

DECISION (EU) 2021/1438 OF THE EUROPEAN CENTRAL BANK**of 3 August 2021****amending Decision (EU) 2017/935 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2021/34)**

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) Decision (EU) 2017/935 of the European Central Bank (ECB/2016/42) ⁽³⁾ specifies the criteria for the delegation of decision-making powers to the heads of work units of the European Central Bank (ECB) for the adoption of fit and proper decisions and the assessment of fit and proper requirements. The experience gained in the application of that Decision has shown that certain clarifications and technical amendments are necessary, in particular for reasons of consistency and certainty in the application of those criteria.
- (2) The procedure for delegating decision-making powers should be clarified in relation to fit and proper decisions where heads of work units have concerns with regard to the interconnectedness of such a decision with one or more other decisions requiring supervisory approval. This may be the case where the outcome of the relevant supervisory assessment directly impacts one or more of those other decisions and therefore the decisions should be considered simultaneously by the same decision-maker in order to prevent conflicting outcomes. Nevertheless, this clarification of the procedure for delegating decision-making powers should not interfere with the possibility of splitting a decision on the appointment of several members of a management body where for one or more appointees the delegation criteria are not met.
- (3) On 24 June 2020, the Governing Council decided to establish close cooperation between the ECB and the Republic of Bulgaria ⁽⁴⁾, and between the ECB and the Republic of Croatia ⁽⁵⁾. Article 7(1) of Regulation (EU) No 1024/2013 provides that to carry out certain tasks in relation to credit institutions established in a Member State whose currency is not the euro where close cooperation has been established in accordance with that Article, the ECB may address instructions to the national competent authority of the relevant Member State. It is therefore appropriate to include such instructions among the acts that the ECB may adopt by means of delegation to heads of work units pursuant to the relevant provisions of Decision (EU) 2017/935 (ECB/2016/42).
- (4) A fit and proper decision in a case where the complexity of the assessment so requires is not adopted by means of a delegated decision, but is adopted instead under the non-objection procedure. It should be clarified that, in addition there may be cases in which the sensitivity of the matter – in terms of impact on the ECB's reputation and/or on the functioning of the Single Supervisory Mechanism – may require that a fit and proper decision should be adopted under the non-objection procedure and not by means of a delegated decision.

⁽¹⁾ OJ L 287, 29.10.2013, p. 63.

⁽²⁾ OJ L 141, 1.6.2017, p. 14.

⁽³⁾ 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) (OJ L 141, 1.6.2017, p. 21).

⁽⁴⁾ Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30) (OJ L 224 I, 13.7.2020, p. 1).

⁽⁵⁾ Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31) (OJ L 224 I, 13.7.2020, p. 4).

- (5) The scope of fit and proper decisions that are delegated should be extended to include (a) decisions authorising additional non-executive directorships within the meaning of Article 91(6) of Directive 2013/36/EU of the European Parliament and of the Council ⁽⁶⁾; (b) decisions as to whether branch managers – as defined in accordance with applicable law – fulfil the fit and proper requirements; and (c) decisions as to whether persons to whom the management body delegates, partially or fully, the executive function – whether or not the persons have been proposed or appointed as formal members of the institution's governing body or bodies under national law – fulfil the fit and proper requirements. This extension of the scope of fit and proper decisions that are delegated is appropriate, as the underlying assessments of such decisions are similar in nature to assessments undertaken in connection with standard fit and proper decisions.
- (6) Further, the scope of fit and proper decisions that are delegated should be extended to include decisions concerning reappointments where the ECB has not objected to the previous appointment and no material new facts have occurred since the last assessment that affect one or more of the assessment criteria.
- (7) To simplify the criteria applied to determine whether a fit and proper decision is delegated and to bring the present delegation scheme in line with other delegation schemes, a definition of 'negative decision' should be added. For the same reason of alignment with other delegation schemes, the requirement – applicable in the case a fit and proper decision to be adopted by means of a delegated decision – that the relevant national competent authority submits to the ECB a draft delegated decision 20 working days prior to the expiry of the deadline for the adoption of the fit and proper decision under applicable law, should be removed.
- (8) In cases where a fact or facts related to criminal or administrative proceedings is or are submitted to the ECB in connection with a fit and proper decision, the criterion applied to determine whether that decision is adopted by means of a delegated decision should be clarified to focus on proceedings that have an impact on the suitability of the appointee.
- (9) Therefore, Decision (EU) 2017/935 (ECB/2016/42) should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Amendments

1. Article 1 is amended as follows:

(a) point (2) is replaced by the following:

'(2) "fit and proper decision" means an ECB decision (i) stating whether an individual fulfils the fit and proper requirements, or (ii) authorising a member of a management body to hold one additional non-executive directorship pursuant to Article 91(6) of Directive 2013/36/EU;'

(b) point (10) is replaced by the following:

'(10) "member" means any one or more of the following: (i) a proposed or appointed member of a management body; (ii) where applicable, a proposed or appointed key function holder as defined in accordance with applicable law; (iii) a proposed or appointed branch manager as defined in accordance with applicable law; and (iv) a person to whom the management body delegates, partially or fully, the executive function, whether or not that person has been proposed or appointed as a formal member of the institution's governing body or bodies under national law;'

⁽⁶⁾ 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

(c) point (14) is replaced by the following:

‘(14) “Guide to fit and proper assessments” means a document with this title including future versions thereof and including any other document containing guiding principles for fit and proper assessments that may in future replace or complement it, adopted and amended from time to time in accordance with the non-objection procedure and published on the ECB’s website;’

(d) the following point (16) is added:

‘(16) “negative decision” means a decision that does not or does not fully grant the authorisation as requested by the significant supervised entity or the member. A decision with ancillary provisions such as conditions or obligations shall be considered as a negative decision unless such ancillary provisions (a) ensure that the supervised entity fulfils the requirements of relevant Union law referred to in Article 4 and have been agreed in writing or (b) merely restate one or more of the existing requirements that the institution has to comply with pursuant to provisions referred to in Article 4 or require information on the fulfilment of one or more of such requirements;’

(e) the following point (17) is added:

‘(17) “ECB Guide on options and discretions available in Union law” means a document with this title including future versions thereof and including any other document containing guiding principles on options and discretions available in Union law that may in future replace or complement it, adopted and amended from time to time in accordance with the non-objection procedure and published on the ECB’s website.’;

(f) the following point (18) is added:

‘(18) “sensitivity” means a characteristic or factor that may have a negative impact on the ECB’s reputation and/or on the effective and consistent functioning of the Single Supervisory Mechanism, including but not limited to any of the following: (a) the relevant supervised entity has previously been, or is currently, subject to severe supervisory measures such as early intervention measures; (b) the draft decision once adopted will set a new precedent that could bind the ECB in the future; (c) the draft decision once adopted may attract negative media or public attention; or (d) a national competent authority that has entered into close cooperation with the ECB communicates its disagreement with the proposed draft decision to the ECB.’;

2. in Article 2, the following paragraph 3 is added:

‘3. The delegation of decision-making powers pursuant to paragraph 1 shall apply to:

(a) the ECB’s adoption of supervisory decisions;

(b) the ECB’s adoption of instructions addressed, pursuant to Article 7 of Regulation (EU) No 1024/2013, to the national competent authorities with which the ECB has established close cooperation.’;

3. Article 3 is replaced by the following:

Article 3

Scope of delegation

1. A fit and proper decision shall not be adopted by means of a delegated decision if any one of the following criteria is met:

(a) the relevant supervised entity is one of the following:

(i) the supervised entity at the highest level of consolidation within the participating Member States of a significant supervised group;

(ii) 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 (i);

(iii) a significant supervised entity that is not part of a significant supervised group;

- (b) the decision is a negative decision;
- (c) any of the following facts is submitted to the ECB:
 - (i) 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
 - (ii) 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;

unless the relevant fact does not impact the reputation of the member based on an assessment in accordance with the criteria specified in the Guide to fit and proper assessments, in particular regarding the nature of the charge or accusation, the severity of the penalty and the time passed (at least five years since the imposition of a sanction or measure);

- (d) the complexity of the assessment or the sensitivity of the matter requires that the fit and proper decision is adopted under the non-objection procedure.

2. Notwithstanding paragraph 1, a fit and proper decision shall be adopted by means of a delegated decision if it concerns the reappointment of the same person for the same position in the same supervised entity, the ECB has not objected to the previous appointment, and no material new facts have occurred since the last assessment that affect one or more of the assessment criteria.

3. Where, pursuant to paragraphs 1 and 2, 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.

4. Heads of work units shall submit a fit and proper decision that fulfils the criteria for the adoption of delegated decisions set out in this Article to the Supervisory Board and the Governing Council for adoption under the non-objection procedure if the supervisory assessment of that fit and proper decision has a direct impact on the supervisory assessment of another decision which is to be adopted under the non-objection procedure.

5. Notwithstanding paragraph 4, if the assessment of the fit and proper requirements concerns more than one member of a management body and pursuant to paragraphs 1 and 2 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 by means of the non-objection procedure and the other by means of a delegated decision.;

4. Article 4 is amended as follows:

- (a) the introductory phrase is replaced by the following:

‘1. The assessment of the fit and proper requirements for members shall be carried out in accordance with applicable law taking into account the Guide to fit and proper assessments (chapters on assessment criteria and on fit and proper related authorisations) covering, where applicable, the following criteria:;

- (b) the following paragraph 2 is added:

‘2. The assessment of the authorisation to a member of the management body to hold one additional non-executive directorship shall be carried out in accordance with the applicable law implementing Article 91(6) of Directive 2013/36/EU and taking into account the Guide to fit and proper assessments (section on time commitment) and the criteria in the ECB Guide on options and discretions available in Union law.’.

Article 2

Transitional provision

The provisions of Decision (EU) 2017/935 (ECB/2016/42) shall continue to apply, as unamended, in cases where a proposal for a fit and proper decision was submitted by a national competent authority to the ECB prior to the entry into force of this Decision.

*Article 3***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, 3 August 2021.

The President of the ECB
Christine LAGARDE
