



RESULTS OF CONSULTATION

Market participants had the opportunity, between 14 July and 30 September 2023, to respond to the proposed Q&As on supervisory board independence. Three parties submitted their consultation feedback to DNB. The table below provides a point-by-point presentation of the feedback received, DNB's response to it, and any changes made further to the feedback.

#	Party	Feedback in brief	Response by DNB	Changes (Yes/No)
Q&A on supervisory board independence – Insurers				
1	Zorg en Zekerheid	<p>Demonstrating independence</p> <p>Health insurer Zorg en Zekerheid asked to be provided with guidance on how to demonstrate supervisory board independence. Zorg en Zekerheid also flagged that the procedures for demonstrating independence were different between the Dutch Healthcare Authority (NZA) and DNB.</p>	<p>DNB acknowledges that the procedure for assessing independence may differ from one supervisory authority to the next. As far as the question regarding guidance on how to demonstrate independence is concerned, DNB refers to the annex of the Policy Rule on Fitness 2012. This Policy Rule offers a description of relevant competences demonstrating fitness, one of which is 'independence'. For the sake of completeness, DNB also refers to Point 5 of this feedback statement, which states that, to answer the question of when a supervisory director qualifies as formally independent, reliance will be placed on the EBA/ESMA Guidelines on the assessment of the suitability of members of the management body and key function holders (hereinafter: "the EBA/ESMA Guidelines").</p>	Yes

2	Dutch Association of Insurers (Association)	<p>Reason for revising existing policy</p> <p>The Dutch Association of Insurers asked about the reason for revising the existing policy. The Association noted that the current policy was adopted in 2019 and that insurers had until 1 January 2023 to ensure their compliance with this policy. Why did DNB decide, some six months after the compliance deadline for insurers, to implement yet another new policy revision?</p>	<p>DNB decided to revise and update the existing Q&A further to an internal review, despite the relatively short time since the publication of the previous policy statement dating back to 2019, the reason being that, in some respects, the existing Q&A lends itself to a stricter and more forceful interpretation of the standard than appropriate, given the applicable law and the status of the policy statement.</p>	No
3	Association	<p>Effective date of revised Q&A</p> <p>The Association noted that, unlike the current policy, the revised Q&A did not specify when compliance with DNB's new position would be required. The Association asked when the revised policy would take effect.</p>	<p>In the existing Q&A, DNB states that institutions have been required to comply with the Q&A since 1 January 2023. This passage is worded more strictly and forcefully than appropriate, given the applicable law and the status of a Q&A (see: Explanatory guide to DNB's policy statements). Ultimately, DNB means for a Q&A to help provide insight into its supervisory practices through the interpretation of regulatory requirements. With this in mind, Q&As do not include independent supervisory standards. While Q&As are binding on DNB, institutions are free to opt for alternative ways in which to meet the statutory and regulatory requirements provided that they apply the comply-or-explain principle. For this reason, the revised Q&A does not specify an effective date. That said, DNB does expect institutions to continuously assess whether their supervisory board meets the statutory independence requirements. If so warranted, DNB will perform an independence screening of a would-be supervisory director and/or of a supervisory board as a whole.</p>	No



4	<p>Association</p>	<p>Omission of existing policy elements from revised Q&A</p> <p>The Association expressed the view that the revised Q&A did not align better to a proportional approach, but rather that it created ambiguity because elements of the existing policy were omitted from the revised Q&A. This pertained to:</p> <p>a) The fact that the requirement that at least 50% of a supervisory board’s members should be formally independent is not upheld. The new Q&A explicitly states that there is room for a stricter interpretation (i.e. more than 50%) or for a more liberal interpretation (i.e. less than 50%) for certain insurers.</p> <p>b) The option that it suffices for subsidiaries to have one formally independent supervisory director if three conditions are met (1. The subsidiary holds a licence and its parent institution has its registered office in the same country (i.e. the Netherlands); 2. The subsidiary is subject to consolidated supervision or group supervision; and 3. The subsidiary provides the same service as its parent institution).</p> <p>c) The individual Q&As that form part of the existing policy and relate to supervisory boards of insurance groups and membership overlaps. In this context, the Association asked whether a formally independent</p>	<p>a) It is true that the position that a supervisory board should always have at least 50% formally independent members is not reflected in the revised Q&A. Rather, the consulted-upon Q&A states that <translated> ‘<i>effective assurance of sound and ethical operational management</i>’ calls for ‘<i>a sufficient number of formally independent supervisory directors on a supervisory board in principle</i>’. Based on the relevant legal framework, DNB cannot demand, without reservation, from all institutions that at least 50% of their supervisory board members are formally independent, the reason being that this framework for insurers does not include a quantitative standard. As a result, DNB is expected to assess on a case-by-case basis whether an insurer has a ‘sufficient number’ of formally independent supervisory board members. In doing so, DNB makes allowance for the nature, scale, risks and complexity of the insurer’s operations and, if they are listed, of their compliance with the Dutch Corporate Governance Code. In some instances, it may be enough for insurers to have fewer than 50% formally independent supervisory board members for the purposes of ensuring sound and ethical operational management and a balanced or adequate organisational structure, while other insurers may be required to have at least 50% formally independent members on their supervisory board. The revised Q&A offers examples of situations in which at least 50% formal independence may be required and an example of a situation in which less than 50% formal independence may suffice. In DNB’s opinion, this approach, which considers all relevant circumstances of a case and assesses on</p>	<p>Yes</p>
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		<p>supervisory director at group level would also qualify as independent at subsidiary level.</p>	<p>a case-by-case basis what level of formal independence would be required to give adequate substance to the standard, effectively offers more scope for proportionality than a uniform quantitative standard (50%) would.</p> <p>b) The new Q&A starts from the premise that an insurer should have a ‘sufficient number’ of independent members on its supervisory board. As mentioned above, in assessing how to interpret the phrase ‘sufficient number’, DNB will consider all relevant circumstances of a case, including the nature, scale, risks and complexity of the insurer’s operations. If the three conditions referenced by the Association are met, the requirement of having to have 50% formally independent supervisory directors may be relaxed where appropriate. That said, each case should be assessed as a whole. There may be different circumstances, for instance, that, despite an insurer meeting the three conditions, call for a higher degree of formal independence. Such circumstances might include situations in which the interests of an insurer are, or are likely to become, incompatible with, or contradictory or subordinate to, the interests of shareholders or other stakeholders. In that context, the revised Q&A points to the presence of a director-majority shareholder, for instance.</p> <p>c) DNB refers to Point 5 below, which explains that the EBA/ESMA Guidelines will be the starting point for assessing whether a supervisory director qualifies as formally independent. The EBA/ESMA Guidelines do not restrict the qualification of a supervisory</p>	
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			director as formally independent if that person also serves as a formally independent supervisory director at the insurer's parent institution or holding company.	
5	Association	<p>Qualification as 'formally independent' supervisory director</p> <p>The Association argued that the criterion for formal independence was unclear. In the current Q&A, this criterion was further fleshed out based on the EBA/ESMA Guidelines and the Dutch Corporate Governance Code. The absence of further clarification in the new Q&A prompted the Association to express the view that legal certainty could be consequently jeopardised.</p>	The revised Q&A clarifies that the EBA/ESMA Guidelines, although not applicable to insurers, offer useful guidance for assessing whether a supervisory director can be considered as formally independent. For this reason, DNB will take the EBA/ESMA Guidelines as a starting point when assessing whether an insurer's supervisory directors qualify as formally independent (Paragraphs 89-91). An insurer may decide not to follow the EBA/ESMA Guidelines, explaining its reasons, if it can demonstrate satisfactorily why it believes a supervisory director should nevertheless be considered as formally independent.	Yes
6	Association	<p>Relevant circumstances for number of formally independent supervisory directors</p> <p>The Association had questions about/comments on the relevant circumstances mentioned in the revised Q&A on the number of formally independent supervisory directors.</p> <p>1) <i>Nature, scale, risks and complexity;</i> 2) <i>Group structure with entities providing different services;</i> 3) <i>Majority interest;</i> 4) <i>Parent institution outside EEA.</i></p>	Re 1: The nature, scale, risks and complexity are referenced in the revised Q&A as relevant circumstances under the heading 'What qualifies as a "sufficient number" of formally independent supervisory directors?' before examples are provided of circumstances in which at least 50% formal independence may be required. It follows from the applicable legislation and regulations (i.e. Section 3:17 of the Dutch Financial Supervision Act (<i>Wet op het financieel toezicht – Wft</i>) and Sections 17 and 26.2 of the Dutch Decree on Prudential Rules for Financial Undertakings (<i>Besluit prudentiële regels Wft – Bpr</i>)) that the operational management of an insurer should be appropriate to the nature, scale, risks and complexity of the insurer's operations. Based on this proportional application of the rules, a small, non-complex insurer might be able to suffice with fewer than 50% formally independent	Yes



	<p>Re 1: The Association failed to see the interrelationship between this criterion and formal independence.</p> <p>Re 2: The Association argued that the situation in which an insurer is a member of a group whose parent institution is an entity providing different services and/or not holding the same type of licence does not, in principle, have to form an impediment in the context of formal independence, provided, of course, that the supervisory board members are fit to fulfil those roles.</p> <p>Re 3: The Association noted that the criterion ‘majority or substantial minority interest’ was unclear, arguing that most groups with a holding company structure had a shareholder with a majority interest. The Association expressed the view that this should not warrant the application of a stricter requirement than 50%.</p> <p>Re 4: The Association expressed the view that ‘<i>parent institution outside EEA</i>’ was not a distinguishing criterion. The Association claimed that such a situation might occur within the EEA too and that the insurer’s supervisory board would be accountable in all cases.</p>	<p>supervisory board members, while a large, complex insurer would have to have at least 50% formally independent supervisory board members.</p> <p>Re 2, 3 and 4: Circumstances may dictate that an insurer should have at least 50% formally independent supervisory board members to ensure sound and ethical operational management and a balanced or adequate organisational structure. To DNB, such circumstances would include situations in which the interests of the insurer in question are, or are likely to become, incompatible with, or contradictory or subordinate to, the interests of shareholders or other stakeholders. In all these circumstances, it is particularly important that the supervisory board can exercise countervailing power. The circumstances listed are examples of such situations.</p> <p>Re 3: DNB has changed the wording of this circumstance to clarify that this is not just about the presence of a holding structure, but also includes situations where the insurer’s interests are, or are likely to become, incompatible with, or contradictory or subordinate to, the interests of shareholders.</p>	
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7.	Association	<p>Governance of group and 'internal' supervisory directors</p> <p>The Association noted that, in general terms, the consultation document seemed to have been written from the interests of individual insurers. Group governance, in which 'internal' supervisory directors potentially play an important role, was not addressed. The Association worried that the proposed policy might contribute to a worsening of sound and ethical operational management at group level.</p>	<p>DNB refers to its response at 4c. above, where it was noted that there are no restrictions on qualifying a formally independent supervisory director at the insurer's parent or holding company level as formally independent at the operating company as well.</p>	Yes
Q&A on supervisory board independence - Banks				
8	Dutch Banking Association (NVB)	<p>Applicability of Q&A to significant banks</p> <p>The NVB noted that the ECB was responsible for all fit and proper assessments of supervisory board members of significant banks. ECB policy on these assessments has been formalised in the ECB Guide to fit and proper assessments. This Guide stipulates that formal independence requirements can be imposed only if required by the national legal framework of a participating Member State. The NVB argued that there was no such requirement governing supervisory directors in Dutch law. The NVB also claimed that the requirements regarding formal independence as set out in the consulted-upon Q&A</p>	<p>DNB does not share the NVB's view that there is no legal basis for imposing requirements for the degree of formal independence of supervisory board members on significant banks. Dutch law ultimately requires banks to conduct sound and ethical operational management, part of which is a clear, balanced and adequate organisational structure (Section 3:17 <i>Wft</i> and Section 17 <i>Bpr</i>, respectively). When adding the balance requirement of Section 17 of the <i>Bpr</i>, the legislator explicitly stated that DNB is responsible for overseeing a clear, balanced and responsible system of management and supervisory functions at financial undertakings. The legislator also expressly stipulated that DNB has the power to impose specific requirements on the corporate organisational structure of financial undertakings and, in this context, also has the power to enforce balanced corporate governance practices, particularly when it comes to an adequately equipped and positioned, and independently</p>	No



		were not in line with ECB policy, as a result of which they could not be applicable to significant banks.	<p>operating supervisory board. This is why, in DNB's opinion, Dutch legislation does provide a basis for imposing requirements on the extent of formal independence of supervisory directors, provided they are imposed on a case-by-case basis and are adequately substantiated.</p> <p>In the consulted-upon policy statement, DNB shares its interpretation of the relevant legal framework for supervisory board independence. In doing so, it applies the relevant EBA/ESMA Guidelines, which include provisions on the degree of formal independence at significant banks. The Q&A follows these provisions of the EBA/ESMA Guidelines in determining the number of independent supervisory board members at significant banks.</p>	
9	NVB	<p>Independence in appearance</p> <p>The NVB noted that the existing Q&A referred to two types of independence: independence of mind and formal independence (independence in state), and that the revised Q&A introduced a third type of independence, i.e. independence in appearance, which concerned preventing and managing conflicts of interest. The NVB endorsed the importance of independence in appearance alongside the two other forms of independence.</p>	The concept of independence in appearance was addressed as early as in the policy statement published in 2019. DNB takes this comment as read.	No



10	NVB	<p>The NVB endorsed the policy interpretation in the revised Q&A for subsidiaries with a banking licence that are neither significant nor listed. These banks should have (at least) one formally independent supervisory board member in principle. This requirement may be waived in some circumstances, allowing these banks not to have <i>any</i> formally independent supervisory board members.</p>	<p>Based on the EBA/ESMA Guidelines, banks that are neither significant nor listed should, as a general principle, have at least one supervisory board member who is formally independent. In addition, the EBA/ESMA Guidelines stipulate that, for banking subsidiaries that are neither significant nor listed, and that are wholly owned by a banking parent, competent authorities may not require any formally independent supervisory directors to be on the supervisory board, in particular when the subsidiary is located in the same Member State as the parent institution.</p> <p>In other words, the EBA/ESMA Guidelines offer a proportional regime for a specific category of banks that are neither significant nor listed. In DNB's opinion, it follows from this regime that all other institutions that are neither significant nor listed should have at least one supervisory board member who is formally independent.</p>	No
11	NVB	<p>Definition of 'sufficient number'</p> <p>The NVB asked DNB to explain what was meant by a 'sufficient number' of formally independent supervisory board members. The NVB also requested further details on how a 'sufficient number' correlated to the phrase that <i>'a majority of supervisory board members of listed banks [...] should be formally independent'</i>.</p>	<p>The quoted passage has been paraphrased from the Dutch Corporate Governance Code (CGC) and is not an interpretation by DNB. The CGC is a form of self-regulation for listed companies.</p> <p>The case-by-case approach taken in the Q&A for banks is directly in line with the proportional formal independence regime of the EBA/ESMA Guidelines. This means that significant or listed banks (Category 1) should have a 'sufficient number' of formally independent supervisory board members, banks that are neither significant nor listed</p>	No

			(Category 2) should have 'at least one independent supervisory board member', and a certain group of banking subsidiaries that are neither significant nor listed (Category 3) do not have to have any formally independent supervisory board members. All three categories are subject to an open standard. How this standard is interpreted depends on the specific circumstances of a case. As a result, there is no strict definition of the term 'sufficient number' that applies across the board. With the revised Q&A, DNB seeks to provide insight into the circumstances it will consider when determining what constitutes a 'sufficient number' of formally independent supervisory board members in a specific case. The revised Q&A gives examples of circumstances in which a bank may have to have at least 50% formally independent supervisory board members to ensure sound and ethical operational management and a balanced or adequate organisational structure.	
12	NVB	Applicability to 'significant subsidiaries' The NVB asked DNB to specify what would constitute a 'sufficient number' of formally independent supervisory directors for a wholly owned subsidiary (with the same banking licence as the parent) qualifying as a significant bank.	The Q&A refers to the relevant EBA/ESMA Guidelines, which apply a proportional strategy with three categories of institutions. A significant wholly owned subsidiary will qualify as a Category 1 bank in the first instance (because it is significant), which is why it would be subject to the requirement of having to have a sufficient number of formally independent supervisory directors. For an elaboration on the definition of 'sufficient number', see Point 11 above.	No
13	NVB	Wholly owned subsidiaries providing different services	DNB stresses that the part of the Q&A referenced by the NVB is about a <i>bank</i> that is a member of a group whose parent institution is an entity providing different services and/or	No



		<p>The NVB argued that, in practice, there could be situations in which the interests of the subsidiary and the parent institution were the same, even if they did provide different types of services or hold different types of licences. The NVB illustrated this with an example of an insurer/reinsurer that was a wholly owned subsidiary. The NVB asked whether, if it could be demonstrated that the interests of the subsidiary and the parent institution coincided to a significant extent, a wholly owned subsidiary providing different services than its parent institution might suffice with having one formally independent supervisory director.</p>	<p>holding a different licence from the bank. Examples of this mentioned in the Q&A are bank/insurer, bank/clearing institution or bank/payment institution. For more on the example of the insurer/reinsurer given by the NVB, DNB refers to its response to Point 17 below.</p>	
14	NVB	<p>Independence in a group context</p> <p>The NVB asked whether a person qualifying as a formally independent supervisory director of a group subsidiary could double as a formally independent supervisory director of a different subsidiary of the same parent institution.</p>	<p>It cannot automatically be assumed that a supervisory director who is formally independent of a bank belonging to a group also qualifies as formally independent of a different banking or other type of subsidiary of the same parent institution. DNB uses the criteria listed in Paragraph 89 of the EBA/ESMA Guidelines to assess whether a supervisory director qualifies as formally independent. This is subject to the condition (Paragraph 90) that, despite meeting one or more of these criteria, a bank should be able to justify to the competent authority the reasoning why an incumbent or newly to be appointed supervisory director should nevertheless be considered formally independent.</p>	No

15	NVB	<p>Change of status during term of service</p> <p>The NVB asked whether it would be possible for the status of a supervisory director to change from ‘formally non-independent’ to ‘formally independent’ during their term of service. The NVB illustrated this with the following example: a supervisory director does not meet the formal independence requirements of the EBA/ESMA Guidelines upon their appointment (e.g. because their employment ceased too recently), but they do meet these requirements during their term of service (e.g. because the required number of years since they ceased their employment is reached during the term of service).</p>	<p>It is impossible for the status of a supervisory director to change from ‘formally non-independent’ to ‘formally independent’ during their term of service. The qualification ‘formally non-independent’ will apply throughout their term of service as demonstrated by Paragraph 89 of the EBA/ESMA Guidelines, which refers to ‘the previous five years’ (under a.) and to ‘a period of at least three years between ceasing such employment and serving on the [...] body’ (under f.). In other words, the period is determined prior to the appointment and does not continue into the term of service.</p> <p>What is more, the independence of a supervisory board member is part of their individual fitness assessment and of the assessment of the collective fitness of a supervisory board.</p>	No
16	NVB	<p>Confirmation of interpretation of Q&A on concrete number of required formally independent supervisory directors</p> <p>The NVB asked whether it was correct that, as per the revised Q&A, subsidiaries with a banking licence that are neither significant nor listed were required in principle to have (at least) one formally independent supervisory director and that this requirement could be waived in certain circumstances, allowing such subsidiaries not to have <i>any</i> formally independent supervisory directors in some instances.</p>	<p>Where the number of formally independent supervisory directors for subsidiaries that are neither significant nor listed are concerned, DNB refers to its response to Point 10 above.</p> <p>For the required number of formally independent supervisory directors per bank category, DNB refers to the section ‘What qualifies as a “sufficient number” of formally independent supervisory directors?’ in the Q&A for banks.</p>	No



		The NVB additionally included a table outlining 'rules of thumb' it felt could be applied to determine the required minimum number of formally independent supervisory board members per bank category.		
17	NVB	<p>Inclusion of captives in new policy statement</p> <p>The NVB claimed that, in its earlier communications, DNB promised that the special position of captives¹ would be clarified in the next update of the existing Q&A, by including that, subject to conditions, a captive would be able to suffice with at least one formally independent supervisory director (rather than having at least 50% formally independent supervisory directors). The NVB flagged that DNB had not, or at least not yet, incorporated this proportional approach into the Q&A.</p>	DNB applies the EBA/ESMA Guidelines to captives in banking groups. ² Based on the EBA/ESMA Guidelines, institutions that are neither significant nor listed should in principle have at least one formally independent supervisory board member. In addition, DNB refers to the Q&A on supervisory board independence – Insurers, which also addresses captives.	No
18	NVB	<p>Unabridged publication of consultation feedback</p> <p>For the sake of transparency, the NVB requested that DNB publish the NVB's consultation feedback on its website in unabridged form.</p>	DNB takes this comment seriously and will publish the NVB's consultation feedback on its website in unabridged form.	No

¹ In the Solvency II Directive, a captive insurer/reinsurer is defined (in brief) as an insurance/reinsurance undertaking, owned by a parent institution for the purpose of providing insurance/reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member.

² Paragraph 9 of the EBA/ESMA Guidelines reads as follows: *CRD institutions subject to Directive 2013/36/EU should comply with these Guidelines on an individual, sub-consolidated and consolidated basis, including their subsidiaries not subject to Directive 2013/36/EU, even if they are established in a third country, including offshore financial centres, in accordance with Article 109 of that Directive.*