into account the skills and knowledge acquired and demonstrated by the professional conduct of the member.

14.2. With regard to assessment of a member's theoretical experience, particular consideration should be given to the level and profile of the education and whether it relates to banking and financial services or other relevant areas. Education in the areas of banking and finance, economics, law, administration, financial regulation and quantitative methods can in general be considered to be related to banking and financial services.

14.3. The assessment should not be limited to the educational degree or proof of a certain period of service in a credit institution or other firm. A more thorough analysis of the members' practical experience should be conducted as the knowledge gained from previous occupations depends on the nature, scale and complexity of the business as well as the function performed within it.

14.4. When assessing the experience of a member of the management body particular consideration should be given to theoretical and practical experience relating to:

- a. financial markets;
- b. regulatory framework and requirements;
- c. strategic planning, and understanding of a credit institution's business strategy or business plan and accomplishment thereof;
- d. risk management (identifying, assessing, monitoring, controlling and mitigating the main types of risk of a credit institution, including the responsibilities of the member);
- e. assessing the effectiveness of a credit institution's arrangements, creating effective governance, oversight and controls; and
- f. interpreting a credit institution's financial information, identifying key issues based on this information and appropriate controls and measures.

14.5. A member of the management body in its management function should have gained sufficient practical and professional experience from a managerial position over a sufficiently long period. Short term or temporary positions can be considered in the assessment, but are usually not sufficient to assume sufficient experience. The practical and professional experience gained from previous positions should be assessed, with particular regard to:

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- a. length of service;
 - b. nature and complexity of the business where the position was held, including its organisational structure;
 - c. scope of competencies, decision making powers, and responsibilities;
 - d. technical knowledge gained through the position about the business of a credit institution and understanding of risks credit institutions face
 - e. number of subordinates.

14.6. A member of the management body in its supervisory function should have sufficient experience to enable him or her to provide constructive challenge to the decisions and effective oversight of the management function. The experience may be gained from academic, administrative or other positions and through the management, supervision or control of financial institutions or other firms. Members of the management body in its supervisory function should be able to demonstrate that they have, or will be able to acquire, the technical knowledge necessary to enable them to understand the business of the credit institution and the risks that it faces sufficiently well.

15. Governance criteria

15.1. When assessing the suitability of a member also other criteria relevant for the functioning of the management body should be assessed, including potential conflicts of interest, the ability to commit sufficient time, the overall composition of the management body, the collective knowledge and expertise required and members' ability to perform their duties independently without undue influence from other persons.

15.2. In assessing a member's independence, the following factors should be considered:

- a. past and present positions held in the credit institution or other firms;
- b. personal, professional or other economic relationships with the members of the management body in their management function, in the same credit institution, in its parent company or subsidiaries; and
- c. personal, professional or other economic relationships with the controlling shareholders of the same credit institutions, with its parent institution or subsidiaries.

15.3. The management body in its management function needs collectively to have sufficient practical experience in credit institutions.

Title III- Final Provisions and Implementation

16. Implementation

The Guidelines should be complied with by competent authorities and credit institutions by 22 May 2013.

Annex 1 - Documentation requirements for initial appointments

Information to be included in the notification of the appointment of members of the management body:

1. Name of the person to be appointed
2. Curriculum vitae, including:
 - a. full name, name of birth
 - b. place and date of birth
 - c. address
 - d. nationality
 - e. detailed description of education and professional training
 - f. professional experience, including the names of all organisations for which the person has worked and nature and duration of the functions performed, in particular for any activities within the scope of the position sought. For positions held in the last 10 years, when describing these activities, the person should specify his or her delegated powers, internal decision making powers and the areas of operations under his or her control, including the number of employees. If the CV includes honorary activities, including management body representation, this should be stated.
 - g. if available, references of employers of at least the last three years
3. Statement as to whether criminal proceedings are pending or the person or any organisation managed by him or her has been involved as a debtor in insolvency proceedings or a comparable proceeding.
4. If available criminal records and relevant information on criminal investigations and proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director, bankruptcy, insolvency and similar procedures);
5. Information, if relevant, on:
 - a. investigations, enforcement proceedings, or sanctions by a supervisory authority which the person has been the subject of;
 - b. refusal of registration, authorisation, membership or license to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation, membership or license; or expulsion by a regulatory or government body;
 - c. dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position;
 - d. whether an assessment of reputation as a person who directs the business of a credit institution has already been conducted by another competent authority (including the identity of that authority and evidence of the outcome of this assessment);
 - e. whether any previous assessment by an authority from another, non-financial, sector has already been conducted (including the identity of that authority and evidence of the outcome of this assessment)
6. Description of any financial (e.g. loans, shareholdings) and non-financial interests or relationships (e.g. close relations like a spouse, registered partner, cohabitee, child, parent or other relation with whom the person shares living accommodations) of the person and his/her close relatives

to members of the management body and key function holders in the same credit institution, the parent institution and subsidiaries and controlling shareholders.

7. The position for which the person is/will be appointed.
8. Record of the credit institutions' suitability assessment results

4. Accompanying documents

4.1 Cost- Benefit Analysis / Impact Assessment

Introduction

As per Article 16(2) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council, EBA has conducted an Impact Assessment (IA) which analyses the “potential related costs and benefits” (proportionate in relation to the scope, nature and impact of the guidelines or recommendations).

Article 11(1) of Directive 2006/48/EC provides that a credit institution shall only be authorised when there are at least two suitable persons who effectively direct the business and asks the EBA to develop guidelines for the assessment of the suitability of the persons who effectively direct the business of a credit institution.

According to Article 22 of Directive 2006/48/EC credit institutions shall have robust governance arrangements in place. This includes that the persons who manage an institution on a daily basis or supervise its activities are suitable to fulfil their duties.

Scope and nature of the problem

‘Weaknesses in corporate governance in a number of institutions have contributed to excessive and imprudent risk-taking in the banking sector which led to the failure of individual institutions and systemic problems in Member States and globally. [...] In some cases, the absence of effective checks and balances within institutions resulted in a lack of effective oversight of management decision making, which exacerbated short-term and excessively risky management strategies. The unclear role of the competent authorities in overseeing corporate governance systems in institutions did not allow for sufficient supervision of the effectiveness of the internal governance process.’¹

The persons effectively directing the business are responsible for the sound conduct of business of an institution.² This responsibility lies collectively with the management body in its management function under the oversight of the management body in its supervisory function. Because of their responsibilities and influence on an institution’s affairs, it is essential that the members of the management body but also key function holders - who are responsible for the day-to-day management of the credit institution under the overall responsibility of the management body - are suitable to fulfil their duties and understand the business activities and the risk of the credit institution. The assessment of the suitability of members of the management body by credit institutions and competent authorities is necessary to ensure that this is the case.

In late 2009, the CEBS conducted a survey on the implementation by supervisory authorities and institutions of its Internal Governance Guidelines published in January 2006. The survey results highlighted inadequate oversight by the management body in its supervisory function of the

¹ Recital 43 of the proposal for a directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, COM (2011) 452 final, Brussels 20/07/2011

² regarding the responsibilities of the management body, see also EBA guidelines on internal governance

management body in its management function as the most important and the most frequently observed weakness. In addition, sometimes a lack of independence contributed to the problems. As a result, challenge of members of the management body in its supervisory function to the management function's business proposals and practices was weak in some cases. Other contributory factors might have been time constraints, particularly for members of the management body in its supervisory function to fulfil their duties, and a failure to check the institution's control environment. The management body, in particular in its supervisory function, might not have understood the complexity of the business and the risk including operational risk involved and might consequently have failed to identify and constrain excessive risk-taking. Another related issue was the difficulty of keeping the management bodies expertise up-to-date especially in fast moving markets with complex and innovative financial products.

Objectives of the guideline

In its proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervisions of credit institutions and investment firms (CRD IV), the EU Commission proposed that all members of the management body should be subject to an enhanced 'fit and proper' test. This test is one of the reforms proposed by the European Commission to improve corporate governance practices. It was suggested that the EBA would develop Binding Technical Standards regarding that issue to ensure a level-playing field³.

The baseline scenario for assessing the impact of the proposed guidelines on suitability is one in which no action is taken. The EU would continue to rely on the existing national regimes for the assessment of the suitability of members of the management body which covers at least the assessment of two persons who effectively direct the business in the moment of the authorisation of a credit institution.

Options Considered

A. Institutions covered by the guidelines

With regard to the type of institutions covered by the guidelines, while Art 11 of Directive 2006/48/EC refers explicitly only to credit institutions, article 135 of Directive 2006/48/EC sets out requirements on the suitability of members of the management body of financial and mixed financial holding companies. Therefore, the two following options have been considered:

- ▶ Option A.1 - Limiting the scope of the guidelines to credit institutions only.
- ▶ Option A.2 - Extending the scope of the guidelines to financial and mixed financial holding companies

Benefits of extending A.2 over A.1

³ The Commission's impact assessment can be accessed under the following link:

http://ec.europa.eu/internal_market/bank/docs/reqcapital/CRD4_reform/IA_directive_en.pdf

Extending the guidelines to financial and mixed financial holding companies will establish a minimum level of expertise of the management body of these companies and improve their governance. Because these firms often have a significant influence on other credit institutions, better risk governance may positively affect the risk management of the concerned credit institutions and, ultimately, may contribute to improve financial stability. The incremental benefit of this proposal will depend on how effectively these guidelines can improve the management and the governance of these companies.

Costs of extending the scope

- *Costs for institutions* - Depending on the current requirements in their member states, some financial and mixed financial companies will need to do an assessment of the suitability of their members of the management body. The incremental costs will be driven by changes to existing assessment processes. These costs are not likely to be material as all holdings should already be conducting a form of assessment of the members of the management body in a form or another as they are required to comply with the same governance requirements as credit institutions.
- *Costs for National Supervisory Authorities* - The costs for the assessment by competent authorities will be driven by the number of holdings whose management bodies would be assessed by the competent authorities, which is by far lower than the number of credit institutions. The implementation of respective requirements could lead in some cases to changes in the national laws, which will also trigger additional one off costs, if the guidelines are complied with in this respect. Because of the small number of financial and mixed financial companies, the total costs for national authorities are likely to be low.

Preferred option

As better corporate governance in holding companies can have a positive impact on their risk strategy and on the governance of concerned credit institutions and given that the incremental costs for these firms and national supervisory authorities are likely to be small, the scope of the guidelines was extended to holding companies.

B. Including the assessment of members of the supervisory function in the guidelines

The proposed CRD IV would require that all members of the management body of any institution shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. In regard to this, the two following options have been considered:

- ▶ Option B.1 - Including the assessment of members of the management body in its supervisory function in the scope of the guidelines
- ▶ Option B.2 - Excluding the assessment of members of the management body in its supervisory function from the scope of the guidelines

Benefits of option B.1 over option B.2

Including members of the management body acting in its supervisory function ensures that the oversight function consists of suitable persons, which improves the quality of this function. A strong oversight function is more likely to ensure that the management of the firms is conducted prudently and sensibly and that the interest of the institution and its stakeholders are protected. This also ensures that a credit institution or holding company has robust governance arrangements in place, as required by Article 22 of Directive 2006/48/EC.

To a lesser extent, harmonised criteria will also lead to a better comparability of assessments, which is beneficial if one person would have more than one mandate as a member of the supervisory function in different countries of the EU.

Costs of including the supervisory function

- *Costs for institutions* - Depending on the different national rules, the guidelines will imply that more assessments are needed. Due to the set-up of the processes and documentation procedures of the assessments, the proposed guidelines are expected to impose costs on institutions. These costs should be small as most of these institutions should already be conducting some form of assessment.
- *Costs for National Supervisory Authorities* - For competent authorities the inclusion of those assessments can generate substantial costs. The costs will vary among member states and largely depend on the number of institutions established and the processes already in place.

Preferred option

The integration of harmonised criteria for such an assessment should lead, if at all, only to minor additional one-off costs for credit institutions for establishing the respective processes. The costs for the competent authorities may be significant, but as the proposed CRD IV requires the assessment of members of the supervisory function and as this will lead to improved and more harmonised processes, the members of the management body in its supervisory function have been included in the scope of the Guidelines. If the Guidelines are implemented before the CRD IV is adopted, the additional costs for the limited number of assessments that are likely to be conducted will be minimal.

C. Including the assessment of key function holders in the guidelines

Because key function holders have a significant influence on the day-to-day management of the credit institution and on the risk profile of an institution, it is also important that individuals that carry out these functions are suitable for their position. Two options have been considered regarding the key function holders:

- ▶ Option C.1 - Including the assessment of key-function holders in the scope of the guidelines
- ▶ Option C.2 - Excluding the assessment of key-function holders from the scope of the guidelines

Benefits of including key function holders

Those proposals should ensure that the individuals exercising a significant influence on an institution are assessed against appropriate standards to ensure that they are suitable to carry out their

functions. This would improve the credit institutions internal governance arrangements and could contribute to a reduction of the probability of failure and a reduction in the cost associated to a failure. However, these benefits will depend on how effective these assessments are in yielding better or more suitable individuals for these functions.

Costs of including key function holders

- *Costs for institutions* - Some institutions will need to change their processes for the assessment of key function holders to include the regulatory requirements. It can be assumed that most institutions already assess in some form the experience and reputation of the key function holders. Therefore, the additional costs are limited to changing the process and the documentation of the assessment results.
- *Costs for National Supervisory Authorities* - While some competent authorities assess the suitability of key function holders, others do not. The costs for implementing a mandatory assessment will vary greatly between national competent authorities and depends on the number of credit institutions and key function holders in a banking system.

Preferred option

The assessment of key function holders in institutions is important as they do the day-to-day management of an institution under the overall responsibility of the management body. The integration of harmonised criteria for such an assessment ensures an appropriate minimum level for the assessment, which ensures that the assessment done by institutions is of sufficient quality. The implementation of mandatory supervisory processes should remain a national discretion, as the costs for a mandatory assessment might be significant.

D. Frequency of assessment by institutions and national authorities

The mandate provided to the EBA is not precise on the situations when an assessment shall be done. Two options have been considered regarding when the suitability of a person needs to be assessed by institutions and national authorities:

- ▶ Option D.1 - Limiting the assessment in the context of the authorisation of the credit institution;
- ▶ Option D.2 - Encompassing in the guidelines the assessment of newly appointed members of the management body and an ongoing review; applied also to the credit institutions assessment of key function holders.

Benefits

- Ensuring that the assessment of the suitability of members of the management body is made regularly instead of once (option D2), is more likely to establish an additional control on the quality of governance arrangements and to ensure that members remain suitable over time. This is consistent with the text of the Directive 2006/48/EC, which requires institutions to subsequently comply with all requirements which are applicable at the point of authorisation.

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- Option D2 is also more likely to ensure that all key function holders are suitable for their respective position and to ensure that they have robust governance arrangements.

Costs for the assessments and comparison of the two options

- *Assessment by institutions* - As the assessment by institutions itself and the respective policies is already required by the EBA Guidelines on Internal Governance, a mere clarification of the responsibilities and content of policies will not have a significant impact on institutions. The same reasoning applies to the clarification of the content of policies for the assessment of members of the management body.
- *Assessment by authorities* - An assessment by the competent authority will create compliance costs for both the institution and the authority and will depend mainly on the number of assessments and the type of assessment to be done. Because it will involve a higher number of assessments, option (D2) is expected to be more costly than option (D1).
 - *Assessment of members of the management body by authorities* - An assessment of the suitability of members of the management body only in the moment of the authorisation of the credit institutions (option D1) would not establish a prudential control on the suitability of such persons; hence, the measure would not be effective. If the management body of an institution is not suitable at any point in time, this increases the probability of and the potential impact from events which may impinge on the financial stability of the institution and the financial system, which can lead to very high costs. To ensure the ongoing suitability of members of the management body, it is preferred that the guidelines include rules on the assessments of newly appointed members and the ongoing review of the suitability (option D2).
 - *Assessment of key function holders by competent authorities* - As the number of institutions differs significantly across jurisdictions and because for some competent authorities a requirement to assess the suitability of key function holders would create significant costs, it is preferred to leave the assessment of the suitability of key function holders by competent authorities to national discretion. Credit institutions, though, will need to ensure that all key function holders are suitable for their respective position and that they have robust governance arrangements. The Guidelines clarify the credit institutions' responsibilities regarding the assessment of key function holders.

E. Harmonisation or discretion in the process of assessment

The Directive 2006/48/EC requires assessing the suitability of persons who are effectively directing the business. While competent authorities have assessment processes in place, the processes differ. Some require a prior approval of a person by the competent authority, before the person takes the position as a member of the management body in its management function. Other competent authorities allow the appointment on a non-objection basis. This may also depend on the national law regulating the governance of companies.

The two following options have been considered:

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- ▶ Option E.1. - Specifying in the guidelines the processes through which persons are assessed
 - ▶ Option E.2. - National authorities define the process through which persons are assessed, but the Guideline would provide some minimum requirements to ensure that the processes achieve a comparable quality.

Comparison of the two options

Harmonising the main tasks and documentation requirements within the assessment process (option E1) would set a minimum standard to ensure that a uniform assessment is conducted by all national authorities. It would also facilitate the reliance of assessments done by other competent authorities and the discussion of any arising issues regarding the suitability of directors of cross-border institutions. Such a process may include the use of assessments by institutions, off-site evaluations by competent authorities and interviews with persons who effectively direct the business of institutions. It is important to apply those processes in a proportionate way, as the structure of the banking system and the number of institutions differs between member states banking systems.

However, the effective degree of harmonisation that the proposed guidelines can achieve is uncertain, as guidelines are not legally binding. Competent authorities would have to apply the processes in a proportionate way. Considering the structural differences of financial markets and national company laws, this would likely lead to differences within the application of such processes. It is important that the objective of having suitable members of the management body is achieved, rather than a harmonised process is used. Therefore, it has been preferred to choose option D2 and to let national authorities define the process for their assessment of the suitability of members of the management body, which should include either a prior approval or a notification requirement, documentation requirements for initial assessments and a timeframe for performing assessments.

F. Harmonisation or discretion for the suitability criteria

According to art. 11 of Directive 2006/48/EC, it is essential that the persons effectively directing the business have sufficient experience and a good reputation. The harmonisation of aspects for the assessment ensures that the outcomes of the assessment are sufficiently homogeneous between member states.

In this regard, the two following options have been considered:

- ▶ Option F.1. - Specifying in the guidelines the criteria through which persons are assessed
- ▶ Option F.2. - Letting national authorities define the criteria under which persons are assessed

Comparison of the two options

Choosing harmonised criteria (option F1) is the preferred option as it will ensure that members of the management body fulfil the same suitability standards. Given the European passport for credit institutions, this is crucial as it ensures a minimum quality for members of the management body's competencies and will improve the trust of stakeholders in the supervisory suitability assessment. While the number of aspects and criteria which need to be assessed has some impact on the costs of

the assessment for both, credit institutions and competent authorities, the harmonisation of criteria itself would, if at all, only create minor one-off costs. The criteria should be defined in a way that allows the application of the proportionality principle.

Option F2 has been rejected as it would not be effective in achieving the desired level of harmonisation. Standards between member states could differ and therefore could lead to different levels of required expertise and reputation.

4.2 Views of the Banking Stakeholder Group (BSG)

The content of the draft Guidelines was presented on 7 February 2012 to the BSG. The Consultation Paper was sent to the BSG with the possibility to comment within the consultation period. The EBA did not receive written comments from the BSG.

Within its meeting on 7 February 2012 some members of the BSG expressed their preliminary views and made the following comments:

There was scepticism if interviews are really helpful for the assessment of the suitability (fit and propriety) of members of the management body. This would be burdensome, competent authorities would need to have the capacity and the people having the specific competencies to do proper interviews. Questions on cultural background and general knowledge (in particular for directors coming from abroad) should be avoided. The efficiency of interviews was doubted as passing an interview can be achieved with coaching, so that the interview creates just more burden.

Concern was raised that it is sometimes difficult to gain the needed managerial experience as senior positions where this is achieved may require already managerial experience. The Guidelines should not restrict staff members from being selected as candidates for management body positions.

It was recommended that the aspect of lifelong learning needs to be considered more explicitly in the Guidelines.

Members suggested being specific on how the Guidelines would be applied within a group context, also considering regional aspects. Sometimes regional bodies (e.g. re saving banks) nominate directly members to the supervisory board. This needs to be still possible, albeit they would need to be fit and proper.

The notion of how proportionality applies could be made clearer, e.g. requirements for three classes of institutions (small, medium, large) could be spelled out in more detail.

EBA has considered the above comments during its drafting of the Guidelines. Interviews may be used by competent authorities, but are not a mandatory element of the assessment. Members of the management body in its management function need to have sufficient managerial experience, this would apply also to staff active in the same institution, if he or she were to move into a management body position. Lifelong learning is a key element which ensures the ongoing suitability of members of the management body. Proportionality is a principle which is applied to every EU legislation, the principle of proportionality is reflected in general in the Guidelines.

4.3 Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for three month and ended on 18 July 2012. 30 responses were received, of which 29 were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases several industry bodies made similar comments or the same body repeated its comments in the response to different questions. In such cases, the comments, and EBA analysis are included in the section of this paper where EBA considers them most appropriate.

Changes to the draft Guidelines have been incorporated as a result of the responses received during the public consultation.

Summary of key issues and the EBA's response

In general respondents are supportive of the Guidelines and acknowledge the need to have suitable directors in the management and supervisory function of the management body. Most respondents support the view that the assessment of the suitability is done in the first place by the credit institution and is afterwards reviewed by the competent authority. Many respondents however were sceptic about the scope of the Guidelines, in particular if they should extend to key function holders, as they felt that EBA's mandate is limited to the management body. A few respondents suggested reducing the scope to the assessment of the suitability of two persons who direct the business. In addition some respondents felt that the experience of the management body in particular in its supervisory function should not be assessed on an individual, but only on a collective level, stating also that the requirements are too restrictive to allow the development of a sufficiently diverse board. Other respondents fully supported the Guidelines and a few even underlined that it is appropriate to assess the suitability of key function holders as they have a key role in the day-to-day management of credit institutions.

The EBA has reviewed the scope of the Guidelines and added additional explanations to the mandate and scope of the Guidelines to the background section. EBA's review confirmed that Directive 2006/48/EC and EBA regulation provide a clear mandate for developing guidelines on the assessment of the management body and key function holders in order to harmonise supervisory practices regarding the assessment of credit institutions governance arrangements.

It is crucial that every member of the management body of a credit institution is suitable and that the management body in its management function and its supervisory function is collectively suitable. The requirements for the individual suitability depend on the position within and the nature, size and complexity of a credit institution. The composition of the management body needs to be taken into

account as well. The members of the management body in its management function need to have sufficient managerial experience gained within the financial sector or with firms outside the financial sector, if those positions can be deemed to have required similar management skills. It is crucial that the management body in its management function collectively has sufficient managerial experience within credit institutions. For the management body in its supervisory function managerial experience is in general not needed. However, the Guidelines on Internal Governance implies that the specific responsibilities of the chair of the management body in its supervisory function requires some specific management abilities. Members of the management body in its supervisory function need to understand the risk facing the credit institution and the financial sector and to be able to challenge the decisions taken by the management function. While the experience of the members may differ, the management body in its supervisory function must be composed in a way that it covers the risk profile of the credit institution and is able to develop a forward looking perspective of the development of the institution and its risk profile.

The EBA had the impression that some respondents misunderstood the concept of ‘consider’ in the Guidelines. When competent authorities or credit institutions have to consider certain circumstances, this does not automatically mean that the existence of such a circumstance automatically disqualifies a person to be suitable for a management body position. Competent authorities and credit institutions should take those issues into account, when they form their judgement on the suitability of a person, assessing in particular how relevant the negative impact of a specific issue is for the suitability of a person.

Some respondents pointed out that the Guidelines should be adjusted to reflect better some specific points of the applicable national company law. As company law is not harmonised within the European Union, EBA cannot refer to specific provisions of national company laws without creating inconsistencies with the applicable company law in other member states. EBA Guidelines apply to national competent authorities and/or credit institutions. The Guidelines are formulated in a generic way which should be compatible with the diverging national company laws, e.g. considering that different governance systems exist. The EBA Guidelines will be implemented by competent authorities into the national rulebooks and supervisory procedures, enabling the competent authorities to take into account or amend the national laws. For example, competent authorities may spell out the Guidelines in more detail according to the governance system (1-tier or 2-tier system) used in their member state.

EBA asked for comments on two specific questions, a summary of the comments and EBA’s analysis is contained in the table below.

Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Executive Summary	One respondent did not agree with the statement "Weak governance arrangements, in particular inadequate oversight by and challenge from the supervisory function of the management body, are widely acknowledged to have been underlying causes of the financial crisis" and suggested to re-draft as follows: "Weak governance arrangements, in particular, inadequate oversight by and challenge from the supervisory function of the management body may have been contributory causes of the financial crisis."	The executive summary was rephrased as follows: <i>Weaknesses in corporate governance, including inadequate oversight by and challenge from the supervisory function of the management body in a number of credit institutions have contributed to excessive and imprudent risk-taking in the banking sector which led to the failure of individual credit institutions and systemic problems.</i>	Executive summary and Background par 3 amended
General comment	Respondents recognised that the Guideline has some overlap with the EBA Guideline on Internal Governance and recommended to amend those Guidelines rather than issuing a new set of Guidelines.	While there is some overlap between those Guidelines, EBA has decided to issue this Guideline as a standalone document as it deals with one specific topic. The future CRD IV may contain more mandates with regard to the development of Guidelines on the management body (e.g. time commitment) or other internal governance aspects. In this context EBA may reconsider if the Guidelines should be merged to one document.	No change
General comment	The Guidelines should clarify that the concept of management body must be seen in the context of national law, as stated in the EBA Guidelines on Internal Governance.	This is already addressed at II. Background and rationale (9) and (10). The Guideline provides the requirements in a generic way which should be compatible to different national company law. The Guidelines do not override the	New Par 7.3 and Background II (20)

		national law. The competent authorities, when complying with the Guidelines, will change the national supervisory processes and respective rulebooks. It was clarified that credit institutions need to consider the national law.	
General comment	Some respondents stated that the guidelines should not and cannot be finalized before the CRD IV is finalized for reason of legal certainty.	When developing the Guidelines EBA was in contact with the EU COM in order to avoid inconsistencies between these guidelines and CRD IV. The mandate provided by Directive 2006/48/EC and EBA regulation is sufficient for the publication of the Guidelines. EBA is following the relevant negotiations with the aim to identify any inconsistencies and will perform a review of its Guidelines based on the adopted CRD IV .	No change
General comment	When drafting the guidelines, EBA could more extensively use the EC Recommendations on the role of non-executive or supervisory directors in listed companies. Paragraph 11 addresses the qualifications of the non-executive or supervisory directors on issues such as proper balance in terms of qualification in the board of directors, introduction programmes for new members, and disclosures of competences upon appointment and yearly review.	EBA has already taken into account the EC Recommendations. However, the scope of application of the EC Recommendations differs significantly from the scope of the Guidelines and covers all listed companies, while the Guidelines cover all credit institutions, including non listed companies.	No change
General comment	Respondents required clarifying the applicability of the Guideline within a 1-tier or 2-tier board structure. One respondent suggested referring to 'board' within the Guidelines instead of the management body.	The Guidelines are written in a generic way; in both structures (1-tier or 2-tier) the guidelines apply to the management body in its management function and in its supervisory function. The term management body is used consistently in EBA Guidelines and will be introduced in the CRD IV (compare also article 2 and 3 of the Guideline). The term 'board' would suggest a restriction to a 1-tier system.	No change
General	A few respondents suggested including guidelines on	The Guidelines deal only with the assessment of the	No change

comment	training, induction and ongoing professional development.	suitability, the mentioned aspects are important and are covered to some extent in article 8 (Credit institutions corrective measures) and the Guidelines on Internal Governance. The responsibility for the development of specific induction or training programs stays with the credit institution.	
General comment	Sometimes it was not clear enough which status footnotes within the document have.	The document was revised and footnotes were integrated as far as possible in the text of the specific sections. References to other Guidelines or legislative texts have been kept.	Guideline amended
Background	As stated above, some respondents asked for clarification of EBA's mandate regarding the scope of the Guidelines, which was received as too broad.	Explanations regarding the mandate have been added to the background and rationale for the Guidelines.	Background II (1) to (6) amended
Background II (7)	It was suggested deleting the reference to legal persons as board members as this was not received as good practice.	Some national company law foresee the possibility that legal persons are represented within the management body. It was clarified that the Guidelines should as far as possible be applied to the natural person representing the legal person.	Background amended
Background II.(8)	Respondents recommend referring to the CRD definitions for the different functions. The statement that the supervisory function responsibilities "includes developing the business strategy" neither properly reflect certain legal frameworks where this is a clear task for the management board.	The comment was taken into account. A reference to the Guidelines on internal governance was added. However, in some member states the management body in its supervisory function approves the strategy or is involved in its development.	Background amended and renumbered
Background II.(13)	One respondent suggested stating the minimum level required in terms of length of experience and educational level.	As the educational levels are not consistent across the world it is not possible to map all possible levels to such a requirement. To achieve a specific level may also not be sufficient as the nature, scale and complexity of the institution and the practical experience of a person need to	No change

		be taken into account.	
Background II.(18) and (19)		The Guidelines contained footnotes explaining the range of practice of assessment processes within competent authorities and explained the sources of information for such assessments. This information has been included in the background section.	new paragraphs included
Art 2	Some respondents believe that the competence for assessing the suitability of key function holders should stay within the credit institution. If the requirements stay in the Guidelines, EBA should provide for a narrow definition of key function holders, in particular for smaller banks. When identifying key function holders credit institutions should be able to take into account the group dimension.	<p>The assessment of key function holders is in the first place a responsibility of the credit institution. Institution will lay down in their policies their own definition of key function holders. Competent authorities have already the possibility to perform such assessments in the scope of their supervisory activities with regard to the assessment of governance arrangements, the Guidelines acknowledge this fact and aim to harmonise the criteria used. Article 2(d) was clarified by including examples for key function holders.</p> <p>The Guidelines provide for a proportionate application of the policies for the assessment of key function holders as it provides a definition of key function holders, which leaves sufficient room to credit institutions to define which staff falls is subject to this policy. When assessing which employees are significant for the direction of the credit institution in particular smaller institutions need also to take into account the group context, e.g. considering if support or control functions are mainly provided by the parent institution.</p>	Par 2(d) amended
Art 2	Some respondents are of the opinion that the supervisor's role should be limited to assessing the suitability solely of an institution's senior management , which should be defined as persons of the required good repute and	All members of the management body have to be suitable. This is consistent with the upcoming draft CRD IV requirements. Hence an assessment should be performed.	No change

	appropriate experience to perform sound and prudent management, who are responsible for directing the business of the credit institution, accounting and financial information, internal control and making decisions on regulatory capital, which seems ample.		
Art 2	Some respondents pointed out that it is vital to ensure that the definitions contained in the EBA guidelines are identical to those laid down by the forthcoming CRD IV	EBA is following the development of the CRD IV and has taken into account the provided definitions and will update them as appropriate.	No change
Art 3 (1)	A few respondents are concerned about the application of the guidelines to financial holding companies, as the criteria are unsuitable for the different role and tasks of the management of financial holdings.	Art 135 of Directive 2006/48/EC states: 'The Member States shall require that persons who effectively direct the business of a financial holding company or mixed financial holding company be of sufficiently good repute and have sufficient experience to perform those duties.' When assessing the suitability the principle of proportionality applies, hence competent authorities will take into account the nature of the holding.	No change
Art 3	Some respondents stated that in the case of cooperative societies, the choice of directors involves figures who do not necessarily come from the banking world but who represent all the members who are chosen for their professional qualities and their commitment to cooperative values. This involves a judgement which goes beyond the concept of criteria. One respondent believes that the EBA could set general assessment criteria for the directors which credit institutions would have to take into account. According to that respondent it seems under no circumstances necessary or justified for the supervisor to	EBA has developed criteria for the assessment of all members of the management body, independent of the legal form of a credit institution. The principle of proportionality applies; hence the specific nature of cooperative banks can be taken into account within the assessment of members of the management body, which has to meet the standards required for such an institution. Credit institutions have to meet all requirements of Directive 2006/48/EC. Supervisors are responsible for the authorisation and the oversight of credit institutions. Hence the assessment of the suitability is part of the regular	No change

	intervene in the process of appointing members of the board.	activities of competent authorities. Dependent on national law this is already within the appointment process or post the appointment of persons.	
Art 3 (2)	Respondents suggested that competent authorities should also specify the situations in which they would consider conducting a reassessment as this would enhance the transparency of the process.	The responsibility to ensure the ongoing suitability of the management body is with the credit institution. Competent authorities do not perform a regular reassessment of members of the management body. When events make it necessary a re-assessment would be conducted by the credit institution in the first place. The requirements are laid down in the Guidelines.	No change
Art 3	One respondent asked if the Guidelines should be applied on group level or solo level as footnote 5 deals with the assessment of third country subsidiary heads.	The Guidelines apply to all credit institutions. Significant subsidiaries outside the EU do not fall on solo level under the applicable EU legislation. Hence the group would need to ensure the assessment of the suitability of third country subsidiaries.	No change
Art 3	A few respondents pointed out that the need to call the suitability of members of the management body into question because of information the supervisory authority has obtained from the outside or through a so-called “whistle-blowing process” should be rejected. For the same reason that does generally not allow hearsay evidence in court, such information should not be sufficient enough to provoke an assessment.	Such information should be considered whenever appropriate. This includes that the competent authority assesses the reliability of the information. However, the footnote was deleted and the context of such assessment explained in the Background and rationale.	Par 3 amended and new paragraph Background II (18)
Art 3	One respondent recommended that all ‘persons who effectively direct the business’ should be treated like members of the management body and recommended also to include the term ‘senior management’ as defined under CRD IV.	EBA understands that members of the management body include ‘persons who effectively direct the business’. The term management body is used consistently in the same way as in the Guidelines on Internal Governance.	No change
Art 4	The Guidelines should encourage early liaison with the	We acknowledge that in most member states it is a	No change

	competent authority regarding the appointment of members of the management body.	common practice to liaise early with the national supervisor. However, inserting this suggestion in the EBA guidelines would indicate that it should be implemented in the supervisory practice via a regulation or law. This would create de facto a prior notification requirement which would be a too strict requirement and would trigger additional costs for both, competent authorities and credit institutions. EBA will leave the assessment and notification procedures to national discretion.	
Art 4	A few respondents commented that the responsibility to assess the suitability was assigned to the credit institution; it should be spelled out who would be responsible for an assessment at least in the national implementation of the Guidelines.	The competent function for the assessment depends on the governance structure (one or two-tier structure) and on the relevant national corporate law. 'Credit institution' in this regard means the competent function within the credit institution. National competent authorities can spell this out in more detail, when implementing the Guidelines.	No change
Art 4 (2)	The reference to the nomination committee should be changed as under German law the 'Chairmans Committee' is convened for appointments to the management board. The reference to the nomination committee should be amended by adding 'or a body with a equivalent role'.	The Guideline was amended accordingly. However, we consider any committee which is responsible for those tasks to be a nomination committee, independent of the name or additional responsibilities.	4Par 4.2 amended
Art 4 (2)	One respondent recommended that EBA should be more active in encouraging credit institutions to put nomination committees in place.	The EBA Guidelines on Internal Governance include this in point 14.6. Larger credit institutions should have such committees in place.	No change
Art 4 (2)	A respondent suggested that the and be replaced by of, since this is the Nomination Committee's key role.	The paragraph was clarified accordingly.	Par 4 amended
Art 4 (2)	Respondents commented that this article also extends the role and remit of the nomination committee beyond board and senior executive positions to key function holders. The recruitment of key function holders should be a	While the appointment of key function holders is usually a responsibility of the management, the establishment of policies should fall under the responsibilities of the nomination committee or the management body.	no change

	responsibility of the management.		
Art (4)-(8)	Respondents pointed to some problems regarding the application of those requirements for members of the management body who were appointed/elected by staff (employee representatives). It was suggested to require an assessment after the appointment, aiming in identifying and mitigating any gaps in the required knowledge. Art 6 should be clarified regarding the scope of the application, and Articles 5(1), 7(1c) and 8(2) clarified accordingly. Staff members should be excluded from the selection policy (art 7.1). Art 14 needs to reflect the expectations for such members and the requirements on independence in art 15(2) need to be adjusted accordingly.	<p>All members of the management body need to be suitable, this also applies to staff representatives. This is consistent with the upcoming CRD IV requirements. The assessment needs to take into account the specific position of a member. Credit institutions need to comply as well with the respective regulation (e.g. law on employee representatives). In cases where the assessment of the suitability might be facilitated to trigger a replacement of a member, this decision may be challenged according to the national law.</p> <p>The Guideline does not interfere with the national laws on employee representatives. It had been clarified that Credit institutions should apply their policies considering the specific experience needed for positions, including such of employee representatives. This should allow to respect specific national legal requirements on matters including the representation of staff on company boards.</p>	Background II (20 and Par 7.3added
Art 6(1)	Respondents suggested clarifying the time frame for assessments made by credit institutions.	The assessments should be performed as soon as practical to ensure that only suitable persons perform their duties. This should take in any case not longer than 6 weeks.	Par 6.1 amended
Art 6	Respondents suggested that members of the management body could make an annual declaration of any changes in their circumstances which would affect their suitability.	Members of the management body should notify any relevant issues which might affect their suitability as they arise and should not wait for an annual notification. However, a annually notification could be a valuable approach to make members aware of their obligation to notify the institution and possibly the supervisor when there has been a change in circumstances that would affect their	Par 7 amended.

		suitability, it was left to the discretion of the institutions if they want to demand such a declaration within the policy on suitability or not. The article on the credit institutions policies was clarified and the respective footnote integrated in the Guidelines.	
Art 6	<p>Some respondents mentioned that collective knowledge requirements are minimally addressed in the guidelines. Art. 6 (3) mentions that it is necessary to assess whether the management body is suitable 'in the round'. The respondents consider that this term is vague, not a legal term and not very well chosen. One respondents considers it necessary to replace the word 'in the round' by 'collectively' (which would be in line with Articles 86 (2)(3), 87(1)(b) CRD IV).</p> <p>Some respondents felt that the correlation between individual and collective knowledge should be addressed better. If the requirement for individual board members are set too high, there would be a risk that the often stressed diversity in organs could not be guaranteed. Therefore, according to some respondents, the focus of the guidelines must be predominantly on the fulfilment of the requirements at the level of the entire body.</p>	<p>The Guideline was changed to reflect also collective aspects. Credit institutions need to assess the individual suitability while also caring that an overall the composition of the management body is sound. This is already stated in the Guidelines. This was slightly strengthened within article 14 on the experience requirements. However, this is more an issue of the appropriateness of the credit institutions internal governance (compare EBA Guidelines on Internal Governance) than of the suitability of an individual person. Each member of the management body needs to be suitable and must meet the requirements for his or her specific position, applying the principle of proportionality. In addition the management body in its management function and in its supervisory function or a unitary board needs to be collectively suitable.</p>	Par 6 and 14 changed
Art 6	<p>One respondent suggests that the guidelines could highlight that the credit institution could carry out assessment of its functioning as a collective unit on a regular basis through self-assessments as well as external assessments facilitated by an external evaluator. This would be in line with the general 2005 EC recommendations on self-</p>	<p>The Guidelines require that the credit institution adopts policies on suitability. The Guidelines foresee a re-assessment whenever appropriate. The credit institution may consider performing periodical re-assessments.</p>	No change

	assessment of non-executive directors in listed companies.		
Art 6 (2)	Participants of the public hearing asked to clarify the situations which trigger a re-assessment of the suitability.	It is not possible to list all situations which can trigger a reassessment. In general a re-assessment would be reasonable if a relevant event happens. This principle is already contained in the Guidelines.	No change
Art 6(4)		It was clarified that re-assessments are also necessary for key function holders, when appropriate.	Par 6.4) amended
Art 7	A few respondents felt that the stipulation that any credit institution should have a recruiting and assessment policy regarding the members of the management body is a formal requirement that will result burdensome especially for smaller institutions whilst not providing any relevant additional information for supervisory authorities. It was pointed out that choosing the members of its management body wisely is within any credit institutions' own vested interest.	Written policies for the nomination of members of the management body and key function holders are already required in the Guidelines on Internal Governance. The current Guidelines add more detail to those requirements without changing the general principle.	No change
Art 8	Some respondents think that Art. 4 is incompatible with Art.8 which should be deleted or clarified. The primary responsibility of the initial and ongoing assessment lies with the bank as is clearly indicated in Art. 4 (1). However, Art. 8 constitutes an interference with the powers of those functions which are responsible for the appointment of members to the management board and the supervisory board and more specifically questions with whom this responsibility lies for the assessment. The management board could not assess itself in the light of Art.8 and the dismissal would in principle be the task of a nomination committee.	As this comment already points out, the competent function for the assessment depends as well on the governance structure (one or two-tier structure) as on the relevant national corporate law. 'Credit institution' in this regard means the competent function within the credit institution. The credit institution must ensure that it meets the regulatory requirements. Hence an assessment of the suitability of the members of the management body needs to be done. If there is no clear setting of competencies, especially with regard to replacement/dismissals this should be established within the credit institutions policies. This task could e.g. be performed by the nomination committee.	No change

	Any mandatory obligation on the part of the credit institution to carry out a critical formal assessment if needs be would give rise to tensions. The only function in which any obligation to make an assessment can possibly be imposed is the function responsible for the appointment and dismissal (whilst not limited to, this especially applies to the suitability assessment). Respondents think Art.8 would create unnecessary complicated situations and enhance legal uncertainty with regards who should determine that a board member is suitable.		
Art 8 (2)	One respondent suggested changing the appraisal system to four categories. 1) completely suitable, 2) mostly suitable (training required), 3) mostly non suitable (temporary appointment possible) and 4) completely non-suitable.	The Guideline is broadly consistent with this approach as it differentiates between suitable and non-suitable, but allows also for measures to establish full suitability for members who do not yet fulfil all requirements. However, this cannot heal all shortcomings. As the principle of proportionality applies, no further break down of categories is deemed necessary.	No change
Art 8		The article was restructured and paragraph (1) on the management function was merged with (2) on the supervisory function, as for both cases the same principle applies that the members need to be suitable for the aspired position, but that there may be the need for additional measures, including training to enhance the persons experience or changing the responsibilities of the position. For cases where the assessment is done after the appointment, it was clarified that measures have to be taken, if the assessment concludes that the person is not suitable.	Par 8 and 15 amended

		It was clarified that the shortcomings of a person and the composition of the management body should be considered and addressed by measures.	
Art 9	Respondents felt that the notification procedure to the competent authority is unclear. They were wondering whether the notification procedure should take place before or after the vote of the shareholders. In the first case, whether the spontaneous board member appointment at the general meeting would not be allowed. In the second case, they considered that the competent authority should not interfere with the shareholders' rights and, hence with the Board's decision making and behaviour.	As there is no unified corporate law in EU member states, EBA will leave the concrete assessment and notification procedures up to national discretion as stated in the background section.	No change
Art 9 (3)	Respondents asked to modify the paragraph to read '... the information provided is accurate according to the institution's knowledge.'	The comment was accommodated.	Par 9.3 changed
Art 10	Respondents recommended that regulators should set a time period within they must notify their objections or confirm they are satisfied.	General agreement. However, this should be amended in Art. 11(4) instead of Art.10.	Par 11.4 changed
Art 10	One respondent suggested a different assessment process to avoid the double assessment of persons. All governance codes devote special attention to a more professional selection and nomination process, which has to be taken care of by the nomination committee. This could form the starting point for applying the criteria set out in the EBA Guidelines. In a second step, the board of directors (unitary) or supervisory board (dual model) discusses the proposals of the nomination committee and decides on the candidate to be nominated. Here the supervisory authority steps in, to validate the candidate proposed. It is only after	The Guidelines apply also to other companies than listed companies. A prior approval is applied in some member states, but not in all member states as national company laws differ. The approval or notification process was deliberately left to national discretion (compare impact assessment). Depending on the number of credit institutions in a member state the proposed process could slow down the assessment and would increase significantly the costs for the competent authority.	No change

	such approval that a formal proposal for nomination by the shareholders meeting -if needed can be made. As to board members (unitary board/supervisory board) the nomination rights finally belong to the shareholders meeting.		
Article 11 (3)	Some respondents felt that providing competent authorities with the possibility to hold interviews should be in principle rejected as it would not necessarily ensure a better suitability of the candidate or avoid conflicts of interest. Respondents argued that interviewing of management body members by the competent authorities should remain exceptional. Other respondents felt that interviews are not appropriate at all as they are focused to gain a personal impression of a person, which does not ensure a better suitability assessment.	The article lays down the scope for the supervisory assessment and names different assessment techniques already used by member states. Interviews may be used, but the Guidelines do not require the conduct of interviews as part of the assessment. Interviews are already conducted in some member states, in particular if the skills of members of the management body of large credit institutions are assessed.	Footnote and parts of Par 14 regarding the assessment of skills integrated into Par 11
Art 11 (4)	Respondents suggested to provide a more specific time frame and not to use 'in good time'.	The length of the assessment process needs to consider the number of such appointments, which depends on the number of credit institutions in a member state. The assessment should be done as soon as practical. To increase the legal certainty the Guidelines were amended. Competent authorities are required to set out a maximum time period which is in any case not longer than 6 month.	Par 11.4 amended
Art 11 (6)	Respondents pointed out that regulators should be required to take into account the results of the suitability assessment of other EEA regulators and asked to change 'may' to 'shall or should'.	Depending on the position and nature, size and complexity of the institution and the institution where a person already has or had a management body position, competent authorities will usually take into account known assessments, when they are relevant and exchange information accordingly. However, information may not longer be up to date and the actual position has to be considered. For this reasons it is obvious that a competent	Par 11. 6 amended

		<p>authority cannot solely rely on the results of such assessments, but need to analyse the underlying information and take into account recent developments, national criminal and other records, the specific requirements for the position and credit institution. The judgement of the supervisor in particular regards the sufficient experience of a person may therefore differ from the first judgement of the other competent authority.</p> <p>The wording was kept as 'may' and the requirement to exchange information between competent authorities on request has been added.</p>	
Art 11 (8)	Respondents think Art. 11(8) should be clarified in order to state that the competent authority will only make general information publicly available. Criteria and/or assessments applicable to particular individuals should not be published.	The publication refers only to the applicable process and not to the assessment of an individual. The paragraph was clarified.	Par 11.8 amended
Art 11 (8)	Respondents stated that assessing the suitability of key function holders is a matter of employment law. Competent authorities should not be empowered to make specific demands as to the suitability of key function holders apart from legal requirements.	Credit institutions have to ensure robust governance arrangements. Sufficiently qualified staff is one key element of credit institutions governance, in particular for key positions. Therefore credit institutions should assess the suitability of those persons in line with the credit institutions policy. Competent authorities may also assess the suitability of such persons as part of their assessment of credit institutions internal governance arrangements.	No change
Article 12 (1)	One respondent considered that a candidate cannot be unsuitable merely on the basis that the information provided is insufficient. That respondent therefore thinks this provision should be deleted.	Sufficient evidence is needed to perform an assessment. If the required available documentation is not provided a person should not be appointed as his or her suitability cannot be assessed or an existing appointment should be suspended or the person replaced. The paragraph was	Par 12.1 amended

		clarified.	
Art 12	One respondent commented that it is important that the person/institution has the right to appeal against the position of the competent authority.	This right is part of the national administrative procedures which are not subject of the EBA Guidelines.	No change
Art 12	One respondent suggested that supervisory corrective measures should be better detailed and motivated, with a risk orientated approach, to avoid a case by case evaluation. The decision for the adoption of corrective measures should be taken by the annual general meeting. Any restriction of shareholder rights should be avoided.	Supervisory measures will only be applied to individual cases. This implies a case by case decision considering the principle of proportionality. Depending on the national company and administrative law the competent authority will either act directly or ask the annual general meeting to replace a member of the management body. However, in case that the credit institution does not comply with the regulatory requirements, competent authorities have the right to take appropriate measures, which can include e.g. penalties, the suspension of mandates or the withdrawal of the credit institution's authorisation.	No change
Art 12 (2)	Respondents asked to add that competent authorities should provide a clear timeframe for the credit institution to resolve situations where members of the management body are considered to be not suitable.	The administrative procedures, including the setting of timeframe are part of the responsibilities of the national competent authority. Due to different administrative laws and due to the fact that different measures would require different time periods, the Guidelines cannot provide for the suggested time frame.	No change
Art 12	One respondent felt that the Guideline is not sufficiently clear when it comes to the applicable consequences of a disagreement between the supervisor and the credit institution regarding the suitability of a member.	The decisions and measures taken by the competent authority are subject to appeal according to the national administrative laws.	No change
Title III chapter 4	Respondents asked to clarify, if this chapter is only applicable to the competent authorities. If so, this should better be moved to chapter III.	As stated in Article 6 the criteria should also be used by credit institutions, the articles have been rephrased accordingly.	Par 13 and 14 amended.
Art 13	Several respondents stated that the idea of taking into	Even though the term 'take into account' already implies	Par 13 amended

	account current investigations and/or enforcement actions may need to be reconsidered. Regulators should pay due regard to the presumption of innocence. This should be expressly mentioned. Art. 13(3) taking into account any administrative or criminal record is too broad. This could be limited to records that give rise to material doubts about his or her ability to ensure the sound and prudent management of the credit institution.	that the proceedings listed in article 13 should only lead to the final judgment when being relevant, this will be clarified. The presumption of innocence is a principle applicable in criminal law. The Guidelines have a prudential perspective; therefore investigations need to be taken into account as they may be relevant for the reputation of a member and therefore for the reputation of the credit institution. This implies that they are identified, followed up and their possible impact would be analysed.	
Art 13	One respondent felt that the assessment criteria are to excessive and proposed to leave the definition of assessment criteria to the national regulators.	The aim of the Guidelines is to harmonise supervisory practices and therefore the Guidelines need to set common criteria.	No change
Art 13 and 14	Respondents were concerned that the strict requirements regarding experience and reputation limit the institutions ability to establish a diverse board.	EBA recognises that diversity within the management body is valuable. The criteria set out in the articles will be applied in a proportionate way. The Guidelines list criteria to be considered, the criteria do not pose an enumerative list of prerequisites. EBA believes that the Guidelines do not harm the diversity of the management bodies.	No change
Art 13 (2)	Respondents stated that the stipulation that a board member “should not be considered to be of good repute 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 repute if the information reviewed as part of the assessment gives rise to any material doubt”.	The review of the business conduct is important, in particular for the re-assessment of members of the management body, but also for the initial assessment. It is implicit that issues can only be identified on the basis of reviewed information.	No change
Art 13 (7)	Respondents stated that criterion a) is not specific enough and would be subject to interpretation. If it stays in the GL ‘deliberately’ should be added. Criterion c) dismissals can	The comments regarding c) have been accommodated. Acting ‘deliberately’ would be narrowing down the requirement as persons may also act e.g. with gross	Par 13.7 amended

	have several reasons, it does not appear to be a relevant criterion in assessing the reputation of a member of the management body.	negligence.	
Art 13 (8)	Respondents asked to state that in case of a bankruptcy or rehabilitation the specific role of the individual should be taken into consideration. In addition such information are not always publicly available. The existence of a large loan/investment is not indicative for financial difficulties.	First argument has been taken into account. Large loans imply possible conflict of interest and should therefore be taken into account. Conflicts of interest should be identified and mitigated or managed.	Par 13.8 amended
Art 13	One respondent suggested making it explicit that any assessment needs to consider the individuals past record as member of a management body of a credit institution or other major company.	Those factors will be part of the assessment and are already implicitly included in the criteria, e.g. as the business conduct or earlier assessments have to be considered. The competent authority will also receive a CV which includes information about such positions.	No change
Art 13 and 14 (7)	One respondent suggested that the reputation criteria could be extended to request evidence from individuals of their positive contribution to enhancing and sustaining a culture of customer-focused, ethical professionalism within credit institutions or similar organisations and to give positive weight to memberships of relevant professional bodies. Competent authorities may also assess whether an individual has the appropriate ethical, professional and technical competence.	While EBA considers ethical behavioural as important, this is implicitly covered in the assessment of the reputation. However, it can be difficult to provide evidence or even proof of such characteristics. The suggested additional criteria go far beyond the requirements of the Directive 2006/48/EC and have therefore not be recognised in the Guidelines.	No change
Art 14	A few respondents suggested that diversity of the board should be added to be an assessment criterion.	While diversity of the management body is important, diversity can only be a criterion for the evaluation of the composition of the management bodies and not for the assessment of an individual person. The EBA will deal with diversity criteria at a later stage, if mandated within the upcoming CRD IV.	No change
Art 14	One respondent recommended requiring for the	As different standards in the area of audit exists and EU	No change

	assessment of the chief audit executive knowledge of the international professional standards of the Institute of Internal Auditors.	regulation does so far not refer to one specific standard, EBA refrains from requiring the knowledge of a specific standard.	
Art 14	Some respondents felt that in the guidelines the banking profession is exposed to over detailed criteria.	The criteria within the Guideline are not to be understood as a checklist, but of areas which will be considered in the supervisory assessment. A certain level of detail is needed to harmonise the criteria within the European Union.	No change
Art 14 (1)	The possibility to gain managerial experience as in 14.3 should also be applied to members of the management body in its management function.	The management body needs to have sufficient practical experience in areas relevant for the credit institution, e.g. in financial markets or risk management. The management experience may be gained from other firms as well, but the experience must be sufficient to allow a sound management of the credit institution.	Par 14.6 amended
Art 14 (1) and (3)	Respondents commented that the assessment needs to be sufficiently flexible and should focus on the overall composition of the supervisory function. The Guidelines should state that the criteria can be fulfilled by the board as a whole and not necessarily by each member. In addition it should be recognised that the supervisory board members are elected by the shareholders. The paragraphs contradict each other as Art 14 (1) requires managerial experience for all members.	Every single member of the management body in its supervisory function has to fulfil the criteria. In this regard, a supervisory body can still be collectively unsuitable even though all members themselves are suitable, as it may need some extra members with additional skills. Art was restructured to clarify which criteria apply to the management function and/or the supervisory function.	Par 14 restructured
Art 14 (2)	Respondents felt that all relevant experience should be considered, even if the positions are only temporary or short-term.	Short term or temporary positions are not excluded from the assessment, but will usually not be sufficient to assume sufficient experience. The requirement was clarified.	Par 14.6
Art 14 (3)	It should be avoided that academic qualifications alone can suffice.	The Guidelines list areas, from which the experience can stem. The suitability will be assessed on a case by case basis taking into account the actual experience.	No change
Art 14 (5)	Respondents asked to clarify that practical work experience	Education can be gained in form of academic studies or	Par 14

and footnote 19	and university degrees are considered equal.	other activities, including trainings during practical work experience. The Guidelines do not require a certain level, but ask the competent authority to assess the education of a person and to evaluate if it is sufficient for the aspired position. The Guideline was restructured to clarify how the requirements apply to the management and supervisory function.	restructured and footnote integrated.
Art 14 and footnote 20	Respondents stated that not all requirements are sufficiently defined (e.g. independence of mind) or applicable to all members of the management board.	Art 14 differentiates between experience requirements for the management and the supervisory function. In some cases it was clarified to whom the requirements apply. While Art 14 applies to the assessment of the credit institution and the competent authority, the skills of a member, should be assessed by the credit institution. It was clarified in article 11 that the competent authority may also perform an assessment of the skills. The lists provided in the guidelines are common examples of skill sets which may be taken into account within the assessment. It is not intended to define a required skill set.	Par 14 restructured and parts transferred to Par 11.3
Art 14 (7)	A few respondents felt that assessing the skills of a person is clearly overshooting the mark and includes factors which are not quantifiable.	Assessing the skills of a person is already practice in some member states and is therefore mentioned as one possible, but not as a mandatory assessment area within the Guidelines.	No change
Art 15	In paragraph 2, with regard to the statement that the supervisor's assessment of a member's independence involves taking into account the person's relationships with the controlling shareholders of the credit institution, some respondents fear that this might undermine a majority	This guideline aims to ensure that conflicts of interest are identified and appropriately managed. The areas listed in paragraph 2 will help to identify such conflicts. Existing conflicts should be managed. However, even for subsidiaries it is good practice to have also independent	No change

	<p>representation of the controlling shareholders on the board. Respondents required that the independence requirements should allow flexibility for reasonable situations where members have economic links and for wholly owned subsidiaries, shareholder and employee representatives. Potential conflicts of interest should be managed for example by recusal from voting or meetings rather than automatically prohibiting board membership</p>	<p>members within the supervisory function.</p>	
Art 16	<p>Some respondents commented that the implementation period is too short, in particular as credit institutions would only have 2 month for the implementation after the national competent authority has implemented the EBA Guideline.</p>	<p>The implementation period has been changed to 6 month for competent authorities and credit institutions. Credit institutions should do their best to comply with the EBA guidelines and therefore can start their implementation work with the publication of the Guideline, the implementation work based on the national implementing measures should be minor and additional transitional arrangements for e.g. notification or prior approval procedures need to be set by competent authorities implementing such processes.</p>	Art 16 amended
Art 16	<p>One respondent suggested introducing a transitional arrangement regarding ongoing employment. Furthermore the requirements should be without prejudice to labour law.</p>	<p>The EBA does not see the need to add transitional arrangements. The Guidelines applies to appointments, re-appointments and re-assessments. An initial assessment of already appointed managers is not required within the Guidelines.</p>	No change
Annex 1	<p>One respondent suggests that Annex 1, item 6: the presentation of the financial and non-financial interests and family ties to other board members, other executives and subsidiaries should be deleted from the list of criteria.</p>	<p>The Annex does not contain criteria, but documentation requirements. The mentioned requirements are needed to identify potential conflicts of interest and to assess if they would be appropriately managed.</p>	No change
Annex1, 2	<p>Respondents stated that issuing references is not common and suggested to delete this from the required documentation. The level and detail of 1.2.f is too</p>	<p>References are only required, if available. As it is required to confirm that all information provided is correct, it is sufficient to hand in a electronic CV.</p>	Annex (2) amended

	excessive. A electronic CV should be sufficient as well.		
Annex 1, 2 f	One respondent suggested limiting the documentation requirements in timeframe and content.	The information listed is crucial for the assessment. However, the time period for which additional detailed information needs to be provided was shortened to 10 years.	Annex (2f) amended
Annex 1, 4	Respondents stated that such records are not always available to a credit institution, therefore 'when in their possession' should be added. The notification of criminal records might contradict data protection rules. There should be at least a reference in point 4 of Annex I that the notification of criminal records applies, subject to the provisions of the Regulation on Data Protection.	The comment has been recognised and the annex has been adjusted. Documents need to provided, if available.	Annex (4) amended
Annex 1, 8	One respondent stated that it would be an additional burden to submit a record of the credit institutions suitability assessment.	Credit institutions should document their assessment; EBA does not see it as overly burdensome to hand in the existing documentation.	No change
Responses to questions in Consultation Paper EBA/CP/2012/03			
Question 1.	In general, most of the respondents are in favour of a flexible, more principle-based approach and do not want to specify the principle of proportionality any further. They fear that more detailed rules could implicitly limit its scope of application to the expressly mentioned examples. Some argued that establishing further criteria may leave less room for institutions themselves or for competent authorities, and they also feel the need to adapt the requirements to the specific local characteristics, with regard to the legal context, firm structures, business models and economic specifics.	Considering the advantage of a more flexible approach, EBA did not introduce a further break down of the applicable rules to different classes of institutions. Competent authorities will take into account the principle of proportionality in their supervisory practices, considering the specifics of the credit institution, national law and the financial system.	

	<p>However, a few respondents are also in favour of more detailed regulations or closer articulation of the principle or proportionality and made suggestions for further differentiation within the rules. It was suggested evaluating the principle further in regard of its application to systematically important financial institutions/larger or more complex credit institutions. As criteria to be taken into account, respondents suggest that the focus should be on the size of a credit institution (measured based on different parameters, such as number of employees/branches, balance sheet total, etc.) and complexity of the business model (commercial vs. investment banking). Other criteria mentioned are:</p> <ul style="list-style-type: none"> - The systemic relevance of the credit institution. - Its membership in a group of credit institutions (if the credit institution is the holding company or a subsidiary of the group, the participation of the parent company –direct majority or not- and if there are other type of financial institutions in it) or institutional protection scheme/cross guarantee scheme. - Geographical sphere of action of the credit institution or the group to which it belongs. - The nature of the credit institution with regard to retail only or investment banking activities. - An institution's internal organisation, e.g. legal structure, stock exchange quotation, company objectives. <p>On the contrary other respondents were very doubtful that</p>		
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	<p>general criteria could be found to accommodate the situation in all 27 Member States especially taking into account the current level of market integration where there is a wide range of different business models, structures and legal forms among European credit institutions. They feared that any further differentiation in the Guidelines would get caught up in endless details and suffocate the assessment process within credit institutions and regulators.</p>		
<p>Question 2.</p>	<p>Most respondents believe the definition of policies of credit institutions for assessing the suitability of key function holders should remain primary the responsibility of the credit institution, and therefore there should be little or no intervention by the competent authorities, as it may affect their private autonomy. Many also question the extension of the draft Guidelines to “key function holders” as they believe it goes beyond the legal basis of Art. 11 CRD and Art. 22 CRD, or Art 13 and 87 CRD 4. According to a few respondents the scope of the guidelines regarding this topic could be limited to the existence of policies, but should not extend to its content or implementation. Some felt that those policies should not be assessed by the supervisor. Many other respondents generally thought that the EBA acts on a legal basis but considered it as not necessary for the Guidelines to require competent authorities to assess the policies of credit institutions with regard to their suitability assessment of key function holders as competent authorities already have the possibility to assess these policies as part of their supervisory review. This assessment by competent authorities should be done as</p>	<p>Sound and robust governance arrangements are a prerequisite for every institution. This contains that credit institutions have suitable managers who are responsible for the day to day management of the institution under the overall responsibility of the management board. Hence it is of utmost importance that a credit institution employs managers only, if they can rely on their competence and personal qualities to fulfil their duties. The definition of key function holders is with the credit institution, changing the scope to senior management would potentially increase the scope of assessments and lead to a weakening of the differentiation of requirements for the management body and for key function holders. Setting principles for the employment of key staff is good practice within credit institutions. An obligatory assessment of the policies will not be introduced within the Guidelines. Specific comments have been summarised in the feedback table below, which also contains EBA’s response and indicates where amendments have been made to the Guidelines.</p>	

	<p>the competent authority sees fit, but should not be made compulsory by the Guidelines.</p> <p>On the other hand, a few interested parties are in favour of a more compulsory approach of the Guidelines. They acknowledge the importance of the suitability of key function holders for the overall functioning of an institution. A small number of respondents asked for a definition of the term key function holder by the EBA. Other respondents suggest the Guidelines to be consistent with the definition of the forthcoming CRD IV and to extend the Guidelines to 'senior management' which also includes the key function holders. This approach would avoid the need to define the term key function holder.</p>		
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5. Confirmation of compliance with guidelines and recommendations

Date:

Member/EEA State:

Competent authority:

Guidelines/recommendations:

Name:

Position:

Telephone number:

E-mail address:

I am authorised to confirm compliance with the guidelines/recommendations on behalf of my competent authority: **Yes**

The competent authority complies or intends to comply with the guidelines and recommendations:

Yes **No** **Partial compliance**

My competent authority does not, and does not intend to, comply with the guidelines and recommendations for the following **reasons**⁴:

Details of the partial compliance and reasoning:

Please send this notification to compliance@eba.europa.eu⁵.

4 In cases of partial compliance, please include the extent of compliance and of non-compliance and provide the reasons for non-compliance for the respective subject matter areas.

5 Please note that other methods of communication of this confirmation of compliance, such as communication to a different e-mail address from the above, or by e-mail that does not contain the required form, shall not be accepted as valid.