CENTRE DE DROIT
BANCAIRE ET FINANCIER

FINMA Practical Guide

Changes within banking bodies

Par Vaïk Müller le 27 September 2021

On 22 September 2021, FINMA published a Practical Guide aimed at setting out its practice regarding changes within banking bodies and, more specifically, at providing an overview of the assessment criteria that it generally applies in the context of examining the guarantee of irreproachable activity.

Concept of body

The concept of a governing body extends to the persons responsible for administering and managing the bank. Holders of qualified participations, although also subject to an examination from the point of view of the guarantee of irreproachable activity (by definition a more limited examination), are not organs. The persons referred to in this Guide are therefore mainly the members of the organ responsible for senior management (board of directors in a public limited company) and the members of the management (executive committee).

Reminder of the general principles

FINMA begins by recalling the general principles applicable in this area. In this respect, the Authority emphasises that the examination of the guarantee of irreproachable activity of a member of a body has two aspects that are well known to practitioners : (1) the adequacy of the person's aptitude to fulfil the function concerned (*fitness*) and (2) his or her integrity (*properness*). In practice, this dual examination is referred to by the generic English term '*fit and proper test*'. This examination is always carried out before the person concerned takes up their post.

The Guide also explains the difference between these two aspects and emphasises that the assessment of *properness* is carried out independently by FINMA, while that of *fitness* takes into account the explanations given by the regulated entity on the person's skills, as well as on the internal selection process put in place by the regulated entity.

FINMA's assessment is based on the general principles of administrative law, in particular that of proportionality, with FINMA taking into account in its assessment the differences in size, complexity, structure, activity and risk of the persons subject to the law. However, FINMA has broad discretionary powers recognised by the Federal Tribunal, the guarantee of irreproachable activity being an indeterminate legal concept (see ATF 129 II 438, consid. 3). In this context, a decision to reject the new member of the body gives rise to a decision that is subject to appeal.

As a general rule, if the examination of the submitted file is negative or if conditions are formulated, FINMA contacts the institution in advance.

Finally, FINMA emphasises that when a member leaves a body, the institution may simply inform FINMA, but in any case, any departure or change of function requires that the body in question can continue *in corpore* (i.e. as a whole) to fulfil its role within the institution.

Preliminary examination of the guarantee of irreproachable activity

In special circumstances, at the request of the institution and on an exceptional basis, FINMA may also conduct an informal preliminary review provided that the candidate's full documentation has already been provided. In this respect, FINMA gives examples of circumstances justifying a preliminary examination : event-driven publicity in connection with a stock market listing, a complex selection process involving different stakeholders (e.g. the case of cantonal banks) or the need to examine several possible candidates on a preliminary basis. The preliminary examination and the opinion expressed by FINMA in this respect do not prejudge its final decision.

Other useful information

The Guide also provides a useful overview of the criteria that FINMA takes into account in its analysis of the integrity and competence of the candidate (see points II.1 and II.2 of the Practical Guide). However, these criteria are relatively standard with regard to supervisory law and the criteria generally used by foreign supervisory authorities. The Guide also contains concrete details on the procedure (via the EHP electronic platform), such as an indicative processing time of 10 working days for the request (see point III of the Practical Guide). It should be noted that this time limit presupposes, in principle, the submission of a complete file by the subject. For the record, the Guide also contains a list of the information and documents expected by FINMA in support of the application, concerning both the applicant and the supervised institution (see point IV of the Practical Guide).

Conclusion

The publication of this Guide accurately reflects FINMA's practice and is a welcome reminder for supervised institutions and applicants. Although this Guide is primarily aimed at the governing bodies of banking institutions, the principles it contains are also relevant to other institutions subject to FINMA supervision. For practitioners, this Guide is not a revolution, but it does contain useful confirmations and clarifications, particularly with regard to the preliminary examination procedure.

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