EBI Working Paper Series

2019 – no. 34

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Fit and proper assessments within the Single
Supervisory Mechanism

05/03/2019

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Fit and proper assessments within the Single Supervisory Mechanism

Danny Busch & Annick Teubner*

I. INTRODUCTION

This chapter analyses and discusses the degree and limits of convergence of fit and proper assessments within the Single Supervisory Mechanism ('SSM'). We will discuss fit and proper assessments of members of the management body of credit institutions (hereafter: 'banks'), in particular of banks under the direct supervision of the European Central Bank ('ECB'), and of their key function holders.¹ Before going into details, we will provide some key terms and definitions (§ II); describe the role of fit and proper assessments as an element of corporate governance of banks (§ III); set out the division of responsibilities between the banks themselves, the ECB and the national competent authorities ('NCAs') (§ IV); and provide an overview of the relevant sources of substantive requirements (§ V). Subsequently, an overview will be provided of what has been achieved so far in terms of convergence of fit and proper assessments (§ VI). Currently, there is still a large variety of national practices despite the harmonisation efforts and there are limits to convergence in this area. These variations and limits are discussed in § VII. We end this chapter with some concluding observations (§ VIII).

II. KEY TERMS AND DEFINITIONS

1. 'Management body'

For the purpose of this chapter and in accordance with the definition of the Capital Requirements Directive IV ('CRD IV'), the term 'management body' has a broad meaning. It is defined in the directive as 'an institution's body or bodies, which are appointed in accordance with national law, which are empowered to set the institution's strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution'.² The term 'management body in its supervisory function' is separately defined as 'the management body acting in its role of overseeing and monitoring management decision-making'.³

A broad definition of the term 'management body' has been chosen, as different governance structures are used in the Member States. The most common governance structures are one-tier boards (monistic board structure) and two-tier boards (dualistic board structure).⁴ CRD IV is intended to apply to all existing models, without indicating a preference for any given structure.

* Annick Teubner has drafted this chapter in her own personal capacity. The views expressed in this chapter are personal and do not necessarily represent the views of the European Central Bank or De Nederlandsche Bank N.V.

¹ 'Credit institution' is defined in Art. 4(1)(1) of Regulation (EU) No. 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, OJ EU L 176, 27 June 2013, pp. 1-337 ('CRR').

² See Art. 3(1)(7) of Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ EU L 176, 27 June 2013, pp. 338-436 ('CRD IV').

³ See Art. 3(1)(8) CRD IV.

⁴ In some Member States, such as Portugal and Italy, there exist also other board structures.

CRD IV stresses that the definitions are purely functional to achieve a given result, regardless of the national company law applicable in a Member State. The relevant definitions do not affect the general allocation of competences between the management function (the executives) and the supervisory function (the non-executive directors) under domestic company law.⁵

The EBA Guidelines on suitability⁶ also take a functional approach, meaning that the management function includes all persons performing executive functions, even when these functions have been delegated to them by the management body or when the said persons have not been proposed or appointed as formal members of the management body.⁷ In addition, the EBA Guidelines on suitability clarify that where shareholders, members or owners of a bank directly exercise management body's responsibilities, the bank should ensure that the responsibilities are exercised, as far as possible, in line with the EBA Guidelines on suitability applicable to the management body.⁸ Thus the fit and proper requirements for members of the management body discussed in this chapter apply to all persons exercising responsibilities of the management function and the supervisory function, irrespective of the governance model prescribed by national law.

2. 'Key function holders'

Not only the members of the management body, but also so-called 'key function holders' are subject to fit and proper assessments. The EBA Guidelines on suitability define 'key function holders' as 'persons who have significant influence over the direction of the bank, but who are neither members of the management body nor the CEO. They include (i) the heads of internal control functions and the CFO, where they are not members of the management body, and, (ii) where identified on a risk-based approach by banks, other key function holders. Other key function holders might include heads of significant business lines, European Economic Area/European Free Trade Association branches, third country subsidiaries and other internal functions'.⁹

⁵ See recital (55) CRD IV. See also Art. 3(2) CRD IV, which clarifies that where CRD IV 'refers to the management body and, pursuant to national law, the managerial and supervisory functions of the management body are assigned to different bodies or different members within one body, the Member State shall identify the bodies or members of the management body responsible in accordance with its national law, unless otherwise specified by [CRD IV]'.

⁶ Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU, EBA/GL/2017/12/ESMA71-99-598 (26 September 2018) ('EBA Guidelines on suitability'), para's 11-14.

⁷ In some Member States the CEO is not always member of the management body.

⁸ The requirements of the EBA Guidelines on suitability only apply to 'senior management' as defined in CRD IV, when these persons are considered to be a key function holder or a member of the management body. However, the EBA Guidelines on suitability clarify that 'all staff of institutions should be suitable to perform their job' (Background and rationale, p. 11, para 33). For the definition of 'senior management' see Art. 3(1)(9) CRD IV: 'those natural persons who exercise executive functions within an institution, and who are responsible, and accountable to the management body, for the day-to-day management of the institutions.'

⁹ See EBA Guidelines on suitability, p. 20.

III. FIT AND PROPER ASSESSMENTS AS AN ELEMENT OF CORPORATE GOVERNANCE

The ECB considers the supervision of the suitability of management body members to be a key task, as governance is one of the priorities of the SSM¹⁰ and the composition of the management body is one of the key drivers of its effectiveness.¹¹ The central role of the management body in the overall governance framework and the need for suitability is well expressed by Solomon and Solomon: ‘a company’s board is its heart and as a heart it needs to be healthy, fit and carefully nurtured for the company to run effectively’.¹² The management body has the ultimate and overall responsibility for the sound and prudent management of the bank and its long-term success and sustainability. A fit and proper management body is a key driver of good governance. The assurance of good governance is not only in the interest of the bank itself, but also contributes to the trust of the wider public in the banking sector as a whole.

For a management body to be effective, it has to provide leadership, strategic direction and oversight of the bank. It has to ensure the implementation of a corporate culture which promotes ethical behaviour and integrity. In order to be able to take informed decisions, the management function and supervisory function of the management body should provide each other with adequate information and collect all necessary information. The management body also has an important role to play regarding effective controls and risk management. It has to set, approve and oversee the implementation by the senior management of the strategy and risk appetite and of independent and effective risk management and internal control frameworks. The management body should enable the internal control functions to act independently and provide them with sufficient authority, stature and resources.¹³

To be able to fulfil the responsibilities described above, management body members have to be fit, meaning that they have sufficient time to fulfil their responsibilities, that they are independent of mind, and that they have the necessary skills and experience, as well as the knowledge of the main areas relevant to the business of the bank. The knowledge and experience requirement applies not only to the members individually, but also collectively, thereby linking it (indirectly) to the composition of the management body. In addition, the members should also have a good reputation, meaning that they should not create a reputational risk to the bank.

The members of the management body should not only be suitable at the moment they take up their position, but should remain suitable during the fulfilment of their mandate. Therefore, banks have to assess the suitability at appointment and monitor their ongoing fitness and propriety. Banks must also ensure that the management body members have sufficient time and resources for induction and training.

¹⁰ ECB, SSM supervisory statement on governance and risk appetite, June 2016, p. 4 (https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm_supervisory_statement_on_governance_and_risk_appetite_201606.en.pdf).

¹¹ ECB, SSM supervisory statement on governance and risk appetite, June 2016, p. 7.

¹² J. Solomon and A. Solomon, *Corporate Governance & Accountability*, John Wiley & Sons 2004, p. 65.

¹³ See Article 88 (1) CRD IV; Guidelines on internal governance under Directive 2013/36/EU, EBA/GL/2017/11 (26 September 2017) (‘EBA Guidelines on Internal Governance’), para’s 22, 23 - 33. See for an example of national legislation, Supervisory Statement SS5/16 of the U.K. Prudential Regulation Authority (‘PRA’), March 2016, pp. 6-7 (<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2016/ss516>).

Although CRD IV does not explicitly provide for the fit and proper assessment of key function holders¹⁴, it is important that they are fit and proper as they have a significant influence over the direction of the bank. This applies in particular to the heads of the internal control functions, who constitute the second and third lines of defence of the internal control framework and are therefore regarded as the most important key function holders of banks. The heads of control functions have to ensure that the risk management and internal control functions perform their roles effectively and that the management body is provided with all information relating to their areas of responsibility that is necessary for sound decision making. Also other key function holders, such as the CFO, where he/she is not a member of the management body, and heads of business lines or other internal functions can have a significant impact on the implementation of the strategy and day-to-day management of the bank. In view of this, the EBA considers their suitability to be of ‘utmost importance’ and the assessment of key function holders as a necessary measure to ensure robust governance arrangements as required by Art. 74 of CRD IV.¹⁵

IV. DIVISION OF RESPONSIBILITIES BETWEEN THE BANKS, THE ECB AND THE NCA’S

1. The role of banks

The banks are primary responsible for setting the selection and succession policies and for defining the desired capabilities, both of individual members of the management body and of the management body as a whole (board composition). They have the responsibility to select, with the current and future needs of the bank in mind, the management body members and key function holders who comply with the suitability requirements.¹⁶ By doing so, the banks determine the level of quality of the management body and key function holders. By monitoring the suitability and assessing the effective functioning of the management body, through self-assessments and other tools, banks can ensure the suitability on an ongoing basis.

2. The role of supervisors

2.1 General

The fit and proper assessments conducted by the competent authorities have a prudential aim, namely to ensure that banks comply with the requirements regarding robust governance arrangements and the suitability requirements for members of the management body.¹⁷

When assessing the suitability, supervisors take a proportionate approach, meaning that they take into account the specific role of the relevant member of the management body or key function holder, the specificities of the bank and the nature and complexity of its activities. For example, the supervisory expectations for the time commitment of a management body

¹⁴ Several respondents to the public consultation of the EBA draft guidelines commented that the requirement to assess key function holders would go beyond the mandate provided to EBA under CRD IV. See further § VII.3, below.

¹⁵ EBA Guidelines on suitability, p. 11 (para 33) and p. 98.

¹⁶ EBA Guidelines on suitability, Background and rationale p. 11 (para 34); section 17 (para 135 and further) and section 21 (para 162 and further).

¹⁷ Art. 4(1)(e) and Art. 6(4) of the SSM Regulation. See also ECB, Guide to fit and proper assessments – Updated in May 2018 in line with the joint ESMA and EBA Guidelines on suitability (‘ECB Guide’), p. 7 (https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705_rev_201805.en.pdf).

member will differ depending on whether the member fulfils an executive or a non-executive role. And a non-executive who chairs the audit committee is expected to commit more time and to have more experience of audit than a non-executive who does not have any additional committee memberships.

2.2 Division of tasks and responsibilities between the ECB and the NCAs

Within the SSM, there exists a division of tasks and responsibilities between the NCAs and the ECB, also with regard to fit and proper assessments. A distinction can be made between (i) assessments of members of management bodies of significant and non-significant banks and between (ii) the different triggers of fit and proper assessments. The division of responsibilities regarding the assessment of key function holders is discussed separately (see point (iii), below).

(i) Significant and non-significant banks

The ECB is responsible for taking decisions regarding assessments of members of the management bodies of banks under its direct supervision (hereafter: ‘significant banks’¹⁸). The fit and proper assessments are conducted in cooperation with NCAs.¹⁹ In the case of licensing or qualifying holdings the ECB is also responsible for taking decisions on new appointments of members of the management bodies of less significant banks as part of the licensing or qualifying holding procedure.²⁰ In this capacity, the ECB acts as gatekeeper for the significant banks.²¹

The NCAs remain responsible for appointments in less significant banks, except in the context of licensing or a qualifying holding procedure.²² However, when necessary for the consistent application of high supervisory standards, the ECB may at any point in time decide to use directly the NCA’s supervisory powers for one or more less significant banks. This also includes the assessment of appointments of members of the management body in those banks.²³

(ii) Assessments of management body members of significant banks

The division of responsibilities regarding the members of the management body depends on how the fit and proper assessment is triggered. There are different reasons for starting a fit and proper assessment: (1) a new appointment, a change of role or a renewal²⁴ or (2) new facts or any other issue²⁵.

¹⁸ ‘Significant’ is defined in Art. 6 of the Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central bank concerning policies relating to the prudential supervision of credit institutions, OJ EU L 28, 29 October 2013, p. 63-89 (‘SSM Regulation’). The ECB is also responsible for taking decisions on the appointment of the members of the management bodies of (mixed) financial holding companies under its direct supervision, see Art. 121 CRD IV. See also ECB Guide, p. 4. In the remainder of this chapter, where reference is made to ‘significant banks’, this also includes (mixed) financial holding companies under the ECB’s direct supervision.

¹⁹ Art. 6(4) read in conjunction with Art. 4(1)(e) of the SSM Regulation.

²⁰ Art. 6(4) read in conjunction with Art. 4(1)(a) and (c) and Art. 14 (licensing) / Art. 15 (qualifying holdings) SSM Regulation.

²¹ See ECB Guide, p. 7.

²² Art. 6(4) read in conjunction with Art. 4(1)(e) SSM Regulation. See also ECB Guide, p. 4.

²³ Art. 6(5)(b) SSM Regulation.

²⁴ Art. 78, 86 and 93 of the Regulation (EU) No. 468/2014 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and the national competent authorities and with national designated authorities, OJ EU L 141, 14 May 2014, pp. 1-50 (‘SSM Framework Regulation’).

²⁵ Art. 94 SSM Framework Regulation.

For the first category, the NCAs always serve as entry point. This means that new appointments within significant banks and appointments in the context of a licensing or a qualifying holding procedure are communicated by the bank (or exceptionally the appointee) to the NCA, and the NCA subsequently informs the ECB. Significant banks must also notify the NCA of any change to the members of its management bodies, including the renewal of the management body members' mandate. The ECB and the NCA collaborate closely in collecting information and in carrying out the assessment. For the assessment, the ECB has the supervisory powers that NCAs have under the relevant Union and national law.²⁶ The decision is taken by the ECB and notified to the bank within the time limit determined by the relevant national law.²⁷

A decision can be negative, in which case the appointee cannot be appointed or has to resign when he/she has been appointed or has already taken up the position.²⁸ The number of negative decisions taken is low, because of the following reasons. Firstly, appointees often withdraw (or are withdrawn by the bank) during the fit and proper assessment procedure, when the competent authority informs the bank and/or the appointee of serious doubts about the suitability of the appointee.²⁹ Secondly, the principle of proportionality also applies to the decision of the ECB. This means that when the appointee does not satisfy all fit and proper criteria, but the shortcomings can be adequately remedied by imposing a condition, the ECB will take a positive decision with a condition instead of a negative decision.³⁰ Lastly, after a few years of fit and proper supervision, the banks have got a better view of what is expected of appointees. This helps to propose appointees who are more likely to be considered fit and proper. Besides positive decisions with or without conditions, the ECB may also take positive decisions with a recommendation or an obligation. Unlike conditions, these do not affect automatically the suitability of the appointee.³¹ Decisions taken by the ECB can be reviewed by the Administrative Board of Review on request of the appointee or the bank and can be challenged before the Court of Justice of the European Union.³²

The second category of triggers for a fit and proper assessment are new facts or 'any other issues'. The ECB could become itself aware of new facts or issues during its supervision or via other ways, such as the press. New facts or other issues may also be notified to the ECB by banks and NCAs, as banks must inform the relevant NCA in case of new facts that may affect an initial assessment of suitability or any other issue which could impact the suitability of a member of the management body. This should be done without undue delay once these facts or issues are known to the bank or the relevant member of the management body. The relevant NCA on its turn must notify the ECB.³³ The ECB may initiate a reassessment of a member of the management body, if the new facts may have an impact on the initial assessment of the relevant manager or if any other issue could impact on the suitability of a manager. The ECB

²⁶ Art. 93(2) SSM Framework Regulation.

²⁷ Art. 93(1) SSM Framework Regulation.

²⁸ In some Member States the fit and proper assessment is conducted after the appointee has been appointed or taken up the position. In the latter case the member fulfils already his role.

²⁹ Several fundamental principles and rights have to be observed during the assessment, if an intended decision could adversely affect the rights of the bank and/or appointee. One of these is the principle of due process and fairness. See Art. 22 SSM Regulation and Art. 27-33 SSM Framework Regulation; ECB Guide, p. 8 and 30.

³⁰ When the bank and/or the appointee do not fulfil the condition within the given time, the appointee will be considered not suitable. See ECB Guide, p. 31.

³¹ ECB Guide, p. 31.

³² ECB Guide, p. 32.

³³ Art. 94(1) SSM Framework Regulation.

decides on the appropriate action in accordance with the relevant Union and national law and informs the relevant NCA of such action without undue delay.³⁴

Whether the management body members remain suitable during the fulfilment of the mandate is supervised as an element of the ongoing governance supervision of the ECB. Also the follow-up of recommendations or obligations or the fulfilment of conditions, imposed by the ECB as part of a positive fit and proper decision, is monitored during the governance supervision.

(iii) Assessments of key function holders of significant banks

Not all Member States have provided the competent authority with the power to assess key function holders. In such cases the ECB did not have such powers either. However, the EBA Guidelines on suitability, published in 2017, now require competent authorities to also assess the fitness and propriety of certain key function holders of banks, namely the heads of internal control functions and the chief financial officer (CFO) where they are not members of the management body.³⁵ In so far as Member States comply with this requirement (see § VII), the ECB will conduct the assessment of the categories of key function holders which are mentioned in the EBA Guidelines. The banks will communicate a new appointment to the NCA, as is the case for members of the management body. The decision on the suitability will be taken by the ECB.

V. RELEVANT SOURCES OF SUBSTANTIVE REQUIREMENTS

1. CRD IV and national law

For the purposes of carrying out its supervisory tasks the ECB must apply all relevant Union law and, where this law is composed of directives, the national law implementing those directives.³⁶ Suitability requirements are included in Art. 91 CRD IV, which has to be implemented by national law. Therefore, the ECB has to apply the fit and proper requirements laid down in the national legislation which implements Art. 91 CRD IV, when taking fit and proper decisions.³⁷

2. EBA Guidelines on suitability and ECB Guide

The fit and proper requirements included in Art. 91 of CRD IV are complemented by and further specified in the EBA Guidelines on suitability. The Guidelines have the aim of improving and harmonising fit and proper assessments within the EU by providing common assessment criteria and an explanation as to how Union law should be applied, and by setting out supervisory practices regarding suitability.³⁸ Competent authorities and banks should make every effort to comply with the guidelines.³⁹ Two months after publication of the EBA Guidelines on suitability, the competent authorities had to confirm whether they (intended to) comply⁴⁰ or alternatively, had to explain to EBA why they will not incorporate the Guidelines into their supervisory practices. With the aims of providing transparency and strengthening

³⁴ Art. 94(2) SSM Framework Regulation.

³⁵ EBA Guidelines on suitability, para's 171, 172 and 176.

³⁶ Art. 4(3), first paragraph, SSM Regulation.

³⁷ See ECB Guide, p. 5.

³⁸ EBA Guidelines on suitability, p. 4 (executive summary) and 16 (status of these guidelines).

³⁹ Art. 16(3) of Regulation (EU) 1093/2010 [2010] OJ L331 (15 December 2010), p. 12-47 ('EBA Regulation').

⁴⁰ Measures can be taken in case competent authorities while having stated that they will comply, do not apply or incorrectly apply the guidelines and thereby breach Union law (Art. 17 of the EBA Regulation).

compliance by national authorities with the guidelines⁴¹, the EBA has published a table of compliance. This table provides an overview of the statements of compliance or the reasons for non-compliance of all competent authorities, including the ECB.⁴²

Whereas the EBA Guidelines on suitability are part of the EU Single rule book and apply to fit and proper assessments within all banks, the ECB Guide to fit and proper assessments is a legally non-binding, supervisory tool which describes the ECB's supervisory policies, processes and practices regarding fit and proper assessments for the banks under its direct supervision. Due to the non-binding nature of the ECB Guide, it cannot substitute relevant Union law or national legal requirements.⁴³ Nevertheless, the SSM policies, practices and processes inform the EBA guidelines on suitability, as the EBA looks at existing supervisory practices when developing guidelines. In addition, when applying EBA guidelines, competent authorities will develop supervisory practices or encounter questions of interpretation or unintended consequences, which may be taken into account in a revision of existing guidelines. Thus the policy cycle will show a continuous influence and interplay between the EBA guidelines and SSM policies, practices and processes.

The policies, processes and practices described in the ECB Guide explain how the ECB applies Union law, on a case-by-case basis, to significant banks within the SSM.⁴⁴ These policies, processes and practices are developed by the ECB jointly with the NCAs. They should ensure as much consistency within the SSM as possible, taking into account the applicable legal frameworks. The latter means that the policies apply without prejudice to national law. The ECB and NCAs should adhere to the policies unless there is contradicting binding national law. For example, the policies on experience include a presumption that a CEO has adequate experience in case he/she has ten years of recent practical experience in areas related to banking or financial services.⁴⁵ Should there be a similar explicit presumption in binding national banking law requiring five years of recent practical experience in areas related to banking or financial services, then this national threshold will apply in the relevant Member State. However, if the supervisory practice is to use a five years threshold or this threshold is included in legally non-binding national banking law, the SSM policy will apply. In case the binding national law does not include an explicit threshold, the national competent authorities interpret the national law as much as possible in accordance with the SSM policies. New national law should also be developed in line with the SSM policies to the extent possible.⁴⁶

Although the ECB policies, practices and processes are only applicable to significant banks, they are likely to have some impact on the fit and proper assessments regarding non-significant banks within the SSM by NCAs. NCAs may apply the policies, practices and processes in a proportionate way to non-significant banks with a view to creating a level playing field and efficiency of processes. On the other hand, NCAs may apply different policies, practices or processes because of prudential or practical considerations.

⁴¹ Preamble (26) of the EBA Regulation.

⁴² See for the table of compliance regarding the Guidelines on suitability: <https://www.eba.europa.eu/documents/10180/15718/EBA+GL+2017+12-CT+GLs+Consolidated+Joint+ESMA+EBA+on+assessment+of+the+s....pdf/09131720-6b13-408c-98ef-8b5ba8e63f22>

⁴³ ECB Guide, p. 3.

⁴⁴ ECB Guide p. 6. Fit and proper assessments of members of the management bodies and key function holders of non-significant banks within the SSM are conducted by the NCAs.

⁴⁵ ECB Guide, p. 12.

⁴⁶ ECB Guide, page 6.

VI. CONVERGENCE

1. General

We will now describe the convergence that has been achieved so far regarding fit and proper assessments of members of the management body and key function holders. Convergence is on the one hand achieved through harmonisation of the rules laid down in CRD IV and the EBA Guidelines on suitability (the Single rule book), and on the other hand through consistent application of the rules set out in the Single rule book.

2. Fit and proper requirements for the members of the bank's management body

2.1 Five assessment criteria

Art. 91(1) CRD IV provides that members of the management body should at all times be of sufficiently good repute and possess sufficient knowledge, skills and experience to perform their duties, while the overall composition of the management body must reflect an adequately broad range of experiences. In Art. 91(2)-(8) CRD IV these overarching requirements are fleshed out in further detail. Art. 91(2) CRD IV specifies that all members of management bodies must commit sufficient time to perform their function, while Art. 91(3)-(6) CRD IV set certain limits on the number of directorships which a member of the management body of a bank may hold at the same time in different entities. Art. 91(7) CRD IV specifies that the management body must possess adequate collective knowledge, skills and experience to understand the bank's activities, including the main risks. Finally, Art. 91(8) CRD IV requires each member of the management body to act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary, and to effectively oversee and monitor management decision-making.

In view of the above, the fitness and propriety of members of the management body is assessed against five criteria: (i) knowledge, skills and experience; (ii) reputation; (iii) independence of mind; (iv) time commitment; and (v) collective suitability. These criteria are further explained and specified in the EBA Guidelines on suitability.

EBA's power to issue these guidelines is based on the specific mandate provided for in CRD IV (Art. 91(12) CRD IV). To the extent that a specific mandate is lacking, the authority to issue guidelines is based on EBA's general power to issue guidelines with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervisors ('ESFS'), and to ensure the common, uniform and consistent application of Union law⁴⁷.

2.2 Knowledge, skills and experience

The EBA Guidelines on suitability provide further detail on the requirement that members of the management body must possess sufficient knowledge, skills and experience to fulfil their

⁴⁷ Art. 16(1) EBA Regulation.

functions.⁴⁸ The ECB has explained in its guide how it will apply this in its fit and proper assessments.

In Art. 91(1) CRD IV and the EBA Guidelines on suitability the terms knowledge, skills and experience are used. In the ECB Guide the term ‘experience’ is used as an ‘umbrella term’ to cover all aspects, namely practical, professional experience gained in previous occupations and theoretical experience gained through education and training.⁴⁹ In this chapter the CRD IV terminology will be used.

With the aim of enhancing efficiency and decreasing the time needed for the assessment, the ECB has introduced a two-step approach. The ECB has defined certain thresholds for the CEO, Chairman, and directors. When the appointee meets the relevant number of years of experience, he/she is presumed to have adequate knowledge, skills and experience. Should the appointee not meet the relevant threshold, then he/she could still have sufficient knowledge, skills and experience, but this should be assessed in a complementary assessment.⁵⁰

For the assessment of the knowledge, skills and experience the following should be considered: ‘(a) the role and duties of the position and the required capabilities; (b) the knowledge and skills attained through education, training and practice; (c) the practical and professional experience gained in previous positions; and (d) the knowledge and skills acquired and demonstrated by the professional conduct of the member of the management body’.⁵¹

Knowledge and experience

In order to be able to understand the bank’s business and comprehend its main risks, an appointee should have basic theoretical banking knowledge and experience. The most important areas of theoretical knowledge are banking, financial services, finance, economics, law, administration, financial regulation, information and technology, financial analysis and quantitative methods.⁵²

The required level of understanding of each of these areas will depend on the appointee’s function within the management body. The knowledge and experience should be commensurate with his/her responsibilities. For example, the knowledge and experience may differ depending on whether the appointee will have an executive or a non-executive role, especially in a two-tier board where the management and supervisory functions are clearly separated.⁵³ Or if the appointee is to become CTO, he/she should have an in-depth knowledge of the ICT aspects of the bank’s business and the ICT risks involved. In addition, he/she will be expected to possess sufficient understanding of areas for which he/she is collectively accountable, jointly with the other members of the management body.⁵⁴

The appointee should also have a clear understanding of the governance arrangements of the bank itself and of those of the group of which it is part, as well as any conflicts of interests that may arise within the group. In particular, the appointee should have a good understanding of

⁴⁸ EBA Guidelines on suitability, p. 32-34.

⁴⁹ ECB Guide, p. 10.

⁵⁰ ECB Guide, p. 11-13.

⁵¹ EBA Guidelines on suitability, p. 32 (para 60).

⁵² ECB Guide, p. 11; EBA Guidelines on suitability, p. 32 (para 62).

⁵³ ECB Guide, p. 10.

⁵⁴ EBA Guidelines on suitability, p. 31 (para 58).

his/her tasks and responsibilities and his/her role within the broader governance framework of the bank and the group.⁵⁵

Since the financial crisis, it is acknowledged that an appropriate culture, sound corporate values and appropriate behaviour are key for achieving good governance within banks.⁵⁶ The ‘tone at the top’ is of paramount importance. The members of the management body should take the lead in creating an appropriate culture, defining corporate values and showing appropriate behaviour. Therefore the ability of the appointee to contribute to the culture and corporate values and the behaviour shown in the past will be taken into account in the assessment.⁵⁷

Skills

Like executives and non-executives in any organisation, an appointee for a position to the management body of a bank needs to have certain skills. The EBA Guidelines on suitability provide a non-exhaustive list of skills which are considered to be relevant for members of the management body: authenticity, language, decisiveness, communication, judgement, customer and quality-oriented, leadership, loyalty, external awareness, negotiating, persuasive, teamwork, strategic acumen, stress resistance, sense of responsibility and chairing meetings.⁵⁸ Many of these skills are not specific for the banking sector, but generally required for managers of organisations. The relevance of each skill will vary, depending on the specific position of the appointee or the bank. Some skills are relevant for all members of the management body, such as leadership, communication or teamwork. Others are important for a specific role, such as the capability of chairing meetings for the CEO and the Chairman of the management body or of committees. Language skills may be specifically relevant in cross-border groups.

Diversity

It is a well-known fact that a diverse composition of the management body reduces the risk of group-think. Having a broad set of experience, knowledge and skills enhances constructive challenge and sharing of independent opinions and thus the sound decision taking of the management body. Therefore, art. 91(10) CRD IV stipulates that Member States or NCAs ‘must require banks and their respective nomination committees to engage a broad set of qualities and competences when recruiting members of the management body and for that purpose must put in place a policy promoting diversity on the management body’.⁵⁹ How does this relate to the requirement for management body members to always possess banking experience?

Diversity is not one of the fit and proper assessment criteria. Therefore, it cannot override the requirement of adequate knowledge, skills or experience for management body members. However, diversity should be taken into account when selecting and assessing a new member.⁶⁰ In particular for members of the supervisory function, diversity is important for the fulfilment of their role, as they have to provide constructive challenge to the management function. The

⁵⁵ EBA Guidelines on suitability, p. 32 (para 59).

⁵⁶ BCBS, Corporate governance principles for banks, Principle 1, Boards responsibilities, p. 8 (para 26). EBA, Guidelines on Internal governance, p. 35 (para’s 99-102)

⁵⁷ EBA Guidelines on suitability, p. 32 (para 59). See also the EBA Guidelines on Internal Governance.

⁵⁸ EBA Guidelines on suitability, p. 32 (para 61), read in conjunction with Annex II.

⁵⁹ The EBA Guidelines on suitability provide further detail, see p. 43-44 (para 104-109).

⁶⁰ EBA Guidelines on suitability, p. 12 (Background and rationale, para 42).

EBA Guidelines on suitability and the ECB Guide provide examples of how a balance can be struck between the need for adequate knowledge, skills and experience and diversity.⁶¹

The EBA Guidelines on suitability leave room for taking into account knowledge, skills and experience ‘gained from relevant academic or administrative positions or through the management, supervision or control of financial institutions or other firms’.⁶² This means that not only previous positions in the banking sectors may count, if they are relevant for the fulfilment of the new mandate in the bank. By looking also at other previous positions the positive impact of diversity on the fulfilment of the role of the supervisory role is acknowledged.

Also the ECB acknowledges the need for and positive impact of broad experience and diversity.⁶³ A lower level of practical banking experience might be acceptable for an appointee for a supervisory function under certain conditions, when he/she brings knowledge and experience to the supervisory function which is specifically needed. For example, ICT and cybercrime knowledge are nowadays of paramount importance in the banking sector. Often, younger individuals possess such knowledge and experience, but they may have less banking experience and managerial experience. However, from the perspective of ensuring the management body to have the necessary ICT or cybercrime knowledge and experience, it is important to be able to appoint such experts to the management body. Therefore, the ECB will conduct a complementary case-by-case assessment in such cases, in which all relevant elements and justifications will be taken into account, such as the specific knowledge and experience, the commitment to following a training plan⁶⁴ and the overall composition of the management body.

Assessment and proportionality

An appointee’s theoretical banking knowledge is assessed against the education and training he/she has enjoyed. For the assessment of the practical experience previous positions are taken into account. Of course, not all previous experience may be relevant for the new position to the same extent. Important factors for the assessment are the length of service, the size of the entity, the type of responsibilities, the number of subordinates and the nature of the activities carried out.⁶⁵ Even though educational degrees or previous positions are an indication of the acquired knowledge and experience, these may not provide a complete picture. Therefore the ECB makes also use of so-called fit and proper interviews to gather all information. These interviews are also an adequate tool to assess the skills of the appointee.⁶⁶

When assessing an appointee, the main characteristics of the position are taken into account, including whether the appointee will become member of the management function or the supervisory function of the management body, and whether this person will also become member of committees (e.g. the audit or remuneration committee). In addition, the main characteristics of the bank involved are taken into account, such as the type of activities and the organisation of its business lines. In this way, proportionality is inherently part of fit and proper assessments.

⁶¹ Diversity is not limited to knowledge and experience, but covers also aspects such as gender, age, geographical provenance, background, etc. See EBA Guidelines on suitability, p. 44 (para 105).

⁶² EBA Guidelines on suitability, p. 33 (para 66).

⁶³ ECB Guide, page 12.

⁶⁴ ECB Guide, p. 12.

⁶⁵ ECB Guide, p. 11; EBA Guidelines on suitability, p. 32-33 (para 63-65).

⁶⁶ See on interviews also section VI.4 below.

Proportionality always works both ways: for less complex institutions, the requirement can be complied with in a simpler way. However, for more complex institutions the requirement will mean a more stringent or detailed application. In the case of fitness of management body members, the application of proportionality means that the more complex the characteristics of the position and institution are, the more knowledge, skills and experience will be required.⁶⁷

Induction and training

The bank should prepare its new members of the management body for their new position. To that end the bank should set up an induction program.⁶⁸ As members have different roles and responsibilities (members of the supervisory function may also be member of one or more committees), the induction program should be tailored to the specific needs of a member. During the fulfilment of their mandate members should keep their knowledge and skills up-to-date. Therefore they should be able to follow training programs⁶⁹, both individually and collectively, which are tailored to the current and future needs of the bank. Underlining the need for induction and training and ensuring that members have access to it, Art. 91(9) CRD IV explicitly provides that adequate human and financial resources must be devoted to the induction and training of members of the management body. The EBA Guidelines on suitability further specify this by requiring banks to have in place policies and procedures for induction and training, which should be adopted by the management body.⁷⁰

2.3 Reputation

No principle of proportionality

Trust is fundamental for modern banking and goes hand in hand with reputation, honesty and integrity. As trust will be based on the perception of an individual's character and behaviour, it is crucial that members of the bank's management bodies have a good reputation and show honest behaviour. The reputation can be deemed to be either good or bad; a little bit good reputation does not exist. Therefore, there is no room for a proportionate application of the reputation requirement.⁷¹

Issues affecting reputation

If there is no evidence of a reputational issue and if there is no reason to have a reasonable doubt, an appointee will be considered to be of good repute.⁷² Fraud, financial crime, tax and other legal offences will impact the reputation, honesty and integrity of an appointee.⁷³ Also pending and concluded criminal or administrative proceedings (or other analogous regulatory proceedings) may be (perceived as) an indication of incorrect personal or business conduct. As these can impact the reputation of the appointee and the bank, such proceedings are taken into account in the fit and proper assessment.⁷⁴ The ECB will assess in this case several factors,

⁶⁷ ECB Guide, p. 10.

⁶⁸ The EBA Guidelines on suitability define 'induction' as any initiative or programme to prepare a person for a specific new position as a member of the management body.

⁶⁹ 'Training' means any initiative or programme to improve the skills, knowledge or competence of the members of the management body, on an ongoing or ad-hoc basis. EBA Guidelines on suitability, p. 21 (para 15).

⁷⁰ EBA Guidelines on suitability, p. 42-43 (para 97-103).

⁷¹ ECB Guide, p. 13.

⁷² EBA Guidelines on suitability, p. 35 (para 73); ECB Guide, p. 13.

⁷³ EBA Guidelines on suitability, p. 35-36 (para 75).

⁷⁴ EBA Guidelines on suitability, p. 35-36 (para 74-76); ECB Guide, p. 13.

such as the nature of the charge or accusation, the personal involvement of the appointee and the time that has passed since the alleged wrongdoing.⁷⁵

If the personal or business conduct of an appointee raises any doubts with respect to his/her reputation which could affect the sound and prudent management of the institution, the bank and/or the appointee should inform the competent authority, who will then assess whether these circumstances should be considered material.⁷⁶

2.4 Independence of mind

Each member of the management body must act with independence of mind to effectively (a) assess and challenge the decisions of the senior management where necessary, and (b) oversee and monitor decision-making.⁷⁷ The aim of this requirement is to enhance objective decision-making and to ensure that management body members do not pursue their self-interest, but act in the best interest of the bank and its customers. This also contributes to enhancing trust in the banking sector.

Distinction between independence of mind and the principle of being independent

A distinction must be made between ‘independence of mind’ and ‘being independent’. The former applies to all the members of the management body of a bank. The latter only applies to certain members of the management body in its supervisory function on the basis of national law.⁷⁸ It should be noted that an independent member of the supervisory function may not necessarily be independent of mind, as he/she can lack the necessary behavioural skills (see below).⁷⁹ So, the independence of mind should always be assessed.

Independence of mind

Acting with ‘independence of mind’ is ‘a pattern of behaviour, shown in particular during discussions and decision-making within the management body’.⁸⁰ For the assessment of the independence of mind, two factors are relevant. Members should:

- (1) have the necessary behavioural skills.

The EBA Guidelines provide a non-exhaustive list of behavioural skills: (i) courage, conviction and strength to effectively assess and challenge the proposed decisions of other members of the management body, (ii) being able to ask questions to the members of the management body in its management function, and (iii) being able to resist ‘group think’.⁸¹

- (2) not have a conflict of interest which could hinder him/her to perform his/her duties independently and objectively.⁸²

⁷⁵ Pending proceedings are also relevant from the perspective of sufficient time commitment. If an appointee is involved in legal proceedings, this may well impact his ability to commit sufficient time to his/her functions. See ECB Guide, p. 13, footnote 14.

⁷⁶ ECB Guide, p. 13.

⁷⁷ Art. 91(8) CRD IV.

⁷⁸ EBA Guidelines on suitability, p. 37 (para 79).

⁷⁹ EBA Guidelines on suitability, p. 37 (para 81).

⁸⁰ EBA Guidelines on suitability, p. 37 (para 80).

⁸¹ EBA Guidelines on Internal Governance, p. 36.

⁸² EBA Guidelines on suitability, p. 38 (para 82).

According to the ECB Guide a conflict of interest exists, if the attainment of the interests of a member may adversely affect the interests of the bank.⁸³ Not only actual or potential conflicts of interest can affect the independence of mind, but also conflicts of interest that are perceived by the public.⁸⁴

In order to avoid conflicts of interest or deal with such conflicts, bank should develop policies to identify, assess, manage and mitigate conflicts of interest.⁸⁵ If a conflict of interest arises, the bank should take the actions described in the policies and inform the competent authority, when the conflict of interest may impact the independence of mind of the relevant member.⁸⁶ The EBA Guidelines on suitability describe what information should be provided by the bank in a statement to the competent authority.⁸⁷

The ECB Guide describes the process for the assessment of conflicts of interest.⁸⁸ The ECB will assess the materiality of the conflict of interest. The ECB Guide provides a list of situations in which a material conflict of interest is presumed to exist. The ECB distinguishes personal, professional, financial and political conflicts of interests.⁸⁹ As it is a presumption, the conflicts of interest described in the list are not automatically considered to be material, but will be assessed in detail by the ECB on a case-by-case basis.⁹⁰

The fact that an appointee has a conflict of interest will not make him/her automatically not suitable for being member of the management body. Non-material conflicts will in principle not impact the independence of mind. However, even if the conflict of interest poses a material risk, the appointee could be considered suitable, if the risk can be prevented, adequately mitigated or managed through either (a) measures taken by the bank based on its conflicts of interest policies, or (b) through a condition imposed by the ECB.⁹¹ In the ECB Guide the following possible conditions are mentioned: ‘(i) prohibition to participate in any meeting or decision-making concerning a particular disclosed interest; (ii) resignation of a certain position; (iii) specific monitoring by the bank; (iv) specific reporting to the competent authority on a particular situation; (iv) cooling-off period for the appointee; (v) obligation on the bank to publish the conflict of interest; (vi) any application of the ‘at arm’s length’ principle; and (vii) specific approvals by the whole management body for a certain situation to continue.’⁹² Should measures of the bank or the conditions imposed by the ECB not be sufficient to manage the risks posed by the material conflict of interest, then the appointee will not be considered suitable.⁹³

Being independent

‘Being independent’ is a requirement which is only relevant in relation to the management board in its supervisory function. It means that the ‘independent members’ of the management body in its supervisory function should not have any present or recent past relationships or links of any nature with the bank or its management that could influence the member’s

⁸³ ECB Guide, p. 15.

⁸⁴ EBA Guidelines on suitability, p. 38 (para 84); ECB Guide, p. 15.

⁸⁵ Art. 88(1) CRD IV.

⁸⁶ EBA Guidelines on suitability, p. 39 (para 86).

⁸⁷ EBA Guidelines on suitability, Annex III, section 5, p. 68.

⁸⁸ ECB Guide, p. 15.

⁸⁹ ECB Guide, p. 17.

⁹⁰ ECB Guide, p. 16.

⁹¹ ECB Guide p. 15.

⁹² ECB Guide, p. 16.

⁹³ ECB Guide, p. 15-16.

objective and balanced judgment and reduce a member's ability to take decisions independently'.⁹⁴

According to the EBA Guidelines on suitability the independent members 'should play a key role in enhancing the effectiveness of checks and balances' within the bank 'by improving oversight of management decision-making'. They should ensure that (i) 'the interests of all stakeholders, including minority shareholders, are taken into account', (ii) 'no individual or small group of members dominates decision-making' and (iii) 'conflicts of interest within the bank or the group are adequately managed'.⁹⁵ The EBA Guidelines on suitability provide details on the sufficient number of independent members.⁹⁶

The requirement for having a sufficient number of independent members is not one of the fit and proper assessment criteria. Therefore, the ECB will take into account this requirement in the context of a fit and proper assessment only, when national substantive law includes specific formal independence criteria.⁹⁷

2.5 Time commitment

A member of the management body must commit sufficient time to perform his/her function. The time commitment requirement consists of two elements: a quantitative element, namely a limited number of directorships (Art. 91(3) CRD IV) and a qualitative element (Art. 91(2) CRD IV).

Quantitative assessment

Combining a high number of directorships could preclude a member of the management body from committing adequate time on the performance of each or several roles. Therefore Art. 91 (3) CRD IV limits the number of directorships which a member of the management body of a significant institution may hold at the same time to: (1) one executive directorship with two non-executive directorships; (2) four non-executive directorships.⁹⁸ The implicit assumption of this calculation rule is that an executive position takes up twice as much time as a non-executive position. Some argue that the workload entailed by a non-executive directorship will, in practice, often be much less than this ratio suggests.⁹⁹ However, since the financial crisis the tasks and responsibilities of non-executives have increased and the accountability has become more important. So the counting rules of the CRD IV could be regarded as an indication of the increasing expectations towards the supervisory function.

In certain situations, several mandates count as a single directorship.¹⁰⁰ This is for example the case when several directorships are held in a group. It is quite common for members of the management body of a top holding entity to be members of the management body of various group entities as well. On the one hand, one could argue that these could be counted as a single directorship, as there may be synergies. On the other hand, each mandate will require time, as

⁹⁴ EBA Guidelines on suitability, p. 37 (para 81).

⁹⁵ EBA Guidelines on suitability, p. 40 (para 90).

⁹⁶ EBA Guidelines on suitability, p. 39 (para 89, first paragraph).

⁹⁷ ECB Guide, p. 17.

⁹⁸ Competent authorities may authorise members of the management body to hold one additional non-executive directorship. See article 91(6) CRD IV.

⁹⁹ Cf. E. Wymeersch, *Corporate Governance for Banks According to CRD IV*, in: P. Gasós, E. Gnan & M. Balling (Eds.), *Challenges in Securities Markets Regulation: Investor Protection and Corporate Governance*, Suerf 2015/1, p. 69-90, § 7.

¹⁰⁰ Art. 91(4) CRD IV.

each entity has its own specific interests, activities and issues. In addition, in case of cross-border situations, the management body members should also have sufficient time to understand the national legal frameworks and compliance obligations.

Art. 91(5) CRD IV also stipulates that certain directorships are excluded from counting, namely mandates in organisations which do not predominantly pursue commercial objectives. The EBA Guidelines on suitability include a few examples of such organisations.¹⁰¹ The ECB Guide provides a more extensive list.¹⁰² The background to the counting rule of Art. 91(5) CRD IV is that a management body member is assumed to be able to more easily free him/herself from the obligations of a mandate in a 'non-commercial entity', when the new directorship in the bank unexpectedly requires more time.

Even if the number of directorships of an appointee remains within the limits of Art. 91(3) CRD IV, the appointee may be considered to not fulfil the qualitative requirement. For the quantitative element, CRD IV provides calculation rules, which could lead to a situation in which an appointee can still have ten or more directorships. Although there may be synergies (in particular when an appointee holds several mandates within one group), the combination of mandates could leave the management body member not sufficient time from a qualitative perspective to fulfil the responsibilities of the new mandate adequately.

Qualitative assessment

Banks have to determine the expected time commitment for a position and assess whether the appointee can commit sufficient time. Relevant qualitative aspects for the assessment of the banks themselves and of competent authorities include (i) the bank's size, (ii) the nature and complexity of its activities, (iii) the country/countries in which the bank is based, (iv) any travel time involved, (v) the appointee's role or roles within the management body (e.g. a role as CEO or Chair, memberships of committees etc.) and (vi) other positions and commitments.¹⁰³

In their assessment banks should also take into account the time needed for ongoing learning and development, and for unexpected circumstances, such as crisis situations and court cases that might come up during his membership of the management body.¹⁰⁴

2.6 Collective suitability

The management body should collectively have the knowledge, skills and experience which is necessary to fulfil its tasks and responsibilities.¹⁰⁵ The bank is primary responsible for ensuring that the management body has an adequate composition.¹⁰⁶ When appointing a new member to the management body, the bank should not only assess the individual fitness and propriety, but also the collective suitability.

¹⁰¹ EBA Guidelines on suitability, p. 31 (para 57).

¹⁰² The ECB Guide mentions the following examples: '(i) non-profit sports or cultural associations; (ii) charities; (iii) churches; (iv) chambers of commerce/trade unions/professional associations; (v) organisations for the sole purpose of managing the private economic interests of members of the management body and that do not require any day-to-day management by the member of the management body; and (vi) organisations which are presumed to pursue predominantly non-commercial activities based on national regulatory provisions.' The Guide further clarifies that 'other organisations could still be considered not to be pursuing predominantly commercial objectives after assessment by the competent authority of the nature of the organisation and the predominance of the non-commercial activities.' See ECB Guide, p. 19.

¹⁰³ EBA Guidelines on suitability, p. 28 (para 43); ECB Guide, p. 20.

¹⁰⁴ EBA Guidelines on suitability, p. 28-30 (para 42 and 44); ECB Guide, p. 20.

¹⁰⁵ EBA Guidelines on suitability, p. 34 (para 71). See Art. 91(7) CRD IV.

¹⁰⁶ ECB Guide, p. 22.

Banks should assess the level of collective suitability in each area through a self-assessment and identify the gaps by comparing the actual composition and collective suitability with the required one.¹⁰⁷ The EBA Guidelines on suitability¹⁰⁸ and the ECB Guide¹⁰⁹ propose suitability matrices as an effective tool for the self-assessment, but banks can also develop their own methodology, as long as it achieves the same objectives. The outcomes of the self-assessment should be taken into account when determining the profile of the new management body member. They should also be transmitted to the competent authority together with the individual assessment of the appointee.¹¹⁰

The collective suitability of the management body is important for sound decision making. Therefore, the collective suitability should cover all necessary areas of knowledge, which should be aligned with the current and future needs, activities and challenges of the bank. This is well expressed in a speech of Danièle Nouy, Chair of the Supervisory Board of the ECB in 2018:

‘The collective knowledge of boards can still be improved. In-depth knowledge is particularly important for challenging senior management on more technical topics such as digitalisation, IT, internal models and regulation.’¹¹¹

Currently, digitalisation and IT are important developments which are changing the banking sector. Therefore, the management body should collectively have sufficient understanding of these topics and the risks involved. In a few years’ time, other issues or risks may arise, which will create new demands on the collective suitability of the management body members. Thus the collective suitability will change over time. This stresses the need for periodic reassessments of the collective suitability and also for ongoing development and education.

The fact that the management body should be collectively suitable does not mean that all members of the management body need to have the same level of understanding of each area. Depending on their role, members could have more or less knowledge of or experience in a certain topic. Overall, each area should be covered by a sufficient number of members to ensure adequate discussion and good decision-taking.¹¹²

As the roles of the management function and supervisory function differ, the collective suitability of each function should be conducted separately. As explained in the EBA Guidelines on suitability, members of the management function should have the knowledge, skills and experience to ensure sound decisions regarding the business model, risk appetite, strategy and markets in which the bank operates, while the supervisory function should be able to effectively challenge the management function.¹¹³

Sometimes it is argued that there is no need for members to have sufficient knowledge, skills and experience individually. The collective suitability would be sufficient in this view, as management body members take decisions collectively and are often collectively accountable (depending on national law). However, this would ignore the fact that members of the

¹⁰⁷ EBA Guidelines on suitability, p. 53 (para 150).

¹⁰⁸ EBA Guidelines on suitability, p. 53 (para 151).

¹⁰⁹ ECB Guide, p. 22.

¹¹⁰ EBA Guidelines on suitability, p. 51 (para 144).

¹¹¹ Keynote speech by Danièle Nouy, Chair of the Supervisory Board of the ECB, at the farewell seminar of Jan Sijbrand ‘From Lehman to Bitcoin - trends and cycles in financial supervision’, Amsterdam, 21 June 2018.

¹¹² EBA Guidelines on suitability, p. 34 (para 70).

¹¹³ EBA Guidelines on suitability, p. 34 (para 67-69) and p. 52 (para 150).

management body have their own individual tasks and responsibilities. In addition, members of the management function should be able to constructively challenge senior management and to discuss propositions and information in order to make sound decisions¹¹⁴, while members of the supervisory function should be able to challenge the management function and should be able to fulfil their role in committees of which they are member.

3. Assessment of key function holders

Two of the assessment criteria applicable to members of the management body also apply to key function holders, namely knowledge, skills and experience and honesty, integrity and reputation. Collective suitability is not relevant for key function holders as they only have individual responsibilities. Also, they are normally assumed to be able to commit sufficient time to their function, as their position is usually full-time. Should a key function holder occupy several positions within a group, then the time commitment criterion may become an issue. Although the EBA Guidelines on suitability do not mention independence of mind as a criterion, the EBA Guidelines on Internal Governance require key function holders to be independent of the business lines or units they control.¹¹⁵

4. Convergence of assessment process

Currently, there is a wide variety of fit and proper assessment processes in the Member States. Nevertheless, the EBA Guidelines on suitability have provided for convergence regarding several aspects of the assessment process, such as:

- the time for notification by banks of a new appointment¹¹⁶;
- the requirement for competent authorities to set out the supervisory procedure applicable to the assessment of the suitability of the heads of the internal control functions and the CFO, where they are not part of the management body¹¹⁷;
- the maximum period for the suitability assessment (including the possibility to suspend) by the competent authority¹¹⁸; and
- documentation requirements for initial appointments.¹¹⁹

Important to mention is the use of fit and proper interviews as part of the assessment procedure.¹²⁰ In its 2016 peer review the EBA concluded that interviews are a useful tool for gathering information on the suitability of the appointee¹²¹, in particular regarding aspects that are difficult to assess based on documents only (such as skills, integrity or reputational issues). The ECB also conducts fit and proper interviews, taking a proportionate and risk-based approach.¹²² The latter means that fit and proper interviews will as a principle always be conducted for new CEO's and Chairmen of stand-alone banks and the top banks of groups, as these entail the highest risk.¹²³ In other cases the ECB may decide to interview an appointee.

¹¹⁴ EBA Guidelines on Internal Governance, p. 20 (para 30).

¹¹⁵ EBA Guidelines on internal governance, paras 155 and 158.

¹¹⁶ EBA Guidelines on suitability, p. 58-59 (para 174).

¹¹⁷ EBA Guidelines on suitability, p. 59 (para 177).

¹¹⁸ EBA Guidelines on suitability, p. 58-59 (para 178-179).

¹¹⁹ EBA Guidelines on suitability, p. 66-67 (Annex III).

¹²⁰ EBA Guidelines on suitability, p. 59 (para 182-183).

¹²¹ EBA Report on the peer review of the Guidelines on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2012/06), p. 18 and 20.

¹²² ECB Guide, p. 24.

¹²³ ECB Guide, p. 24.

This will in particular be useful when a specific concern has arisen regarding the appointee's fitness or integrity/propriety.¹²⁴

VII. NATIONAL VARIATIONS AND LIMITS

1. General

As explained above, CRD IV and the EBA Guidelines on suitability aim to harmonise fit and proper assessments across Europe, while the SSM policies reflected in the ECB Guide aim to achieve consistent application of the regulatory framework and common supervisory practices. Nevertheless, there is still a wide variety of national practices regarding fit and proper assessments, due to the fact that there are limits to convergence in this area.

Below we will discuss the reasons for these varying practices, which relate to (1) the transposition of and the level of harmonisation by CRD IV; (2) the limits to harmonisation through the EBA guidelines on suitability; and (3) the requirement for the ECB to apply national law.

2. Transposition of and level of harmonisation by CRD IV

CRD IV fit and proper requirements do not apply directly within Member States, but have to be transposed into national law. This has not always been done¹²⁵ or at least not in the same way. This is due to the fact that regarding governance CRD IV only provides for minimum harmonisation, leaving room for Member States to develop requirements regarding those aspects that have not been covered by CRD IV or when there is room for more detailed requirements.

One important area that has not been covered by CRD IV is the fit and proper assessment process. The consequence is that Member States have taken varying approaches to these assessments. In some Member States candidates are assessed *ex-ante*, i.e. prior to their appointment or to taking up their position (e.g. the Netherlands, Belgium, Spain and Portugal), while in others the assessment is conducted *ex-post*, i.e. after the candidate has been appointed or has already taken up his/her position (e.g. Germany, Austria, France and Italy). Even between Member States with the same approach, there are differences regarding the duration of the assessment and the possibility to suspend or interrupt the deadline, the manner in which a decision is taken (explicit decision necessary, tacit approval or rejection), and as to whether a candidate can take up the position when the deadline has passed.

A good practice that has not been covered explicitly by CRD IV is the practice to have a sufficient number of independent members in the management body in its supervisory function. Some Member States have included a provision on the number in their national law, requiring a sufficient number, a majority or a specific number of independent members; other Member States do not have such requirement. In the latter case, management bodies are not legally required to have independent members (see also 'Limits to harmonisation through the EBA Guidelines on suitability' below).

¹²⁴ ECB Guide, p. 24.

¹²⁵ For example, the criterion of time commitment is not included in Italian law, which means that legally, it cannot be applied to candidates for Italian banks.

The assessment criteria are examples of aspects where CRD IV leaves room for interpretation. When does a candidate possess sufficient knowledge, skills and experience and sufficient time? And when is a candidate considered to have independence of mind? The EBA Guidelines on suitability have provided some more detail.

Another issue regarding the transposition of CRD IV is the implementation of requirements in legislation that is not specific for banks, e.g. in company law or civil law. An example is the list of organisations which pursue predominantly non-commercial objectives. As explained above, mandates in these organisations do not have to be taken into account for the assessment of time commitment. In France this CRD IV provision has not been implemented in financial law, as there was already a list of such ‘non-commercial organisations’ included in civil law. In particular when this legislation already existed before CRD IV, it can be questioned whether it could be considered as an adequate basis for the transposition of the CRD IV fit and proper requirements. The original objectives of such national legal provisions may often relate to other considerations than suitability, such as tax reasons, supporting shared ownership or ensuring the provision of community services (for example garbage collection or water supply).

3. Limits to harmonisation through the EBA Guidelines on suitability

A second reason for the national variety of practices on fit and proper assessments relates to the limits of harmonisation through the EBA guidelines on suitability.

One limit stems from the fact that competent authorities in their capacity of members of the EBA Board of Supervisors have to agree on the guidelines. In the Consultation Paper on the EBA Guidelines on suitability a proposal to harmonise the assessment approach (ex-ante assessments) was included, but there was not sufficient support for this proposal.¹²⁶ Therefore, in the final guidelines a neutral approach was taken. The EBA explains the reason for the neutral approach in the guidelines as follows:

‘A higher level of harmonisation would be desirable within the banking union, but could not be achieved in the current circumstances due, amongst other, to the existing fragmented national frameworks’.¹²⁷

In addition, harmonisation through EBA Guidelines on suitability is limited due to the fact that Member States can choose not to comply with (a part of) the guidelines, but explain their reasons for not complying. The table of compliance regarding the EBA Guidelines on suitability shows that 9 out of the 28 Member States will not fully comply. The main topics of divergence are the assessment of key function holders and independence (in particular ‘formal independence’). Some competent authorities mention that in their view there is no legal basis in CRD IV for these requirements.¹²⁸ Thus the lack of harmonisation in CRD IV cannot always be solved through guidelines.

¹²⁶ See for the initial proposal for an ex-ante assessment: Consultation Paper on the Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU, EBA/CP/2016/17 (28 October 2016), p. 53-54 (para 161). See for a summary of the negative responses regarding the initial proposal for an ex-ante assessment: EBA Guidelines on suitability, p. 118-119. See for the final neutral approach EBA Guidelines on suitability, p. 56 (para 170).

¹²⁷ See EBA guidelines on suitability, p. 118-119.

¹²⁸ See for the table of compliance regarding the Guidelines on suitability: <https://www.eba.europa.eu/documents/10180/15718/EBA+GL+2017+12->

4. Application of national law by the ECB

Consistency of fit and proper assessments within the SSM is impacted by Art. 4(3) of the SSM Regulation which requires the ECB to apply ‘all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives’. As the fit and proper requirements are included in CRD IV (a directive), the ECB has to apply the relevant national law transposing CRD IV and all national specificities included therein. The outcome of the ECB fit and proper assessment should thus be fully in line with the applicable national laws.

As we have seen above, CRD IV and the EBA Guidelines on suitability leave room for national legislators and competent authorities to interpret, specify or add to the Single rule book in their national laws, which hinders the creation of more consistency and a level playing field. The Chair of the Supervisory Board of the SSM described the problem as follows:

‘The rules on these “fit and proper” assessments were written a long time ago. They were written at a time when supervising banks was still a purely national task here in Europe. The result is that the rules are not as harmonised as they should be in a banking union. And on top of that, they are not tailored to the challenges of modern banking. It would be good to base future appointments of bank executives on rules that are the same across Europe and that fully take into account the lessons learned from the financial crisis.’¹²⁹

Some examples of varying national laws are described below. Regarding reputation, national laws provide different approaches to the assessment of pending or finalised proceedings. For example, in some Member States certain convictions result automatically in a rejection¹³⁰, while this is not the case in others. There are also differences regarding the impact of the time passed after proceedings or supervisory measures. In some Member States the period after which a person will be rehabilitated after a conviction varies between 3-20 years¹³¹, while national law in other Member States does not foresee for a rehabilitation period for fit and proper assessments.¹³²

The counting of the number of directorships is relevant for the assessment of the quantitative time commitment. As described above, mandates in organisations which pursue predominantly non-commercial objectives do not have to be counted. Which organisations are considered to be ‘non-commercial’ differs among Member States. An example of varying national law regarding conflicts of interest are the different thresholds for loans which a director can take without impacting its independence of mind.

The varying application of assessment criteria also leads to different measures. The ECB can only oppose to the appointment of a candidate or remove him/her from the management body when the candidate does not fulfil the requirements set out in the national law which transposes CRD IV.¹³³

[CT+GLs+Consolidated+Joint+ESMA+EBA+on+assessment+of+the+s....pdf/09131720-6b13-408c-98ef-8b5ba8e63f22](https://www.ecb.europa.eu/press/pr/2018/181112_en.pdf?09131720-6b13-408c-98ef-8b5ba8e63f22)

¹²⁹ Being good pays off: how ethical behaviour affects risk, reputation and returns. Speech by Danièle Nouy, Chair of the Supervisory Board of the ECB, The Communicators Conference, Frankfurt, 12 November 2018.

¹³⁰ E.g. Belgium.

¹³¹ E.g. in France, Finland and Belgium. The rehabilitation period will always depend on the specific situation, including the seriousness of the crime and the sentence.

¹³² E.g. Ireland and Portugal.

¹³³ Article 16(2)(m) SSM Regulation.

In other Member States national law includes the requirement to have employee representatives on the management body.¹³⁴ These members do not always have the same level of banking knowledge and managerial experience as executives or non-executives at the moment of appointment.

Finally, it should be noted that CRD IV itself includes a possibility to exceed the maximum number of directorships as described in Art. 91(3). According to Art. 91(6) CRD IV, competent authorities may authorise members of the management body to hold one additional non-executive directorship. These authorisations are granted on a case-by-case basis.¹³⁵

The issue of varying national laws and practices could be solved by further harmonisation at EU level. However, in both cases Member States or competent authorities would need to agree on the changes and they would have to comply with the new rules or guidelines. As described above, the revised EBA Guidelines on suitability aim to provide more harmonisation on topics which are not explicitly included in CRD IV (key function holders and formal independence). However, when Member States do not comply, but explain (as is legally allowed), the harmonisation objective is not achieved.

VIII. CONCLUDING OBSERVATIONS

Within the limits described above, the revised EBA Guidelines on suitability have increased the level of harmonisation, in particular regarding the assessment criteria, but also on procedural and other aspects. The ECB has achieved consistency of application through the development of policies and supervisory practices which the national competent authorities apply without prejudice to national law. With every step towards more harmonisation and consistency, the existing national variations become more obvious. This will underline the need for more harmonisation and inform revision of Union law in the longer term. For the SSM, the solution would be to revise the SSM Regulation requirement that the ECB has to apply national law implementing CRD IV and provide the ECB with specific rules for conducting fit and proper assessments. This would contribute significantly to more consistent application of Union law throughout the SSM.

¹³⁴ E.g. Germany and Austria.

¹³⁵ Article 91(6) CRD IV.

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