

Brussels, 5th July 2021

Questions for ECB public hearing

ECB consultation on its revised Guide to fit and proper assessments

15th July 2021

I. General questions

1. The role of the management bodies in group structures varies a lot depending on the level of centralization at group level. The level of centralization is particularly high in co-operative networks, where the central body is responsible e.g., for the strategy, products, the management of risks, liquidity, and capital etc. within the network and the affiliated institutions (often small rural banks) have a legal responsibility to follow the instructions issued by the central body. However, also in normal group structures these functions may be carried out mainly by the management body of the parent company. The tasks of the management body in its management function and in its supervisory function also vary in groups with a dual governance structure so that in some groups the Board of Directors may be responsible for a large part of the supervisory tasks in addition to their management function, while the Supervisory Boards may play a very limited role in its supervisory function. The draft Guide does not, however, appear to take into account these quite significant differences in the roles of the management bodies in different group structures and governance models.

How does the ECB intend to take into account the significant differences in size of group entities to prevent disproportionate application of the requirements to management bodies of subsidiaries and members of co-operative groups, which have a limited autonomy in their decision making?

2. Given the extent of new detailed fap requirements, an adequately long transitional period is called for.

What is the estimated date of adoption for the Guide and how long a transitional period is planned to allow banks adequate time to prepare for the new requirements?

The voice of 2.700 local and retail banks, 85 million members, 214 million customers in EU

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3. We have noted that the objective of this revised version of the Guide is about - among other things - (i) explaining *"in greater detail the policy stances [of] the ECB when assessing the suitability of members of the management bodies"* and (ii) specifying the *"ECB's main expectations"*.

How do you reconcile these targets with the "case-by-case" and "appropriate" approach, which the draft revised Guide often referred to as regards fit and proper assessments? From our point of view, getting into such details may affect the visibility of what is expected from the ECB. The Guide seems to make procedures even more granular and burdensome from an administrative perspective, an approach that appears more similar to Court proceedings.

4. It seems to us that the revised version of the Guide focuses more on individual assessments compared to the current Guide.

How does the ECB would reconcile this approach with the collegial nature and the collegial duties/liabilities of the management body (especially, but not exclusively, as regards French or Finish law)?

5. Presumption of innocence/ privacy rights

Would it be possible to reaffirm more firmly in the Guide the presumption of innocence, on one hand, and the privacy rights, on the other hand? In view of the new expectations set out in the revised Guide, how does the ECB see the application of these fundamental principles in practice?

II. Specific questions

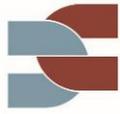
1. **Section 3.1.1 "Practical experience and theoretical knowledge", first paragraph** *"Members of the management body must have up-to-date and sufficient knowledge, skills and experience to fulfil their functions. This also includes an appropriate understanding of those areas for which an individual member is not directly responsible, but still is collectively accountable together with the other members of the management body."*

When responsibility is at stake, is it from a civil law point of view or in the meaning of the duties as regards fit and proper assessments? The current wording may suggest that civil liability is at stake, which is not within the scope of this Guide as we understand it. More specifically, we are not at all comfortable with the notion of possible responsibility of a member of the management body.

2. **Section 3.1.3.2 Practical experience- Step 2 – complementary assessment**

*"[..]As indicated above, different requirements apply to **members of the management body in its management (executive) function** and **members of the management body in its supervisory (non-executive) function**, as their roles and responsibilities are different by nature. (...)*

A member of the management body in its supervisory function who does not meet the threshold for the position may still be considered suitable if (i) the member has experience or expertise which addresses the institution's specific needs (e.g. IT



experience or climate-related or environmental risk experience); (ii) the member and the institution commit to the necessary training being undertaken to overcome the lack of basic banking knowledge; and (iii) the member fulfils all other fit and proper requirements."

Can the reference to the member of the management body in its supervisory function also be extended to the executive members, or should this be considered limited only to non-executive members?

When assessing members of the management body of Supervised Entities based in Member States where National Law provides different thresholds, will the ECB Banking Supervision take into consideration the different thresholds applicable to banks based in those jurisdictions?

3. Section 3.1.4 Special Cases

"For staff representatives, specific national law considerations may apply. For small savings banks and/or cooperatives, the criterion for experience can be considered met if the supervised entity and/or the cooperative group provide an adequate and timely training plan for the appointee. In the case of a supervised entity operating in a specialised business area, experience in the specialised field will be treated as relevant experience."

Does the reference to small savings and/or cooperative banks, apply to any executive and non-executive members of small banks?

What exactly is meant by "small banks"?

Is the reference to the criterion of experience ("*the criterion for experience can be considered met if the supervised entity and/or cooperative group provide an adequate and timely training plan for the appointee*") to be considered as referring to both practical experience and theoretical knowledge?

If confirmed that the Guide allows for training plans to fill the gap in the practical experience (beside the theoretical knowledge), such provision for small banks can be applied even if not provided in the national legislation?

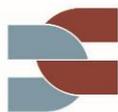
4. Section 3.2. Reputation

What would be the territorial scope of the information to be provided as regards "Reputation" (cf. section 3.2.1)?

Why going in so much intrusive detail as regards "*the professional insight shown by the appointee*" (cf. section 3.2.1)? Are the 3 bullet points necessary?

In section 3.2.2, it is stated that "*any other evidence that suggests that the appointee acts or has acted in a manner that is not in line with high standards of conduct*" would be taken into account in the assessment approach regarding Reputation. Is this criterion necessary? Indeed, from our point of view, this is an extremely large and subjective approach, which makes this criterion difficult to assess in practice.

5. Section 3.3 Conflicts of interest and independence of mind.



Section 3.3.1 Information

"In line with the joint ESMA and EBA Guidelines on suitability the following minimum set of information from the appointee and the supervised entity is considered relevant to conduct the assessment:

[...]

4. description of any financial obligations towards the supervised entity, the parent undertaking or their subsidiaries that are cumulatively above EUR 200,000 (excluding private mortgages (31)), or any loans of any value that are not negotiated at arm's length or that are not performing (including mortgages);

[(31) Private mortgages of any value do not need to be disclosed (if they are performing, negotiated at arm's length and not contrary to any internal credit approval rules) if they are not of a commercial nature. Moreover, all personal loans (e.g. credit cards, overdraft facilities and car loans) to the appointee from one and the same entity (if performing, negotiated at arm's length and not contrary to any internal credit rules) do not need to be disclosed as long as they are cumulatively under the threshold of EUR 200,000. Note that such mortgages or loans should be disclosed if they are likely to become non-performing for any reason.]"

The main text seems to exclude from the calculation of the 200K only private mortgages. However, the footnote refers also to both private mortgages and (up to 200K) personal loans as exposures that do not need to be reported. It is therefore not clear what is the exact meaning of (and the interaction between) the two provisions – the one in the main text and the one in the footnote. For example, if the appointee has a mortgage of 500K, other personal loans for 150K and other non-personal loans for 150K (all performing, negotiated at arm's length etc.), is it correct to assume that no information has to be reported?

6. Section 3.3 Conflicts of interest and independence of mind.

Section 3.3.2.3 Financial conflict of interest

"Where the appointee has:

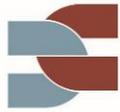
- a material financial obligation towards the supervised entity, the parent undertaking or **their** subsidiaries (e.g. loans or credit lines);*
- a material financial interest (such as ownership or investment) in the supervised entity, the parent undertaking or **their** subsidiaries; or in clients, suppliers or competitors of the supervised entity, the parent undertaking or **their** subsidiaries."*

The Guide seems to consider the financial relations of the appointee with subsidiaries not only of the S.E., but also of its parent company. Is this correct? What type of conflict of interest could materialise between the appointee of a S.E. and a different subsidiary of its parent company?

7. Section 3.3 Conflicts of interest and independence of mind.

Section 3.3.2.3 Financial conflict of interest

"In principle, the following is considered to be material: financial obligations towards the supervised entity cumulatively exceeding EUR 200,000 (excluding private



mortgages 33) or any loans of any value that are not negotiated at arm's length or that are non-performing (including mortgages); and current shareholdings of more than 1% or other investments of equivalent value.

[33 In the sense of footnote no. 29]"

Could you please provide some details on the interaction between this provision and the provision under point 4? of paragraph 3.3.1 Information? Is it correct to assume that, with the new Guide, situations that are not deemed material will no longer have to be reported? On a separate note, the reference shall probably be to footnote 31 instead of 29.

8. Section 3.3.3 "Conflicts of interest statement" provides that *"An ancillary provision may be targeted to the supervised entity's conflicts of interest policy, (...) or to create specific committees within the management body to assist the supervisory function of the management body in situations where there is a potential conflict of interest "* (p.27).

We fear that at least cooperative banks are not in a position to organize these committees at the level of each regional bank. Wouldn't this expectation be too burdensome taking into account that regulations already require several committees to be set up?

9. Section 3.4 Time commitment.

Section 3.4.3.2 Qualitative assessment: two step assessment process. Second Step – "Detailed assessment"-

"The necessary time commitment may be lower in the case of: (i) a credit institution with a small balance sheet size and a simple business model, such as a cooperative bank, or a small subsidiary or institution with low overall weight within a group."

The paragraph seems to be too vague: how should the less stringent regime for small cooperatives be interpreted in relation to the time commitment?

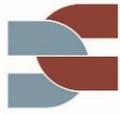
10. Section 3.5 Collective suitability of the management body.

Section 3.5.1 Information and Section 3.5.2 Assessment approach

In cases where one or more members are appointed but there is not a renewal of the entire body, does the same set of information need to be provided for the entire body (including the members that had been previously appointed) and does the same assessment approach have to be followed?

11. Section 3.5 "Collective suitability of the management body": *"There should be a sufficient number of members with knowledge in each area to enable effective discussions and challenges to be made and robust decisions to be taken" (p. 37)*

From a practical point of view, does this mean that there should be at least two experts on each subject? From our point of view, this is not necessarily always achievable in practice, especially at the level of Regional cooperative banks, to have at least two members that are experts on each subject. In addition, a discussion and a truly collective decision-making can be reached through other means than such individual depth knowledge, for instance through the



management body's committees, targeted training sessions or hearing of experts.

12. Section 3.6 Assessment of individual accountability of board members.

"The above approach is applied in conjunction with the fit and proper assessment criteria provided in Sections 3.1 – 3.3 of this Guide."

While the connection between the assessment of individual accountability and Reputation criteria (3.2) is clear, the link with the Experience (3.1) and the Independence (3.3) criteria seems more blurred. Could you please provide some more details on this?

Could you please explain how the "Assessment of individual accountability of board members" (section 3.6) should work in practice?

As regards section 3.6, could you please confirm that "accountability" does not refer to civil liability, which is not in our view in the scope of the Guide?

13. Section 6.2 ECB approach to interviews.

The aim of interviews is to complement and/or verify (i) the documentation submitted by the appointee and/or credit institution or (ii) information that the competent authority has obtained by other means. (...) Interviews are mandatory for new appointments to the positions of CEO and Chair of the management body⁸¹ at stand-alone banks and top banks of groups. If the top entity in a group is a holding company, mandatory interviews are required for such new appointments in the largest bank in the group. In the case of cooperatives, they are required for such new appointments in the central body or central body association.

What are the specifics of the requirement for cooperatives to hold mandatory interviews with the central body of the association? Do they apply only under certain conditions? Are they alternative to the interviews in the central body of cooperative banking groups?

14. Section 7.1 (page 68)

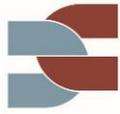
*"The new guide ...encourages banks that are subject under national to an **ex post assessment regime** to file their fit and proper applications before making appointments" – ECB press release*

p. 68 et s. of the Guide: *"The ECB invites all credit institutions in participating Member States that are not required under national law to notify the competent authorities before the intended appointment of a member to (...)"*

We are of the opinion that the ECB as per the Fit&Proper guide cannot expect banks not to follow national laws. On top of that, an ex-ante assessment in a country like France for example, where there are lots of cooperative banks, would put the banks and the national supervisor in an impossible situation in practice.

15. Section 7.2

Would the ECB consider an emergency procedure in certain cases to go faster than the 4-months period referred to in section 7.2?



III. LSI supervision

1. Scope of the ECB's fit and proper assessments

"This Guide covers fit and proper assessments of members of the management body, both in their management function (executive directors) and supervisory function (non-executive directors) of all institutions under the direct supervision of the ECB (significant institutions), whether credit institutions or (mixed) financial holding companies and in the case of licensing or qualifying holdings. On the basis of Article 6(4) of the SSM Regulation, responsibility for regular appointments in less significant institutions (i.e. outside the context of licensing or qualifying holdings) lies with the NCAs."

Do the ECB Guide in consultation and the questionnaire apply only to significant institutions directly supervised by the ECB, or could they be considered by NCAs in their assessment processes for less significant institutions?