

## 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	1 Scope of the ECB's fit and proper assessments			5	Deletion	With regard to key function holders and managers, the explanations in the guide lead to a far-reaching, unjustified equality of members of the management body and key function holders. Key function holders (KFH) are precisely not members of the management board. Such de facto equality lacks any sufficient legal basis and would constitute an impermissible new requirement. It is also disproportionate and blurs the responsibilities to which the ECB otherwise attaches great importance. Some member states (e.g. Germany) do not require any assessment of KFH through the supervisory authority / NCA. We see no legal basis in CRD to apply the fit and proper regime to KFH. Therefore we ask for that the relevant references to KFH be deleted from the guide.	We recommend deleting the comments on key function holders and managers throughout the guide.		Publish
2	3.2 Reputation	3.2.1 Information	point 4	15/16	Amendment	In our view this approach is too far reaching as administrative / civil proceedings and investigations are a broad field and do not necessarily allow the conclusion that the person can be made responsible. In addition it would be a huge administrative and unproportional burden for the institution to provide these information to the authorities (in particular as these information should already be available to them due to their supervisory review and evaluation process). Furthermore, in cases where the candidate comes from a competitor, the candidate would not be allowed to disclose internal information such as administrative and civil law proceedings / investigations towards the potential new institution.	Administrative and civil proceedings as well as pending criminal proceedings that have not yet been concluded should not be taken into account. Only relevant proceedings (in the fields of banking, insurance activities, investment services, securities markets, payment instruments, money laundering, ...) should be taken into account.		Publish
3	3.2 Reputation	3.2.2 Assessment approach	3.2.2	17	Amendment	It is suggested to define a specific timeframe to assess the relevance of any proceedings and other facts.	It is suggested to define a specific timeframe to assess the relevance of any proceedings and other facts.		Publish
4	3.3 Conflicts of interest and independence of mind	3.3 Conflicts of interest and independence of mind	lit (a)	22	Deletion	To avoid a subjective view on the matter, how can independence of mind (courage, resisting group-think) be evaluated? Since we see no possibility to assess such behaviour, we suggest to delete this requirement.	To avoid a subjective view on the matter it is important to have a clarification to assess behavioural skills like "courage", "resist 'group-think'" etc. Since we see no possibility to assess such behaviour, we suggest to delete this requirement.		Publish
5	3.5 Collective suitability of the management body	3.5 Collective suitability of the management body	Diversity	39	Amendment	We would like to note that public-law institutions have <u>no or hardly influence</u> on the composition of the management body in its supervisory function. They cannot ensure a level of diversity on experience or gender aspects that is different from what is predetermined by electoral outcomes or appointments.	These particularities should be pointed out in the guide. The ECB should take into account national specificities.		Publish
6	3.6 Assessment of individual accountability of board members			41 - 47	Amendment	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 <u>revision</u> of the entire Sect. 3.6. Please consider the proposals to Sect. 3.6 of the Guide as mentioned below.	Explanation provided as detailed comment under Column G.		Publish

7	3.6 Assessment of individual accountability of board members			41	Deletion	<p>The accountability for the events that took place at the time the appointee held a position in the management body of the entity in which the breaches occurred, is already evaluated under Section 3.2 "Reputation". Under Section 3.2, information regarding "the personal involvement in non-personal corporate offences, wrongdoing, proceedings, investigations or sanctions involving entities in which the appointee holds or has held mandates" is already requested (p.16). Accordingly, analyzing the individual accountability for this type of events or breaches under a different Section 3.6 "Individual Accountability" entails a duplication and re-evaluation of the same facts that we do not consider justified and that may lead to contradictory results.</p> <p>As indicated in Section 3.6 "Individual Accountability", in order to determine such accountability, the facts shall evidence the appointee's failure to perform his/her duties in 'a proper manner' ("an appointee may be held individually accountable for not complying with their collective responsibility to properly address the issues which resulted in the findings"; p.42). We agree that such lack of proper management can be appreciated even if the facts have no connection with their individual roles and responsibilities. Nevertheless, assessment of a lack of proper management, and/or a breach of his collective responsibility as a board member is a proper and essential element of the Reputation assessment as it is connected to the duty of due diligence, integrity and honesty in management and it shouldn't be evaluated in a different Chapter.</p> <p>In line with the above, is our understanding that lack of experience alone (in the terms of Section 3.1 Experience) cannot cause individual accountability. In particular, a person with a proven and consolidated trajectory and experience can be held individually accountable if he or she does not comply with their collective responsibility and fails to address the issues which resulted in the findings, as what determines his/her individual accountability is the breach of due diligence duties arising from his/her collective responsibility as a board member, not a lack of knowledge or inexperience. Consequently, it cannot be upheld that lack of experience is determined as a result of appreciating individual liability.</p> <p>Nor do we consider that the appreciation of individual accountability affects the independence of mind of the appointee. It is stated in page 45 that if appreciated, individual accountability is capable to affect the appointees' independence of mind, as "...the findings may indicate a pattern of behavior of failing to ...take sound, objective decisions". However, in Section 3.3 'conflict of interest and independence of mind', the appreciation of independence of mind is done in relation to an absence of conflict of interest (the Guide indicates, independence of mind can be affected by conflicts of interest.) We, therefore, do not consider that the existence of individual responsibility alone is an indicator of the existence of a conflict of interest, and shouldn't compromise the appointees' independence of mind.</p> <p>Moreover, if "Individual Accountability" is included as an additional Section and criteria of evaluation, it is likely to go against the mandate of the CRD insofar as according to Art. 91</p>	<p>The element of individual accountability is already examined when assessing the sufficient reputation of board members under Section 3.2. In addition, it is considered that the appreciation of individual roles and responsibilities, does not compromise his/her expertise or independence of mind. Consequently, it is suggested to delete the section 'individual accountability'.</p>		Publish
8	3.6 Assessment of individual accountability of board members			42	Amendment	<p>it is unappropriate 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>	<p>Explanation provided as detailed comment under Column G.</p>		Publish
9	3.6 Assessment of individual accountability of board members	3.6.2 Findings		44	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>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>		Publish

10	5. Situations that trigger a fit and proper assessment other than new initial appointments	5.3.3 Part 2: General guidance on whether or not a new fact may trigger a reassessment	Skills, knowledge and experience (including the ability to independently challenge)	60	Amendment	<p>The ECB wants to reassess the individual suitability of management bodies also in the case of individual poor performance. A reassessment is to be triggered by a "significant" or "persistent" poor performance, which can also be seen in a relevant omission (e.g. the prevention of violations). This clearly goes too far, contradicts the legal requirements and the character of the Guidelines as a "self-binding document". The criteria for poor performance are too vague. We see the danger here that every negative development could be taken as an opportunity to question the individual suitability in each case and in this respect build up a "threatening backdrop". A determined poor performance must, however, also be individually attributable. The principle of responsibility is only taken up in the current wording with regard to the lack of compliance with "warnings" or "expectations" of the competent authority. However, the principle of responsibility would have to apply overall to any bad performance and in particular to the case of relevant omissions. It is also disproportionate to automatically attach a judgement of poor performance to non-compliance with "warnings" or "expectations". In any case, it contradicts the prohibition of excessiveness. It is also unclear how the corresponding statements in section 5.3.3. relate to the statements in section 7.4, according to which non-compliance with an "obligation" should not automatically affect suitability.</p>	We suggest deleting individual poor performance as a trigger for individual reassessment.		Publish
11	5. Situations that trigger a fit and proper assessment other than new initial appointments	5.3.3 Part 2: General guidance on whether or not a new fact may trigger a reassessment	Skills, knowledge and experience (including the ability to independently challenge)	60	Clarification	<p>In relation to the reassessment of the appointee's experience in the terms of Section 3.1 'Experience' and given that the evaluation method for this criteria follows the compliance with certain objective and quantified thresholds in years of experience and academic requirements, we consider it is inappropriate to take poor performance into account, as it is an element that is not considered under Section 3.1 and its latter appreciation cannot override the proven experience in number of years and training. The only new event we consider that may affect the experience of board members is the case in which the entity extends its size or business into areas for which the board member is no longer qualified or has no experience, and providing training would be insufficient to cover his/her lack of experience in the field. We consider that the appreciation of poor performance is subjective and in any case insufficient to determine the board member's unsuitability, as poor performance can be caused by factors that do not compromise either the board member's experience, reputation, independence of mind, collective suitability or time commitment. Overall, we consider that the competence of the entity to identify the underperformance and take appropriate action.</p> <p>We also would like to note that in the Guide page 60, Subsection "Skills, knowledge and experience (including the ability to independently challenge)", the element of independence of mind is assessed in conjunction with the Experience criterion set in Section 3.1. As set in Section 3.3, independence of mind is part of the assessment of Conflict of Interest and assessing such element in conjunction with the Experience criterion set in Section 3.1, and without mentioning the element of conflict of interest, may lead to a confusion of concepts.</p>	It is suggested to remove from the assessment of 'Experience' the latter appreciation of poor performance.		
12	7. Notifications	7.1 Notification of intended appointments	7.1	68	Amendment	<p>The draft guide provides an "invitation" for ex-ante notice only for members of the management body in its executive function. This restriction to executive board members is particularly important. A supervisory encouragement of ex-ante notifications for members of the management body in its supervisory function would be unfeasible to comply with for such public-law institutions, which - due to existing legal requirements - have practically no or only hardly influence on the recruitment process of members of the management body in its supervisory function. On the one hand, this is the case for ex-officio members, which are members by law e.g. because of their main occupation within the local public authority (e.g. mayor of the town / district) or state level. Further members are elected by the municipal trustees or appointed by public bodies or shareholders. Since these institutions cannot possibly know in advance which candidates will become new members on the supervisory board, they are not in a position to submit notifications before the election / appointment. In some member states (e.g. Germany) notifications of new members of the management body in its supervisory function must be carried out only after the appointment, which is necessary to take into account the structure of public-law institutions.</p>	National options should remain. In any case, limitation to executive members is important. We suggest to maintain the freedom of choice of the National Competent Authorities on this point.		Publish



# Template for comments

## Fit and proper Questionnaire

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**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	Declaration by the supervised entity		Page 3, Bullet 5	Amendment	Please amend as follows: "Declaration by the supervised entity ...confirms that the supervised entity believes, on the basis of <del>due and diligent enquiry</del> provided by the candidate and by reference to the fit and proper criteria as laid down in [national and European law, international standards, including regulations, codes of practice, guidance notes, guidelines and any other rules or directives issued by the [NCA] or by the ECB and the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA), that the appointee is a fit and proper person to perform the function as described in this questionnaire"	Supervised entity must be allowed to rely on the information provided by the candidate - a due and diligent enquiry is not required by the supervised entity itself.		Publish
2	4. Reputation	A-I (in particular A, B, E)	15-18	Amendment	<i>"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."</i> This should be <u>limited to the appointee personally</u> as this information can only be provided in relation to the specific person.	We suggest limitation to the appointee personally.		Publish
3	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 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.		Publish
4	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.		



