

EBA Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of credit servicers, as a whole, under Directive (EU) 2021/2167

FIGEC response

5 Juillet 2023

FIGEC is concerned that the proposed guidelines may create a very heavy additional administrative burden for credit servicers, which is likely to hinder the development of the secondary market in NPLs to the detriment of the objective sought by the directive. It is particularly true for small and medium-sized credit managers despite the proportionality principle recalled in the draft guidelines.

Today, credit servicers are like many companies faced with numerous legislative and regulatory obligations, including the soon-in-force obligations set forth by Directive 2021/2167.

What the EBA is proposing would unnecessarily add a layer on the top of those obligations. Based upon the proposal, credit servicers would indeed have to develop a complex, costly, resource- and time-consuming internal procedure, which FIGEC believes could prove impractical. There is no requirement in Directive 2021/2167 which goes as far as requiring credit servicers to set up brand new internal policies and processes specifically dedicated to the criterion of adequate knowledge and experience. And there should not be one.

FIGEC appreciates that it would be helpful to ensure some level of harmonization in the interpretation and application of this criterion within the EU. FIGEC sees a clear risk that the draft guidelines may create legal uncertainty to the detriment of credit servicers as they provide many indications, but a lot of them seem to be either too subjective (and hence subject to interpretation) and/or rather vague and difficult to apply in practice.

Acknowledging the difficulty of drawing up guidelines without the benefit of hindsight in a given situation and without the benefit of precedents, FIGEC is of the view that the draft guidelines should be limited to formulating general principles (proportionality, principle of continuous compliance with the criterion of adequate knowledge and experience...). They should leave it for the national competent authorities to apply the criterion of adequate knowledge and experience in light of the overall national legislative environment applicable to credit servicers.

In this respect, FIGEC would like to draw the EBA's attention to the successful experience of transposing Article 4 (professional requirements) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation in France. Article 4 presents some similarities with Article 5(1)(c) as it requires Insurance and reinsurance intermediaries to possess appropriate knowledge and ability. In France, compliance with this criterion is based on objective requirements (such as the level of education) and as far as FIGEC is aware there has been no complaint or criticism thus far relating to a potential enforcement gap in that regard. FIGEC thinks that a similar approach should be taken in respect of Article 5(1)(c).

✓ Q1: Is the section on subject matter, scope, definitions and implementation appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comment.

Given the variety of companies statutes available within the EU, it should be recommended to delete the suggested definitions of “Management or administrative organ” or “Administrative or management organ in its supervisory function” or “Member” and refer instead to the legislation under which the credit servicer is incorporated. FIGEC is indeed concerned that the definitions may potentially not be fully consistent with national laws and cause legal uncertainty.

✓ Q2: Is the section on proportionality appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comments.

The attempt in the draft guidelines to illustrate the implications of the proportionality principle in the assessment to be carried out by credit servicers opens a lot of unresolved questions.

The criteria set out in the section on proportionality are not precise enough. They will give rise to interpretation by national authorities and will cause legal uncertainty to credit servicers and be counter-productive in terms of harmonization.

To mitigate these undesirable effects:

- The suggested criteria a), b), g) should provide for materiality thresholds, which could not be subject to interpretation.
- Figec does not understand Criterion d). It would be useful to clarify it and the reason why it may play a role in terms of proportionality principle.
- Criterion c) which refers to complexity is subjective and shall be clarified.
- Criterion h) is particularly unclear and would deserve either clarification (by referring to specific types of business activities or organizational structure).

While the proportionality criterion is clear, it is unclear to what extent the obligations will be simplified for smaller credit servicers and on the contrary to what extent the obligations will be reinforced for larger credit servicers. At minimum, concrete illustrations should be provided to help to understand its practical impact on smaller vs larger credit servicers.

Lastly, it is unclear how this set of criteria will apply and the weight attached to each criterion.

✓ Q3: Is the section 2 on the suitability assessment by credit servicers appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comments.

- §15. The requirement for the performance of an assessment “where material changes to the business model, underlying legal provisions or technologies used occurred” is too vague and shall be more specific. Clarifications can be brought either by providing relevant examples (“Business model”: recourse to sub-contracting?), or by fine-tuning the wording (for the reference to “underlying legal provisions or technologies used occurred”, one could specify that they are those having a direct impact on the relationships with customers).
- §17. Circumstances allowing the credit servicer to perform an ex-post suitability assessment should be broadened. Circumstance (a) shall cover all situations where the credit servicer or the management or administrative organ does not need to be consulted prior to the appointment and nomination of the member concerned. Circumstance (b) shall include any circumstances which are beyond the control of the credit servicer which prevent the prior assessment of suitability to the extent those circumstances can be documented.
- §22-23. The self-assessment duty vested on credit servicers is cumbersome. At least, it should be provided that competent authorities may be consulted by credit servicers on those aspects and shall provide relevant guidance where appropriate.

✓ Q4: Are the sections 3 and 4 on the individual and collective criteria for the assessment of members of the management or administrative organ appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comments.

- Articulation between sections 3 and 4: the possible complementarity of individual members to satisfy the requirement for collective adequate knowledge and experience shall be illustrated in the guidelines as it is unclear how “compensation” between the Members’ respective knowledge and experiences will work/be assessed.
- §30. Contrary to what is suggested in that paragraph, FIGEC considers that a combination of educational degree as well as relevant past experience shall suffice to establish the requirements for adequate knowledge and experience. Once met, those requirements should allow credit servicers to benefit from a presumption that the criterion of adequate knowledge and experience is met.

- With respect to certain technical expertise (e.g., legal, data protection), it shall be clarified in the guidelines that members do not need to be specialists and that their awareness in those fields shall suffice. It is common practice for members of the management or administrative organs of any company to get advice from in-house experts or external advisors when necessary. There is no reason to demand a higher level of expertise of members of the management or administrative organs of credit servicers.
- Account shall be taken of the belonging of the credit servicer to a large group engaged in credit servicing activities. The assessment of the collective adequate knowledge and experience of the management or administrative organ of a credit servicer belonging to a large group engaged in credit servicing should allow to take into account the overall expertise/competencies of the group (e.g., legal, corporate) and hence not be duplicated at the credit servicer's level.

✅ Q5: Are the sections 5 and 6 on the individual and collective assessment of members of the management or administrative organ appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comment.

FIGEC considers that sections 5 and 6 create cumbersome obligations and create undue interference in the freedom of companies to choose the members of their management or administrative organs.

✅ Q6: Is section 7 on corrective measures appropriate and sufficiently clear?

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

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- §.43-45. The reference to “timely manner” is vague. It could be useful for national competent authorities to provide for a given time-period even.
- To pre-empt potential conflicts with members who would no longer meet the requirements of knowledge and experience and would need to be replaced, the possibility for the credit servicer to obtain an opinion from the competent authorities of non-compliance of this member shall be provided for.

✓ **Q7: Is section 8 on the assessment by competent authorities appropriate and sufficiently clear?**

FIGEC considers that the draft guidelines should be simplified and contend to recall general principles that should be followed by national authorities when assessing the criterion of adequate knowledge and experience.

However, should the EBA think otherwise, after having reviewed all comments received from stakeholders, and stick *mutatis mutandis* to the draft guidelines, FIGEC would like to make the following comment.

- **§ 48-49.** For the sake of harmonization, it would be useful if more detailed guidance regarding the supervisory procedures to be specified by competent authorities be given in the EBA guidelines.
- Supervisory procedures should be made publicly available by competent authorities not only in the national language, but also in English to facilitate access of foreign credit servicers.

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- inter-company credit represents some 800 billion euros. Unfortunately, it is the leading "free" source of business financing, three times higher than bank cash credit,
- 56 billion, the total amount of write-offs for outstanding receivables,
- 90% of the sums recovered by debt collection agencies are recovered amicably,
- in the event of default, nearly 9 out of 10 debtor companies and more than 8 out of 10 debtor individuals are actually solvent,
- 25% of defaults are due to late or defaulted payments,
- representing about 300,000 jobs at risk.

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Our companies work daily to secure the €800 billion in inter-company credit, reduce the €56 billion in losses for unpaid debts and preserve the 300,000 jobs threatened each year.

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