

Circular

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Suitability of directors, members of the management committee, responsible persons of independent control functions and senior managers of financial institutions

Scope

- *credit institutions, stockbroking firms, payment institutions and electronic money institutions governed by Belgian law, and the aforementioned institutions' branches abroad,*
- *branches established in Belgium of credit institutions, stockbroking firms, payment institutions and electronic money institutions governed by the law of a State that is not a member of the European Economic Area,*
- *settlement institutions and institutions assimilated to settlement institutions governed by Belgian law, and the aforementioned institutions' branches abroad,*
- *central securities depositories, their supporting institutions and central depository banks governed by Belgian law, and the aforementioned institutions' branches abroad,*
- *branches established in Belgium of institutions supporting central securities depositories, central depository banks and settlement institutions and institutions assimilated to settlement institutions, governed by the law of a State that is not a member of the European Economic Area,*
- *(re)insurance undertakings and their branches abroad, as well as branches established in Belgium of such undertakings that are governed by the law of a State that is not a member of the European Economic Area,*
- *(mixed) financial holding companies and insurance holding companies.*

Summary/Objectives

The purpose of this circular is twofold: firstly it introduces the "fit and proper" handbook to replace circular NBB_2013_02 dated 17 June 2013 on standards on expertise and professional integrity for management committee members, directors, responsible persons of independent control functions and senior managers of financial institutions, and secondly it transposes into the Belgian prudential framework the guidelines of the European Banking Authority (EBA) of 26 September 2017 on the assessment of the suitability of members of the management body and key function holders.

Specifically for the insurance sector, this circular also transposes into the Belgian prudential framework, through the aforementioned handbook, EIOPA guidelines 11 to 14 of 14 September 2015 on system of governance.

For reasons of consistency and level playing field, a cross-sectoral approach to the suitability requirements has been pursued as far as possible, while taking into account national and international sectoral requirements applicable to the various types of institution under supervision. Therefore, the handbook is addressed to all financial institutions within its scope, but at the same time it contains different chapters that provide a comprehensive and separately readable overview of the suitability requirements applicable to the various types of institution. In doing so, the handbook, which can be consulted online, aims to guide institutions, in a user-friendly manner and using interactive references (links), through the set of most relevant policy documents.

EBA's Guidelines EBA/GL/2017/12 were published on 26 September 2017 to replace EBA/GL/2012/06 of 22 November 2012 with effect as from 30 June 2018. They specify how the suitability of members of the management body and holders of key positions in financial institutions is to be assessed, as did the previous EBA guidelines. Financial institutions that are expressly included in the scope of these EBA guidelines are therefore required to apply and comply with these guidelines in addition to and clarification of the legal provisions on suitability of the persons referred to above.

Dear Sir,
Dear Madam,

In accordance with the various laws on supervision of financial institutions, directors, members of the management committee, responsible persons of independent control functions and senior managers of financial institutions must be assessed as being fit and proper.

The subject of suitability has become highly topical over the last few years due inter alia to the severe financial crisis which broke out in 2008 and led to an increased need to guarantee that financial institutions are managed as soundly as possible. A process involving thinking about this subject has emerged and various steps have been taken at international, European and national level.

In the meantime, a number of these initiatives have culminated in regulatory or policy documents which need to be applied nationally. It is therefore appropriate to have a certain form of codification in order to provide a clear overview of the whole situation.

The purpose of this circular is twofold.

Firstly, it introduces the "fit and proper" handbook, which aims to guide institutions, in a user-friendly manner and using interactive references (links), through the set of national and international policy documents on professional suitability of in-scope persons. The handbook can be consulted online and replaces circular NBB_2013_02 dated 17 June 2013 on standards on expertise and professional integrity for management committee members, directors, responsible persons of independent control functions and senior managers of financial institutions. The handbook is addressed to all financial institutions within its scope, and it contains different chapters that list the suitability requirements applicable to the various types of institution.

Secondly, this circular transposes into the Belgian prudential framework guidelines EBA/GL/2017/12 of the European Banking Authority (EBA) of 26 September 2017 on the assessment of the suitability of members of the management body and key function holders. The guidelines are explicitly addressed to credit institutions, investment firms, financial holding companies and mixed financial holding companies. The circular includes in annex the full English text of the EBA guidelines. The annex to this circular is available on the website of the National Bank of Belgium.

For the insurance sector, this circular also transposes into the Belgian prudential framework, through the aforementioned handbook, guidelines 11 to 14 of the guidelines of 14 September 2015 on system of governance as developed and published by the European Insurance and Occupational Pensions Authority (EIOPA).

1. Handbook

The handbook consists of 5 chapters and is intended to bring together all applicable policy documents relating to suitability (European regulations, Belgian legislation, preparatory parliamentary work, regulations, circulars, international standards, etc.) and, where necessary, to clarify them. In addition, the handbook provides guidance on topics that are not as such the subject of specific policy documents. Furthermore, any policy documents that are not dealt with in this handbook naturally remain applicable; likewise, the handbook does not affect the competences of other supervisory authorities (e.g. the FSMA) as regards suitability.

The handbook does not in any way replace the underlying policy documents. Any changes to the latter will result in an amendment of the handbook. As this is in principle an online publication, the handbook is intended to evolve as time goes without the need to change the reference and name each time, as is the case for circulars, for example. However, any changes will always be brought to the attention of the institutions. In addition, they will be clarified in a separate section, with an indication of the date of adjustment.

The handbook is structured around the scope *ratione personae*: Chapters 2, 3 and 4 each contain an overview of those legal texts and policy documents on fitness and propriety that are relevant to the financial institutions concerned.

As mentioned above, the handbook also refers to a number of policy documents. Special attention is paid – for the institutions concerned – to guidelines EBA/GL/2017/12 (see below) and the guide to fit and proper assessments (“SSM Guide”) published in May 2018 by the European Central Bank (ECB). Both the NBB and the ECB will in practice rely on this SSM Guide, and recommend that the institutions concerned take it into account.

Specifically for the insurance sector, the handbook also refers to a series of national and international policy documents that are relevant to the sector, including EIOPA guidelines 11 to 14 of 14 September 2015 on system of governance.

2. EBA/GL/2017/12 on the assessment of the suitability of members of the management body and key function holders

Directives 2013/36/EU¹ ('CRD IV') and 2014/65/EU² ('MIFID II') lay down various provisions that empower the EBA to issue guidelines on individual and, where applicable, collective suitability requirements for members of the statutory governing body and key function holders within credit institutions, investment firms, financial holding companies and mixed financial holding companies.

In this context, the EBA issued on 26 September 2017 Guidelines EBA/GL/2017/12, which are to be applied as from 30 June 2018.

The NBB will rely on these guidelines in its effective supervision of suitability requirements. Institutions should therefore apply and comply with these guidelines as a complement to and clarification of the legal provisions on suitability requirements, unless expressly provided otherwise by the law. As regards the latter point, attention is drawn to the following:

- In calculating the quantitative restrictions for directorships, the EBA guidelines apply a calculation method for the aggregation of different mandates exercised within the same group that differs from the specific rules laid down in Article 62, § 9, of the Banking Law³.
- The formal independence criteria laid down in the supervisory laws refer to the independence criteria as stipulated in Article 526ter of the Code on Companies. These criteria are not fully consistent (sometimes wider, sometimes narrower) with the criteria used in §§ 91-93 of the EBA Guidelines for assessment of 'independence'. To the extent that the EBA Guidelines lay down additional independence requirements on top of those required by Article 526ter of the Companies Code, these additional requirements should therefore be considered as (recommended) good practice (i.e. application on the grounds of the so-called “comply or explain” principle), rather than as a formal legal requirement. In this respect, the institution should be mindful of the basic principle that not only the letter but also the spirit of the law must be respected: the formal criteria on legal independence aim to guarantee **effective independence** of the directors concerned in their day-to-day functioning. However, if the institution were to become aware of elements which might potentially compromise that effective independence, it should examine those elements and, where appropriate, justify why it considers that the ability of the person concerned to make an objective and balanced assessment and take independent decisions is not affected.

These two singularities are explained in more detail in the fit and proper handbook under the headings 'independence and conflicts of interest' and 'amount of time invested'.

For reasons of consistency and level playing field, a cross-sectoral approach to the suitability requirements has been pursued as far as possible. The guidelines are explicitly addressed to credit institutions and investment firms, but at the same time they contain good practices which should be widely replicated. Consequently, the NBB also recommends that the other institutions should wherever possible apply, *mutatis mutandis*, the good practices laid down in these guidelines, taking into account the specific proportionality variables mentioned in the fit and proper handbook.

¹ Directive 2013/36/EU of the European Parliament and of 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.

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

³ Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms.

3. The EBA guidelines on system of governance and the specific aspects in the context of insurance

Directive 2009/138/EU⁴ (“Solvency II”) and Delegated Regulation 2015/35/EU⁵ contain a series of requirements on fitness (both individual and collective) and propriety for managers as well as responsible persons of independent control functions in insurance and reinsurance undertakings.

This framework was completed by EIOPA’s guidelines of 14 September 2015 on system of governance, which include 4 specific provisions on fitness and propriety⁶: (i) requirements on collective fitness within the board of directors and the management committee, (ii) rules on content of the fit & proper policy to be developed by insurance and reinsurance undertakings, (iii) specific rules on assessing the suitability of the “relay person” responsible for monitoring outsourcing of an independent control function, and (iv) an obligation to notify the supervisory authority.

This set of rules has been transposed into chapter 4 of the annexed handbook. This chapter has also been supplemented with a number of additional elements which either are inspired by existing best practices at international level (notably the EBA/GL/2017/12 guidelines) or are specific to the insurance sector in Belgium (e.g. general theoretical knowledge of the insurance market, specific theoretical knowledge expected from the head of the actuarial function in actuarial mathematics, the recommendation -in conglomerates- to have at least one independent director, within the meaning of Article 526ter of the Code on Companies, dedicated to insurance, etc.).

Yours faithfully,

Jan Smets
Governor

Annexes:

- Handbook on assessment of fitness and propriety
- EBA guidelines of 26 September 2017 on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2017/12)

⁴ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance.

⁵ Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance.

⁶ These provisions were provisionally included in Circular NBB_2016_31 on the governance system and are now transferred into the handbook as an annex thereto.