

DECISION (EU) 2017/935 OF THE EUROPEAN CENTRAL BANK**of 16 November 2016****on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42)**

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ⁽¹⁾, and in particular Article 4(1)(e) thereof,

Having regard to Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) ⁽²⁾, and in particular Article 4 thereof,

Whereas:

- (1) The European Central Bank (ECB), as the competent authority for significant supervised entities, is responsible for ensuring, in accordance with Article 4(1)(e) of Regulation (EU) No 1024/2013 and Articles 93 and 94 of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽³⁾, that members of the management bodies of those entities meet the fit and proper requirements.
- (2) Article 91 of Directive 2013/36/EU of the European Parliament and of the Council ⁽⁴⁾ requires that: (a) members of the management bodies of supervised entities must at all times be of sufficiently good repute and must possess sufficient knowledge, skills and experience to perform their duties, and that the management body as a whole must possess adequate collective knowledge, skills and experience to be able to understand the institution's activities; (b) all members of the management body must commit sufficient time to perform their functions in the institution and, taking into account individual circumstances and the nature, scale and complexity of the institution's activities, the number of directorships that each member holds must not exceed a certain number; (c) each member of the management body must act with honesty, integrity and independence of mind; and (d) supervised entities must put in place a policy promoting diversity in the management body.
- (3) In accordance with Article 4(3) of Regulation (EU) No 1024/2013, the ECB must apply all relevant Union law when carrying out its supervisory tasks, and where this law is composed of Directives, the national legislation transposing those Directives. The ECB is also subject to the regulatory and implementing technical standards developed by the European Banking Authority (EBA) and adopted by the European Commission in accordance with Articles 10 to 15 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council ⁽⁵⁾. The ECB must make every effort to comply with the guidelines and recommendations developed by the EBA under Article 16 of Regulation (EU) No 1093/2010 and with the European supervisory handbook developed by the EBA in accordance with that Regulation.
- (4) According to Guidelines EBA/GL/2012/06 of the European Banking Authority ⁽⁶⁾, when assessing the suitability of a member, in addition to criteria concerning the member's reputation and experience, criteria that are relevant to the functioning of the management body should also be considered. The assessment should include potential conflicts of interest of members, their ability to commit sufficient time, their ability to perform their

⁽¹⁾ OJ L 287, 29.10.2013, p. 63.

⁽²⁾ See page 14 of this Official Journal.

⁽³⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

⁽⁴⁾ Directive 2013/36/EU of the European Parliament and the Council 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 L 176, 27.6.2013, p. 338).

⁽⁵⁾ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

⁽⁶⁾ Guidelines EBA/GL/2012/06 of the European Banking Authority of 22 November 2012 on the assessment of the suitability of members of the management body and key function holders.

duties independently without undue influence from other persons, the overall composition of the management body and the collective knowledge and expertise required of it. This is without prejudice to the assessment of the implementation of the institution's governance arrangements for the purposes of Article 88 of Directive 2013/36/EU.

- (5) In addition to the national law implementing Article 91 of Directive 2013/36/EU, an ECB fit and proper decision should also ensure compliance with the requirements set out in any other applicable national law. Therefore, an assessment of whether a decision may be adopted by means of delegation should be performed without prejudice to the assessment of the fulfilment of fit and proper requirements set out in applicable law.
- (6) The ECB, as the competent authority, is required to adopt a substantial number of fit and proper decisions each year. To facilitate the decision-making process, a delegation decision is necessary in relation to the adoption of such decisions. The Court of Justice of the European Union has recognised delegation of authority to be necessary to enable an institution required to adopt a considerable number of decisions to perform its duties. Similarly, it has recognised the need to ensure that decision-making bodies are able to function as a principle inherent to all institutional systems ⁽¹⁾.
- (7) Delegation of decision-making powers should be limited, proportionate and the scope of the delegation should be clearly defined.
- (8) Decision (EU) 2017/933 (ECB/2016/40) specifies the procedure to be followed for adopting delegation decisions concerning supervision and the persons who may be delegated decision-making powers. That Decision does not affect the ECB's exercise of its supervisory tasks and is without prejudice to the Supervisory Board's competence to propose complete draft decisions to the Governing Council.
- (9) Where the criteria for the adoption of a delegated decision, as laid down in this Decision, are not met, fit and proper decisions should be adopted in accordance with the non-objection procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and Article 13g of Decision ECB/2004/2 ⁽²⁾.
- (10) If a member is not deemed to fulfil the fit and proper requirements, the fit and proper decision should not be adopted by means of a delegated decision, but rather under the non-objection procedure. It is thus necessary to allow for sufficient time for a non-objection procedure in cases where it is not possible to determine in advance whether a delegated decision may be adopted. For this reason, if a national competent authority does not submit to the ECB a draft delegated decision 20 working days before the expiry of the deadline for the adoption of the fit and proper decision under applicable national law, the decision should be adopted under the non-objection procedure. Furthermore, if the heads of work units have concerns regarding the fit and proper requirements being fulfilled by the member due to insufficient information being provided by the national competent authority or the complexity of the assessment, the non-objection procedure should again be used,

HAS ADOPTED THIS DECISION:

Article 1

Definitions

For the purposes of this Decision, the following definitions shall apply:

- (1) 'fit and proper requirements' means the requirements that the members of the management body of a significant supervised entity must fulfil at all times in accordance with Article 91 of Directive 2013/36/EU and any other applicable law;
- (2) 'fit and proper decision' means an ECB decision stating whether an individual fulfils the fit and proper requirements;
- (3) 'applicable law' means relevant Union law within the meaning of Article 4(3) of Regulation (EU) No 1024/2013, and any national law which is relevant for the assessment of the fit and proper requirements;

⁽¹⁾ Judgments of the Court of Justice of 23 September 1986, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*, 5/85, ECLI:EU:C:1986:328, paragraph 37, and of 26 May 2005, *Carmine Salvatore Tralli v ECB*, C-301/02 P, ECLI:EU:C:2005:306, paragraph 59.

⁽²⁾ Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

- (4) 'participating Member State' means a participating Member State as defined in point (1) of Article 2 of Regulation (EU) No 1024/2013;
- (5) 'significant supervised entity' means a significant supervised entity as defined in point (16) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17);
- (6) 'supervised entity' means a supervised entity as defined in point (20) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17);
- (7) 'significant supervised group' means a significant supervised group as defined in point (22) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17);
- (8) 'delegated decision' means a decision adopted on the basis of a delegation of power by the Governing Council pursuant to Decision (EU) 2017/933 (ECB/2016/40);
- (9) 'management body' means a management body as defined in point (7) of Article 3(1) of Directive 2013/36/EU, subject to Article 3(2) thereof;
- (10) 'member' means a proposed or appointed member of a management body or, where applicable, a proposed or appointed key function holder as defined in accordance with applicable law;
- (11) 'heads of work units' means the heads of work units of the ECB to whom the power to jointly adopt fit and proper decisions is delegated;
- (12) 'national competent authority' means a national competent authority as defined in point (2) of Article 2 of Regulation (EU) No 1024/2013;
- (13) 'non-objection procedure' means the procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and further specified in Article 13g of Decision ECB/2004/2;
- (14) 'Guide to fit and proper assessments' means a document with this title, adopted and amended from time to time in accordance with the non-objection procedure and published on the ECB's website, which contains guidance on how fit and proper assessments should be conducted;
- (15) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council ⁽¹⁾.

Article 2

Delegation of fit and proper decisions

1. In accordance with Article 4 of Decision (EU) 2017/933 (ECB/2016/40), the Governing Council hereby delegates the power to adopt fit and proper decisions to the heads of work units nominated by the Executive Board in accordance with Article 5 of that Decision.
2. The heads of work units shall adopt delegated decisions in accordance with this Decision and applicable law.

Article 3

Scope of delegation

1. A fit and proper decision shall not be adopted by means of a delegated decision if the relevant supervised entity is one of the following:
 - (a) the supervised entity at the highest level of consolidation within the participating Member States of a significant supervised group;
 - (b) the credit institution with the largest total value of assets in a significant supervised group, if this entity is different to that referred to in point (a);
 - (c) a significant supervised entity that is not part of a significant supervised group.

⁽¹⁾ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

2. A fit and proper decision shall not be adopted by means of a delegated decision if the fit and proper decision:
 - (a) states that the member does not fulfil the fit and proper requirements; or
 - (b) contains conditions, unless such conditions are necessary to ensure that the member fulfils the fit and proper requirements and have been agreed in writing.
3. A fit and proper decision shall not be adopted by means of a delegated decision if, based on information submitted to the ECB:
 - (a) the member is currently subject to criminal proceedings before a court of law or has been convicted of a criminal offence at first or final instance; or
 - (b) an investigation has been or is currently being carried out in relation to, or an enforcement action or an administrative sanction is pending against or has been imposed upon, the member for non-compliance with any financial services legislation or regulatory provisions.
4. A fit and proper decision shall not be adopted by means of a delegated decision if:
 - (a) the national competent authority does not submit to the ECB a draft delegated decision 20 working days before the expiry of the deadline for the adoption of a fit and proper decision under applicable law; or
 - (b) insufficient information or the complexity of the assessment require that the fit and proper decision is adopted under the non-objection procedure.
5. Where, pursuant to paragraphs 1 to 4, a fit and proper decision cannot be adopted by means of a delegated decision, it shall be adopted in accordance with applicable law and the non-objection procedure.
6. For the purpose of paragraphs 2 to 4, if the assessment of the fit and proper requirements concerns more than one member of a management body and a decision cannot be adopted by means of a delegated decision with regard to one or more of them, the assessment shall result in two fit and proper decisions. One decision shall be adopted in accordance with applicable law and the non-objection procedure, and the other by means of a delegated decision.

Article 4

Fit and proper assessment

The assessment of the fit and proper requirements shall be carried out in accordance with applicable law taking into account the Guide to fit and proper assessments (chapter on assessment criteria) covering the following criteria:

- (a) Experience. The member shall have sufficient knowledge, skills and experience to fulfil their functions.
- (b) Reputation. The member shall at all times be of sufficiently good repute to ensure the sound and prudent management of the supervised entity. The principle of proportionality shall not apply to the assessment of good repute.
- (c) Potential conflicts of interest and independence of mind. The member shall have the ability to act independently. The assessment of any potential conflicts of interest and independence of mind shall include an assessment of the supervised entity's governance arrangements for disclosing, mitigating, managing or preventing conflicts of interest.
- (d) Time commitment. The member shall have the ability to dedicate sufficient time to the performance of their functions in the supervised entity. The assessment may be impacted by several factors, such as the number of directorships held by the member, the nature, scale and complexity of the supervised entity's activities, and other relevant commitments.
- (e) Collective suitability. The member shall be assessed with respect to the collective suitability requirement at the time of their initial fit and proper assessment, taking into account the ongoing supervision of the governance of the supervised entity, as well as the self-assessment of the management body, in particular with regard to its composition and collective suitability needs.

*Article 5***Transitional provision**

This Decision shall not apply to proposals for a fit and proper decision submitted by a national competent authority to the ECB prior to the entry into force of this Decision.

*Article 6***Entry into force**

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Frankfurt am Main, 16 November 2016.

The President of the ECB
Mario DRAGHI
