

Joint position paper on the proposals on “Fit and Proper” in the 2021 Banking Package:

The democratic selection process for supervisory board members of local savings banks must be protected.

On 27 October 2021 the European Commission published the draft Banking Package 2021, introducing changes to the Capital Requirements Regulation and Directive (CRR III/CRD VI). The proposals on the procedure for the suitability assessment of new supervisory board members (“Fit and Proper”, Article 91a and 91b CRD-VI draft) are incompatible with German law and the right of local self-government, which is expressly to be respected by the European Union as part of national identity pursuant to Article 4 (2) TEU.

An assessment of the suitability of new members before they take up office (ex-ante assessment) and an internal assessment of the suitability of supervisory board members by the local savings banks contradict the special structural features of these banks, in particular the local sponsorship and the resulting requirement for a democratically legitimised composition of the supervisory board. The proposals therefore urgently need to be adapted.

Specifically:

According to the first sentence of Article 4 (2) of the Treaty on European Union (TEU), the Union shall respect the equality of the Member States before the Treaties and their respective national identities. This includes the fundamental political and constitutional structures, including regional and local self-government. In Germany, Article 28 (2) of the Basic Law (Grundgesetz) guarantees cities, counties and municipalities the right to local self-government. On this basis of local self-government, savings banks have been established as institutions under public law with legal capacity to fulfil certain public tasks incumbent on them in the area of which they operate.

From their status as local banks, it follows that the elected representative body of the local authority determines the composition of the supervisory board (Verwaltungsrat) of the local savings bank at the beginning of each local election period. This is enshrined in the savings bank laws of the German Länder. The selection of members is based on knowledge of the suitability requirements and the mandate responsibility. It is important to protect this democratic selection process by the representatives of the local authority. The savings banks are not legitimised to influence the selection of members, which is incumbent on the representative body.

In particular, the savings banks are not entitled to take a decision on this or to question it through their own (internal) suitability assessments of new members.

After the appointment of supervisory board members by the local council, the savings banks fulfil their primary responsibility for the suitability of the supervisory board members in accordance with Article 91 (1) CRD without compromise. New supervisory board members receive special training as standard practice within the first months after taking office. This procedure takes into account the special features of savings bank legislation and has proven reliable in the past. The subsequent (ex-post) suitability assessments by the supervisory authorities also ensures the suitability of the members.

We would like to emphasise that the Commission’s harmonisation efforts alone cannot justify an intervention in the balanced and well-functioning organisational structure of local savings banks and, a fortiori, cannot undermine the boundaries of Article 4 (2) TEU.

We therefore urge that the proposals (Articles 91a to 91b CRD) be deleted altogether or else be limited to executive board members; in that case, however the regulatory assessment period should be limited to a maximum of two months.

If the provisions should also apply to supervisory board members, then for the above reasons an exception is absolutely necessary to the effect that Article 91a (2) and

Article 91b (8) CRD do not apply to such banks which have no influence on the selection of members (cf. also Article 88 (2) sub-para. 5 CRD).

Conclusion / Summary:

A prior assessment of the suitability of members of the supervisory bodies of savings banks contradicts important principles of both local self-government and the EU treaties and is also practically impossible to be put in place. The so-called „Fit and Proper“ proposals in the 2021 Banking Package must therefore be adapted so the existing, democratic selection process for supervisory board members of local savings banks is not impaired in any way.

- The preliminary (ex-ante) suitability assessment of board members proposed in the draft Directive (Article 91a et seq. CRD VI draft) is legally and practically untenable. New members of supervisory boards of savings banks under public law are only determined after their appointment by the local council or after election to the office as the head of the administrative body (e.g. ex-officio members like a mayor or county president). Local savings banks have no influence on the selection of these members.
 - Only the elected representative body of the local authority may be responsible for appointing the supervisory board members. This democratically legitimised decision may not be called into question by the savings banks through their own (internal) evaluation of the candidates.
 - A subsequent (ex-post) evaluation of savings bank board members by the supervisory authority must continue to be possible, and the relevant draft directive must be adapted accordingly.
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