



EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Template for comments

ECB Guide to fit and proper assessments and fit and proper Questionnaire

Institution/Company

Austrian Federal Economic Chamber, Division Bank and Insurance

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Please tick here if you do not wish your personal data to be published.

General comments

Ad Guiding Principles: We welcome that ECB in its Draft Guide aims to respect the principle of proportionality (size, systemic importance and risk profile of the credit institutions).

We advocate for extending the general commitment to proportionality also to proportionate application of the Draft Guide to all aspects, e.g. the less complex, important a (re)assessment is, the more proportionate the ECB should apply its expectations.

According to the Draft Guide, "ECB and NCAs strive to interpret national rules consistently with the policy stances". We believe the interpretation of national law cannot depend on supervisory acts, the opposite applies: ECB and NCAs have to comply with national law. National law, if necessary, has to be amended by EU Directives, never supervisory practises.

General recommendation regarding suitability aspects within the SSM: we encourage the ECB to publish on a regular basis benchmarking reports, in order to give institutions an orientation on their suitability practices (like the ECB Report on declared time commitment of non-executive directors in the SSM).

Template for comments

ECB Guide to fit and proper assessments

Please enter all your feedback in this list.

When entering feedback, please make sure that:

- each comment deals with a single issue only;
- you indicate the relevant chapter/subsection/paragraph/page, where appropriate;
- you indicate under "Type of comment" whether your comment is a proposed amendment, clarification or deletion.

Deadline: Midnight of 2 August 2021

ID	Chapter	Section	Paragraph	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1		7.1 Notification of intended appointments		68 -69	Amendment	In case of an ex-ante submission of the fit and proper questionnaire after the appointment proposal by the Nomination Committee the ECB should be granted with a timeframe of maximum five working days to express serious concerns about the appointee (if any). In case that there are no such concerns from the ECB the internal appointment process should continue with the appointment by the Supervisory Board. In such case when there are no serious concerns about the appointee the formal ECB Fit and Proper Decision can be issued after the appointment by the Supervisory Board within the deadlines provided for in national law or by the joint ESMA and EBA GLs on suitability (four months from the date when the notification was provided).	The internal steps in case of appointments are extremely tight and in case that an ex-ante notification is required it must be ensured that there is no delay in this process by the intervention of the ECB. A timeframe exceeding the suggested five working days between the proposal by the Nomination Committee and the appointment by the Supervisory Board would adversely affect the functioning and the governance arrangements of the institution (for example, the nomination of a new CEO in case of supervised entities at the highest level of consolidation).	Rudorfer, Franz	Publish
2		7.1 Notification of intended appointments		68 - 69	Clarification	It should be clarified that irrespective of the ex-ante notification proposed by the ECB under Sect. 7.1. an early engagement with the JST (before the appointment process) at the initiative of the institutions should be possible for all institutions (not only largest institutions) and all members of the management bodies (not only executives).	An alignment with the JST before the official appointment process would help clarifying certain open suitability issues and would avoid possible reputational risks for appointees and institutions.	Rudorfer, Franz	Publish

3	3.6 Assessment of individual accountability of board members			41 - 47	Deletion	<p>The entire approach of individual accountability laid down by Sect. 3.6 of the Guide covers aspects that are already provided by banking, corporate and civil law (due diligence obligations, liability regime) and are not related to the suitability requirements. Sect. 3.6 would create confusion and lead to significant conflicts with existing legal requirements. Furthermore, the treatment of findings within the suitability framework is totally inappropriate since findings are not subject to any remedy like sanctions and court decisions. We therefore recommend ECB the deletion of the entire Sect. 3.6. In case that Sect. 3.6 is not entirely deleted please consider the proposals to Sect. 3.6 of the Guide as mentioned below.</p>	Explanation provided as detailed comment under Column G.	Rudorfer, Franz	Publish
4	3.6 Assessment of individual accountability of board members			42	Amendment	<p>it is inappropriate to deem members of management bodies as responsible for findings where there is no connection between their individual roles and responsibilities in the management body and the given findings. This responsibility approach stated in the Guide clearly contradicts the principle of "business judgement rule". This principle states basically that board members should be excluded from the legal liability in case of decisions in which they act in good faith and with sufficient information, based a standard decision-making process. This principle is a basic law principle widely assumed in the legal corporate framework of Member States. We therefore strongly recommend ECB to restrict the individual accountability to findings that are directly related to the responsibility areas of the respective board members. The use of findings in the suitability assessment must be strictly connected to the personal liability and the non-compliant behaviour of the respective board member.</p>	Explanation provided as detailed comment under Column G.	Rudorfer, Franz	Publish

	3.6 Assessment of individual accountability of board members	3.6.2 Findings		44 and 43	Clarification	<p>In case of findings resulting from on-site inspections and SREP letters it should be clarified that only findings of the category F4 (very high impact) in accordance with the <i>ECB Guide to on-site inspections and internal model investigations</i> are deemed to be severe and should be taken into account for the assessment of individual accountability. Furthermore, it should be clearly stated that findings from on-site inspections and SREP letters that have been properly addressed by the institutions and corrected on schedule as provided by the respective action plan should not be taken into account for suitability assessment purposes. Only severe findings that have not been implemented in the relevant timeframe resulting in supervisory measures should be subject to the individual accountability approach of the <i>ECB Guide to fit and proper assessments</i>.</p> <p>ad page 43: Letter a) of the draft refers to "supervisory measures" and lists "warning" or "instruction" as examples. The Guide should be amended to make clear that only serious supervisory measures (related to serious breaches of the law) can be seen as "supervisory measures".</p> <p>In any case, mere expectations or recommendations of the supervisory authorities without a binding character should not be seen as "supervisory measures". For example, with regard to the mandatory re-evaluation in the case of violations of anti-money laundering provisions, it should be clarified that a re-evaluation is only mandatory when administrative criminal proceedings are initiated due to violations of money laundering provisions, but not already when there is only a suspicion of a violation of the provisions.</p> <p>Hence, there is a strong need for clarification regarding the existence of a relevant "finding".</p>	<p>Since the <i>ECB Guide to on-site inspections and internal model investigations</i> clearly provides for a categorisation of findings (from F1 low impact to F4 very high impact), this should be also used for defining the severity of findings in the <i>ECB Guide to fit and proper assessments</i>.</p>	Rudorfer, Franz	Publish
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5	3.1 Experience	3.1.3.2 Practical experience	12	Amendment	<p>The following comments relate also to 3.5: Collective suitability of the management body, P. 38, 39: Knowledge and experience in the area of sustainability, climate protection, ESG factors and ESG risks when assessing individual and collective suitability:</p> <p>Knowledge and/or experience in the area of climate-related and environmental risks are now explicitly required by the Guide. Regarding this new requirement it would be important to grant a transitional period in order to allow sufficient time for members of the management body (on an individual and on a collective level) to acquire this knowledge/experience.</p> <p>With regard to the assessment of individual experience, the two-step assessment procedure applied by the ECB is explained in detail (thresholds for CEO, Chair - professional experience, if the thresholds are not reached, then further factors must be evaluated which nevertheless can prove suitability).</p> <p>The requirements on knowledge for collective suitability are described in detail. These requirements essentially correspond to those for the assessment of individual suitability.</p> <p>Climate and environment-related risks: collective knowledge, skills and experience regarding climate and environment-related risks of the members of the management body are required for a sound and effective management of the risks. This is a new requirement, for the fulfilment of which (as stated above) a sufficient transitional period should be granted.</p> <p>The knowledge and experience are also asked for in the ECB Fit & Proper questionnaire. ad foot note 23: According to footnote 23, the ECB expects institutions to "assign responsibility for the management of climate-related and environmental risks within the organisational structure in accordance with the three lines of defence model." Although we understand the importance of environmental risks and their management, we believe</p>	Rudorfer, Franz	Publish
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6	3.2 Reputation	3.2.2 Assessment approach	20	Amendment	<p>Consideration of numerous factors in the assessment of reputation</p> <p>The scope of the information which have to be provided was expanded, since not only findings relating to criminal/civil and administrative proceedings are relevant in the assessment of reputation (personal reliability), but also other findings that affect reputation must be considered. For example:</p> <ul style="list-style-type: none"> - Negative records in credit default databases - Performance of entities owned or directed by the appointee or in which the appointee had or has a significant share or influence - Large investments or loans that have an impact on the candidate's financial stability - Any evidence that the candidate has not been transparent, open and cooperative with competent authorities - Any dismissal, suspension or being asked to resign from employment or any position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position following gross misconduct - Any other fact in the public domain of freely available information - Supervisory measures (AML/ CTF examinations) = findings <p>The requirement to consider any other fact in the public domain in the assessment of reputation is seen very critically.</p> <p>On the one hand, this raises the question of feasibility (especially when it comes to obtaining the relevant information), and on the other hand, it creates the possibility of conflicts with national law (e.g. labour law, data protection law). A high degree of reputation and high personal standard should undoubtedly apply to members of the management body of credit institution. This must not lead to assumptions made by the ECB based on administrative or non-final decisions. Furthermore, we wanted to point out that</p>		Rudorfer, Franz	Publish
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7	3.3 Conflicts of interest and independence of mind	3.3.1 Information	23-24	Amendment	<p>The following comments relate also to 3.3.2. Personal conflict of interest: The scope of the information which has to be submitted for the assessment of a conflict of interest as well as the group of persons (relevant for the assessment) is extended.</p> <p>Personal relationships are defined in a very broad sense (any personal relationship, especially "clients", "suppliers" or "competitors"). The guide has to be specified to the effect that such personal relationships are only seen as a conflict of interest if these personal relationships can influence the decisions of the appointee. Only material conflicts of interest should therefore be examined in detail in the context of a fit and proper assessment.</p> <p>In the previous Guide there was a definition of a "close personal relationship": "A close personal relationship includes spouse, registered partner, cohabitee, child, parent or other relation with whom the person shares living accommodation." We suggest including such a definition in the new Guide as well. The ECB lists actual, potential or perceived conflicts of interest. We believe that "perceived conflicts of interests" are not relevant for the F&P assessment and should therefore be deleted in the Draft Guide. Actual and potential conflicts of interest relate to intrinsic features of appointees while "perceived" conflicts of interest may not even be known to the appointee concerned and should therefore not be included in the assessment. Inter alia, according to the Draft Guide any financial obligations that are cumulatively above EUR 200,000 (excluding private mortgages) are to be taken into account in the assessment. We do not understand why the current expectation in this regard is amended and believe it should be kept. It does not appear justified to limit the exemption to private mortgages, as other secured, performing and non-preferential loans also do not bear a higher risk of financial conflict of interest. We would also welcome a clarification that membership in</p>		Rudorfer, Franz	Publish
8	3.4 Time commitment	3.4.2 Information	28	Amendment	<p>It must be ensured here that this information is publicly available in Austria from the company register (Firmenbuch).</p> <p>Both the Austrian company register (Firmenbuch) and the register of associations (Vereinsregister) are understood as "public information" in the sense of the Guide, as they are publicly accessible and are available.</p>		Rudorfer, Franz	Publish

9	3.5 Collective suitability of the management body	3.5.1 Information		40	Amendment	<p>With a supervisory board consisting of several members, this requirement is excessive. In general, the possibility to upload documents in the IMAS portal should be established. Filling in the fields manually is impractical and also creates an unnecessary source of errors.</p> <p>One of our concerns here is that submissions to the IMAS portal can be done not only by filling in the data mask but also by uploading the ECB questionnaire as it was possible in the past. That would be a significant bureaucratic relief.</p> <p>Also in the interest of legal certainty for all parties involved (how can the appointee - who does not have access to the IMAS portal - confirm the accuracy if she/he does not know the entries?), the option of uploading the ECB questionnaire should be reintroduced.</p> <p>Otherwise massive additional effort and increased susceptibility to errors and a lack of legal uncertainty would inadvertently be created.</p>		Rudorfer, Franz	Publish
10	1. Scope of the ECB's fit and proper assessments			5	Amendment	The ECB states in the scope " <i>the guidance provided below can also be used to interpret the criteria app</i>		Rudorfer, Franz	Publish
11	3.3 Conflicts of interest and independence of mind	3.3.1 Information		23	Amendment	One of the assessment criteria of conflict of interest is " <i>whether or not the appointee is being proposed d</i>		Rudorfer, Franz	Publish
12	3.4 Time commitment	3.4.3.1 Quantitative assessment: multiple directorships		32	Amendment	<p>It should be clarified that the list of "organisations which are presumed not to be pursuing predominantly commercial objectives" is non-exhaustive. This could be achieved by adding a sentence that the organisations listed serve as examples, but other organisation might qualify as not pursuing predominantly commercial objectives.</p> <p>Regarding point vi), "organisations which are presumed to pursue predominantly non-commercial activities based on national regulatory provision" we advocate for refining the wording. Although we welcome the reference to national specifics, we want to raise awareness that the predominantly non-commercial activity of an organisation may highly depend on national specifics, i.e. the practise might lead to the qualification of an organisation as predominantly commercial or non-commercial rather than a national provision. Therefore, the wording should be extended accordingly by e.g. the statutes and national specifics.</p>		Rudorfer, Franz	Publish

13	3.4 Time commitment	3.4.3.2 Qualitative assessment: Two step assessment process		33	Amendment	<p>The Draft Guide included a list of reasons which raise doubts whether the time commitment is sufficient, including:</p> <ul style="list-style-type: none"> •ā peer comparison, meaning that where one appointee allocates significantly less time compared with others, this raises doubts. <p>We believe the ECB should delete any “peer comparison” as it does not generate any additional value and interferes in private life. Time commitment assessment is an individual assessment, therefore not justified. The time needed e.g. for preparation may depend highly on the member and on many factors, including e.g. knowledge, synergic effects, speed of reading, etc.</p> <ul style="list-style-type: none"> •the chair allocates less time than ordinary non-executive members. <p>We believe this assumption for the inappropriateness of time commitment should also be removed, as it cannot be generalised. Also, the workflow depends on individual allocation of duties within the institution. The Chair may have additional knowledge, work e.g. as a lawyer and therefore need significantly less time for preparation. We rather believe in an individual case-by-case assessment.</p> <ul style="list-style-type: none"> •inconsistency of the workload with that indicated in the same or previous applications for the same appointee. <p>Rather than a source of doubt, this might be the result of training or development and therefore higher efficiency.</p>		Rudorfer, Franz	Publish
14	3.4 Time commitment	3.4.3.2 Qualitative assessment: Two step assessment process		36	Amendment	chairmanship: as described above, should be assessed case-by-case. We advocate for deleting this		Rudorfer, Franz	Publish
15	3.4 Time commitment	3.4.3.2 Qualitative assessment: Two step assessment process		38	Amendment	Collective suitability of the management body: According to the Draft Guide, effective collective suitability		Rudorfer, Franz	Publish
16	4 Fit and proper-related authorisations	6.4 Procedural aspects		66	Amendment	Regarding the language used in interviews with appointees, the Draft Guide links the language the instit		Rudorfer, Franz	Publish
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Template for comments

Fit and proper Questionnaire

Please enter all your feedback in this list.

When entering feedback, please make sure that:

- each comment deals with a single issue only;
- you indicate the relevant section/question/page, where appropriate;
- you indicate under "Type of comment" whether your comment is a proposed amendment, clarification or deletion.

Deadline: Midnight of 2 August 2021

ID	Section	Question	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1	4. Reputation	IMPORTANT: throughout section 4 "you" means "the appointee personally" and also includes all corporate entities, partnerships or unincorporated entities with which the appointee is or has been associated as a board member, key function holder, senior manager, owner, partner, associate, or qualifying shareholder. Information should be provided only for alleged wrongdoing which happened in the period in which the appointee was associated with the entity.	15	Deletion	The information required in this granularity level is much too complex and will be impossible to fill in. Providing all these information is only possible with support of lawyers or legal experts which makes the entire nomination process ineffective. Considering that ECB encourages institutions to submit the notification ex-ante which tightens the entire nomination process it will be impossible to gather all these information within a short period of time. Consequently, providing all these information within a predictable and reliable timeframe is possible only at the level of "to the best knowledge" of the appointee.	Providing these information at this granularity level does not improve at all the suitability process but makes it much more difficult and bureaucratic.	Rudorfer, Franz	Publish
	4. Reputation	D: Has any financial institution in which you hold or have held any managerial function, or whose management you influence or have influenced materially in any other way, or in which you hold or have held material interests, ever received State aid or ever been subject to a restructuring, recovery or resolution procedure?	17	Deletion	The reference to state aid is not really clear in this context. Granting of state aid is legally permitted if this follows the legal requirements and does not restrict the competition. The reference to state aid should be deleted or the ECB should further specify what is meant with state aid and what is the purpose of this question, in order to avoid putting state aid on the same level with restructuring, recovery or resolution proceedings.	Avoidance of misleading requirements/questions.		
2	4. Reputation	I. To be completed by the supervised entity: If the answer to any question above is "Yes", assess the appointee's reputation taking the relevant facts into consideration and expressly stating the reasons why such facts are not considered to affect his/her suitability.	18	Deletion	The way institutions deal with aspects regarding the appointee's reputation is subject to the internal suitability assessment which is discussed in the Nomination Committee. This is always documented by the Meeting minutes of the respective meeting and provided to the ECB. Therefore, it is not necessary to submit this information also in the Fit and Proper Questionnaire.	Avoidance of double submissions	Rudorfer, Franz	Publish

3	5. Conflicts of interest	IMPORTANT: throughout Section 5 "you" means "the appointee personally", but also their close relatives (spouse, registered partner, cohabitee, child, parent or other relation with whom they share living accommodation) and any legal person in which the appointee is or was a board member or a manager, or a qualifying shareholder, at the relevant time.		Amendment	In the current version of the Fit and Proper Questionnaire the information to be provided under this section does not refer to legal persons in which the appointee is or was a qualifying shareholder. This reference should be deleted, in order to keep the information to be provided on a adequate level (see also comment above to Section 4. Reputation). A qualifying shareholder can not influence the development of a company in the same way as a management board member does, in order to be able to assess his/her reputation based on this aspect.	Not a properly criteria for assessing the reputation of an appointee.	Rudorfer, Franz	Publish
4	5. Conflicts of interest	J. To be completed by the supervised entity: If the answer to any questions above is "Yes", assess whether the potential conflict of interest is material (if it is not considered material, justify this finding) and indicate how the potential conflict of interest is proposed to be mitigated or managed.	23	Deletion	The way institutions deal with aspects regarding conflicts of interests is subject to the internal suitability assessment which is discussed in the Nomination Committee. This is always documented by the Meeting minutes of the respective meeting and provided to the ECB. Therefore, it is not necessary to submit this information also in the Fit and Proper Questionnaire.	Avoidance of double submissions	Rudorfer, Franz	Publish
5	5. Conflicts of interest	Do you have any personal relationship with any of the following: - clients, suppliers or competitors of the supervised entity, the parent undertaking or their subsidiaries	19	Deletion	In case of large institutions with high number of clients, suppliers and also competitors it is almost impossible to provide this information. Also, in this case it would be possible providing this information only at the level of "to the best knowledge" of the appointee. Furthermore, in case this information is available, it would be critical to provide it from a data protection perspective	Requested information to a not feasible granularity level.	Rudorfer, Franz	Publish
6	5. Conflicts of interest	Do you have any business, professional or commercial relationship or have you had such a relationship in the past two years with any of the following: - clients, suppliers or competitors of the supervised entity, the parent undertaking or their subsidiaries	20	Deletion	The same as above.	The same as above.	Rudorfer, Franz	Publish
7	5. Conflicts of interest	Do you have any financial interest (such as ownership or investment)20 in any of the following? -clients, suppliers or competitors of the supervised entity, the parent undertaking or their subsidiaries	22	Deletion	The same as above.	The same as above.	Rudorfer, Franz	Publish
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