

FMA Communication 2013/07 – Guarantee in respect of the proper conduct of business

Communication on the current licensing requirement of the guarantee in respect of the proper conduct of business

Reference:	FMA-M 2013/07
Addressees:	<p>Banks and investment firms within the meaning of the Liechtenstein Law of 21 October 1992 on Banks and Investment Firms (<i>Gesetz vom 21. Oktober 1992 über die Banken und Wertpapierfirmen</i>; hereinafter referred to as the “BA”);</p> <p>Financial holding companies and mixed financial holding companies within the meaning of Article 1(3)(b) BA in conjunction with Article 4(1)(20) and (21) of Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No. 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No. 648/2012 (CRR II);</p> <p>E-money institutions within the meaning of the Liechtenstein E-Money Act of 17 March 2011 (<i>E-Geldgesetz vom 17. März 2011</i>; hereinafter referred to as the “EMA”);</p> <p>Payment institutions and account information service providers within the meaning of the Liechtenstein Payment Services Act of 6 June 2019 (<i>Zahlungsdienstegesetz vom 17. September 2009</i>; hereinafter referred to as the “PSA”);</p> <p>Persons who have directly or indirectly acquired a qualifying holding and ultimate beneficial owners in accordance with the BA, EMA and PSA;</p> <p>Auditing companies within the meaning of the BA, EMA and PSA;</p> <p>management bodies of a mixed financial holding company within the meaning of the Act of 20 September 2007 on the Supplementary Supervision of Entities in a Financial Conglomerate (<i>Gesetz vom 20. September 2007 über die zusätzliche Beaufsichtigung von Unternehmen eines Finanzkonglomerats</i>; hereinafter referred to as the “FCA”)</p>
Concerning:	Assessment of individual professional and individual suitability (“guarantee”) of managers (members of the Board of Directors and Executive Board), heads of the internal audit department, key function holders at significant institutions and head auditors
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1. Scope of application

On 2 July 2021, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) published their joint guidelines for assessing the suitability of members of the management bodies and key function holders (EBA/GL/2021/06). The EBA/GL/2021/06 apply to competent authorities throughout the European Union as well as institutions on an individual and consolidated basis as of 31 December 2021. Following the implementation of the CRD V in Liechtenstein from 1 May 2022, the EBA/GL/2021/06 have also been applicable in Liechtenstein. The previously applicable EBA/GL/2017/12 were revoked as of 31 December 2021.

The EBA/GL/2021/06 establish the criteria with reference to which banks, investment firms, financial holding companies and mixed financial holding companies as well as the Financial Market Authority Liechtenstein (FMA) must assess the suitability of members of the Board of Directors and the Executive Board, the head of the internal audit department, key function holders at significant banks and investment firms, as well as of the persons who manage a financial holding company or a mixed financial holding company. The principles of proportionality laid down in the EBA/GL/2021/06 are applicable.

The FMA declares that the EBA/GL/2021/06 is applicable by analogy to the assessment of the suitability of members of the Board of Directors and Executive Board as well as the head of the internal audit department at payment institutions, account information service providers and e-money institutions as well as to the special-law recognition as head auditors of auditing companies in accordance with the BA, EMA and PSA.

The present Communication and the EBA/GL/2021/06 also apply to the procedure to obtain a licence under the BA, EMA and PSA, and the procedure for the regulatory assessment of the acquisition, increase or disposal of qualifying holdings (FMA Guidelines 2017/20) as regards the guarantee in respect of the proper conduct of business:

- by (directly or indirectly) interested acquirers;
- by members of the Executive Board and the Board of Directors or other managers or persons who have directly or indirectly acquired a qualifying holding;
- by ultimate beneficial owners of Liechtenstein institutions within the meaning of FMA Communication 2017/20 (and JC/GL/2016/01).

2. Addressees

The present Communication is aimed at banks and investment firms as well as financial holding companies and mixed financial holding companies according to the BA, e-money institutions according to the EMA, payment service providers and account information service providers according to the PSA and special-law auditing firms according to the BA, EMA and PSA. When reference is made to institutions in the present Communication, this encompasses all addressees of this Communication where this is provided for in the specific laws that are to be applied in each individual case.

In addition, this Communication is aimed at persons who have directly or indirectly acquired a qualifying holding and/or their governing bodies as well as ultimate beneficial owners of Liechtenstein institutions within the meaning of FMA Communication 2017/20 (and JC/GL/2016/01).

3. Guarantee in respect of the proper conduct of business

According to Article 19(1) BA, banks and investment firms must ensure that the members of the Board of Directors and the Executive Board as well as the head of the internal audit department at a bank or

investment firm at all times guarantee the proper conduct of business in both professional and individual terms. This also applies to all other key function holders at significant banks and investment firms.

According to Article 29(1) BO, the persons intended for the Board of Directors, the Executive Board and the head of the internal audit department must be appropriately qualified for the intended position on the basis of their education and career history. When assessing the requirements, the FMA takes into account, for example, the factual and geographical scope of business and the organisation of the bank or investment firm, in accordance with Article 29(2) BO. According to Article 29(3) BO the intended persons must also be in a position to duly perform their tasks in the bank or investment firm when one takes into account their other duties and their place of residence¹. This includes a requirement that a majority of the members of the Executive Board and at least one member of the Board of Directors has a strong command of the German language. According to Article 29(4) BO, when assessing the proposed persons the FMA may refer to their curriculum vitae (CV), educational and work certificates and references. Article 30 BO stipulates that the proposed persons must have a good reputation as business professionals.

According to Article 41i(1) BA, persons who manage a financial holding company or mixed financial holding company pursuant to Article 4(1)(20) or (21) CRR II must have a sufficiently good reputation and sufficient knowledge, skills and experience in order to perform their tasks.

According to Article 7 EMA, a licence will, for example, be granted to e-money institutions that ensure sound and prudent management (Article 7(1)(c) EMA in conjunction with Article 3(1)(i) EMO). As this is a licensing requirement, this condition must be fulfilled at all times.

Article 9 PSA also provides that a licence will be granted to payment institutions that ensure, inter alia, sound and prudent management (Article 9(1)(d) PSA). As this is a licensing requirement, this condition must be fulfilled at all times.

Besides the aforesaid requirements, also shareholders or governing bodies who hold a direct or indirect qualifying holding at a Liechtenstein institution have to meet the standards needed to ensure sound and prudent management of the institution (Article 17(5) BA; Article 7(1)(d) EMA; Article 9(1)(f) PSA; FMA Guidelines 2017/20).

Additionally, head auditors of special-law auditing firms in accordance with the BA, EMA and PSA must also provide a guarantee in respect of the proper conduct of business (Article 37(2)(a) BA in conjunction with Article 40(2)(c) BO; Article 38 EMA in conjunction with Article 7 EMO; Article 40 PSA in conjunction with Article 3 PSO).

The assessment of the experience of members of the Board of Directors and the Executive Board, the head of the internal audit department, key function holders at significant banks and investment firms and persons who manage a (mixed) financial holding company must take account of the nature, scope and complexity of the business activity of the institution and the responsibilities held by the person concerned. Persons must have the necessary knowledge, skills and experience in order to perform their respective functions and duties.

When appointing members of a collective body, attention is to be paid to the composition and balance. The members of the Board of Directors and the Executive Board must have the necessary knowledge, skills and experience in order to be jointly in a position to understand the work of the institution including its risks (Article 22(5) BA; Article 7(1)(c) EMA in conjunction with Article 3(1)(i) EMO; Article 9(1)(d) PSA and Article 8(1)(o) PSA). According to Article 22(8) BA, when selecting the members of the Executive Board and the Board of Directors, the topic of diversity must be borne in mind.

Whatever the nature, scope and complexity of the business activity of the institution, the members of the Executive Board and the Board of Directors, the head of the internal audit department and key function

¹ In this context, the place of residence is the place where the person is ordinarily resident.

holders at significant banks and investment firms and persons who manage a (mixed) financial holding company must under all circumstances be reliable.

The institution must confirm to the FMA that the information transmitted is accurate to the best of its knowledge.

4. Requirements applicable to members of the Executive Board and the Board of Directors

In order for the Executive Board to fulfil its overall responsibility and/or the Board of Directors to exercise overall control in a proper manner, each member of the Executive Board and the Board of Directors of an institution must have sufficient knowledge. All members of the Executive Board and the Supervisory Board must have the necessary knowledge and skills, both individually and collectively. Responsibility for assessing the suitability of members of the Executive Board and the Board of Directors lies primarily with the institution. The key issue is that institutions have internal guidelines for selecting and assessing members of the Executive Board and the Board of Directors (fit and proper policy). In addition, the ongoing monitoring and ensuring of suitability must occur primarily within the institution itself.

Professional suitability is assessed in the first instance by the FMA based on the information submitted. The intended persons must have a sufficient level of knowledge, skills and experience that is commensurate with the type, size, business and risk profile of the institution. In addition, the FMA may invite the intended persons for whom a guarantee must be provided to interviews in order to assess their professional and individual suitability.

Alongside professional suitability, members of the Executive Board and the Board of Directors must be suitable on an individual level. This is the case if the intended person has the necessary reliability, honesty, impartiality and integrity. Under certain circumstances, members of the Board of Directors must also be independent.

The individual suitability of members of the Executive Board and the Board of Directors is assessed by the FMA primarily on the basis of the information submitted.

The members of the Executive Board and the Board of Directors must also be capable of dedicating sufficient time to the performance of their functions within the institution. If a member takes up an additional mandate, the time requirement must be reassessed and the FMA must be informed accordingly. The constraints on mandates established by law for significant banks and investment firms must be complied with.

The FMA assesses whether availability in terms of time is sufficient with reference to a self-assessment submitted as well as a declaration by the person concerned that he or she has sufficient time to perform his or her function as a member of the Executive Board or the Board of Directors in a proper manner.

Members of the Executive Board and the Board of Directors must inform the institution concerning any changes to the information transmitted that could have an impact on the fulfilment of individual requirements. The institution must report the changes to the FMA immediately.

4.1 Individual suitability requirements for members of the Executive Board and the Board of Directors

All members of the Executive Board and the Board of Directors of an institution must at all times be individually reliable, honest and impartial. There must be no circumstances that cast doubt on their reliability, honesty or impartiality.

Members are deemed to be reliable if they are of impeccable repute and good standing, professional standards are met and their financial affairs are in good order.

No member of the Executive Board or the Board of Directors may be subject to any grounds for exclusion under commercial law according to Article 9(1) of the Business Act of 22 June 2006 (*Gewerbegesetz vom 22. Juni 2006*; hereinafter referred to as the “BusA”).

Doubts are deemed to subsist in particular in the event of convictions for relevant financial offences, fraud or tax offences, as well as rulings concerning insolvency or pending insolvency. As a general rule, all circumstances that could raise concerns regarding reliability in relation to the planned activities are recorded.

In addition, no insolvency procedures may have been launched in relation to the assets of a member of the Executive Board or the Board of Directors, and no insolvency procedure may have been discontinued on the grounds that the assets are not sufficient to cover the costs of the procedure. The same applies for legal entities over the business of which the member has and/or had a significant influence.

Not only criminal convictions but also civil judgments, sanctions imposed under administrative or supervisory law as well as ongoing investigations in relation to judicial or administrative proceedings or investigations by the supervisory authorities must be taken into account when assessing individual suitability. In addition, pending criminal, administrative or supervisory proceedings may establish justified doubt as to individual reliability, honesty and impartiality.

Previous and current business success and financial solidity must also be taken into account. This also includes the financial and commercial success of businesses that are or were under the management, significant influence or ownership of the member, or in which he or she had a major holding.

The following factors in particular are taken into account when assessing individual suitability:

- evidence that the person has not been transparent, open and cooperative in dealings with the competent authorities;
- refusal, revocation, withdrawal or termination of a registration, authorisation, membership or licence to carry out a trade, business or profession;
- grounds for dismissal from employment or a position of trust, fiduciary relationship or similar situation, or having been asked to resign from employment in such a position;
- exclusion by the relevant competent authorities from the position as a member of the Executive Board or the Board of Directors, including persons who manage a business;
- other evidence indicating that the person has acted in a manner that is not consistent with high standards of behaviour.

Each member of the Executive Board and the Board of Directors must be capable of acting impartially. When performing their functions and fulfilling their responsibilities, individual members must actively attend to their tasks and must be capable of making their own reasonable, objective and independent decisions and judgments and of critically examining proposals, asking questions and not falling prey to groupthink.

The member’s previous and current conduct is taken into account as part of the assessment. Conflicts of interest (in particular in terms of individual, professional or financial relations) may also constitute circumstances that cast doubt on impartiality.

All actual or potential conflicts of interest must be reported, discussed, documented, properly dealt with² and decided upon within the governing body. Conflicts of interest must also be reported to the FMA along with the action taken.

In particular, the circumstances referred to in para. 83 of the EBA/GL/2021/06 must be regarded as potential conflicts of interest.

² According to chapter 12 of the EBA/GL/2021/05, institutions must implement guidelines for dealing with conflicts of interest involving employees.

In order to ensure strong governance, a sufficient number of the members of the Board of Directors of an institution must fulfil the prerequisite of independence. Being independent means that a member of the Board of Directors does not currently have or has not previously had any material or relevant relationships or links of any type with the institution or its Executive Board that could affect the member's objective and balanced judgment and impair the member's ability to take decisions independently. In this regard, a member of the Board of Directors is deemed not to be independent under the circumstances mentioned in para. 89 of the EBA/GL/2021/06.

The assessment as to whether the number of independent members of the Board of Directors is sufficient is made on the basis of the proportionality principle. Notwithstanding the above, the following applies:

significant institutions and listed institutions must have a sufficient number of independent members of the Board of Directors.

All other institutions must have at least one independent member of the Board of Directors, although the FMA may approve exceptions under the following circumstances:

- institutions that are fully owned subsidiaries of an institution (in particular if both the parent company and the subsidiary company are based in Liechtenstein);
- non-significant institutions that are investment firms.

In particular, in the view of the FMA, a member of the Board of Directors must not be regarded as independent in the event that any of the circumstances mentioned in para. 89 of the EBA/GL/2021/06 obtains. If a member falls under any of the circumstances mentioned in para. 89 of the EBA/GL/2021/06, the institution may demonstrate to the FMA that the member may still nonetheless be regarded as independent.

4.2 Professional suitability requirements for members of the Executive Board and the Board of Directors

Members of the Executive Board and the Board of Directors must be professionally suitable in terms of their educational background and previous professional activity and must have a sufficient level of knowledge, skills and experience in order to be able to perform their tasks within the institution. They must have an understanding of the specific business of the institution concerned and the associated risks that is commensurate with their responsibilities. This also includes an appropriate understanding of areas for which the member is not directly responsible, whilst however being collectively responsible along with other members.

Members of the Executive Board and the Board of Directors must have a sufficient level of theoretical and practical experience. In this regard the following aspects in particular must be taken into account:

- banking and financial market law;
- combatting money laundering and terrorist financing;
- legal requirements and regulatory frameworks;
- strategic planning, understanding of the institution's business strategy/business plan and the implementation thereof;
- risk management (identifying, assessing, monitoring controlling and limiting the main risks for the institution);
- accounting and auditing;
- assessing the efficacy of the institution's regulations, ensuring effective corporate governance, supervision and controls;
- interpreting financial information concerning the institution, identifying important matters on the basis of this information as well as corresponding controls and measures.

In order to be able to fulfil the prerequisite of professional suitability, members of the Executive Board must under all circumstances have sufficient knowledge of the following areas of the law (insofar as applicable to the institution):

- Banking Act (BA) and Banking Ordinance (BO);
- Due Diligence Act (DDA) and Due Diligence Ordinance (DDO);
- Deposit Protection and Investor Compensation Act (DPICA) and Deposit Protection and Investor Compensation Ordinance (DPICO);
- PSA and PSO;
- EMA and EMO;
- Recovery and Resolution Act (RRA) and Recovery and Resolution Ordinance (RRO);
- Financial Conglomerates Act (FCA);
- Regulation (EU) No. 596/2014 (MAR) and the Act Implementing the EEA Market Abuse Regulation (EEA-AIR) and the relevant level II acts of the Commission;
- CRR and the relevant level II acts of the Commission;
- Regulation (EU) No. 600/2014 (MiFIR) and the relevant level II acts of the Commission;
- Disclosure Act (DA);
- Settlement Finality Act;
- Regulation (EU) No. 648/201 (EMIR) and the relevant level II acts of the Commission;
- other relevant provisions and rules of European supervisory law (e.g. EBA guidelines, CRD V, MiFID, etc.), where transposed into national law;
- relevant FMA Guidelines, FMA Communications and FMA Guidances concerning the areas mentioned above;
- knowledge of the Articles of Association and rules of procedure of the institution.

Members of the Executive Board must have practical experience in a management role. The following in particular must be taken into account when assessing management experience:

- the nature of the management position held and its hierarchical level;
- length of service;
- the nature, complexity and risk profile of the company and/or group in which the position was held, including its organisational structure;
- the scope of competences, decision-making powers and responsibilities;
- any specialist expertise acquired by virtue of this position;
- the number of subordinates.

Members of the Board of Directors must be capable of critically examining decisions of the Executive Board and monitoring them effectively.

The allocation of responsibilities within the institution must be taken into account when assessing the professional suitability of a member of the Executive Board, although individual members are not released from their joint responsibility on account of their overall responsibility. Each member of the Executive Board must therefore have basic knowledge of all areas of the institution as well as supervisory requirements.

A demonstrative list of additional skills that must be taken into account when assessing suitability is contained in Annex 2.

As professional suitability must subsist at the time of appointment and throughout the entire period of appointment, institutions must dedicate appropriate resources to ensuring that the knowledge and skills of the members of the Executive Board and the Board of Directors required in order to perform their tasks are maintained and refined through training and development.

5. Requirements for persons who manage a financial holding company or a mixed financial holding company

According to Article 41i(1) BA, financial holding companies and mixed financial holding companies must ensure that the persons who manage them have a good reputation and sufficient knowledge, skills and experience in order to perform their tasks. By virtue of the reference to Article 22(5) and (6) BA, persons who manage a financial holding company or a mixed financial holding company must have the necessary knowledge, skills and experience in order to be able to understand the operations of the group and its subsidiaries, along with the related risks. These persons must also have sufficient time in order to perform the tasks.

6. Requirements applicable to key function holders

Key function holders are persons who have a significant influence on the management of the institution, but are not members of the Board of Directors or of the Executive Board, and have been identified as such by the institution according to a risk-based approach (Article 3a(1)(36b) BA). The following functions are under all circumstances key functions according to the BA and the EBA/GL/2021/06:

- the head of the internal audit department, unless that person is a member of the Executive Board;
- the Chief Financial Officer, unless that person is a member of the Executive Board;
- managers of major national and foreign branches and group subsidiaries.

With the exception of such persons, who must in any case be classified as key function holders, significant institutions must identify key function holders themselves according to a risk-based approach and report such persons to the FMA.

Key function holders must also provide a guarantee in respect of the proper conduct of business at all times (in both individual and professional terms). The persons intended must therefore at all times have a sufficiently good reputation, must be honest and reliable and must have sufficient knowledge, skills and experience for the position. Key function holders must be identified in the first instance and their suitability must be assessed by the institutions themselves. In addition, institutions are responsible for ensuring ongoing suitability at all times. Here too, the key issue is that institutions have internal guidelines for assessing key function holders (fit and proper policy).

The FMA performs a suitability assessment of key function holders at significant banks and investment firms as well as the respective heads of the internal audit department according to the same criteria that are applied for assessing suitability requirements for members of the Executive Board and the Board of Directors at significant institutions. The guarantee in respect of the proper conduct of business by the head of the internal audit department is also examined by the FMA in relation to non-significant institutions (Article 19(1) BA).

7. Requirements applicable to the head of the internal audit department

Article 19(1) BA provides inter alia that the head of the internal audit department at a bank or investment firm must provide a guarantee in respect of the proper conduct of business at all times in both professional and individual terms.

The persons intended for appointment as the head of the internal audit department must be appropriately qualified for the intended position on the basis of their education and career history. When assessing the requirements the FMA takes account inter alia of the substantive and business scope of business and the organisation of the institution. In addition, the head of the internal audit department must be able to perform his or her tasks properly, taking account of his or her other obligations and place of residence.

In assessing the relevant individuals, the FMA may refer to their CV, educational certificates, evidence of employment and employer's references (Article 29 BO).

The head of the internal audit department must have a good reputation (Article 28(1)(e) in conjunction with Article 30(1) BO).

8. Requirement applicable to head auditors at auditing companies according to the BA, EMA and PSA

According to Article 37c(1)(b) BA in conjunction with Article 37(2a) BA, over and above the assessment criteria referred to in section 4, the requirements set forth in the FMA Communication on the licensing of special-law auditors and their reporting duties (SRM; FMA Communication 2015/06) for initial recognition as well as the maintenance of recognition as head auditor must be taken into account and the requisite proof must be furnished. This also applies to head auditors of e-money institutions and payment institutions (Article 38c(1)(b) EMA in conjunction with Article 38(2a) EMA and Article 40c(1)(b) PSA in conjunction with Article 40(2a) PSA).

9. Requirements applicable to governing bodies of companies that have directly or indirectly acquired a qualifying holding as well as beneficial owners

This Communication applies mutatis mutandis to governing bodies of companies that have directly or indirectly acquired a qualifying holding and beneficial owners of institutions. Reference is made to FMA Guidelines 2017/20.

10. Assessment of individual and professional suitability by the institution

Institutions must continually assess the suitability of a member of the Board of Directors or the Executive Board, especially if events occur that require a reassessment, in order to ensure the continued suitability of a person.

Institutions must, according to their individual guidelines, carry out an assessment of individuals and, where participation in a collective body is envisaged, an assessment of the collective body. Internal assessments of suitability must be carried out and documented upon application for a licence, at the time the individual is initially appointed and also regularly based on the criteria indicated in Title VII of the EBA/GL/2021/06 and in accordance with the principles of prudent business management (see Annex 3). In particular, an internal assessment of suitability must be carried out in the event of reappointment, any change in personal circumstances (e.g. if additional mandates or other activities are taken on) or in the event of any incident that renders a reassessment necessary.

The assessment must be carried out before the person is selected by the competent body and takes up his or her position. For the assessment the criteria in Annex 2 and, where applicable, those in Annex 1, are to be applied.

The documentation and the result of the internal assessment must be submitted to the FMA upon initial appointment using the form available on the FMA homepage, which is also contained in Annex 4. The FMA may at any time request documentation concerning the internal assessment of suitability, which must be carried out at regular intervals. This reassessment may be limited to the examination as to whether the person remains suitable in view of the relevant incident. The same applies for the head of the internal audit department and for other key function holders at significant banks and investment firms.

11. Form for assessment of guarantees in respect of the proper conduct of business

The FMA provides forms for the examination of the assessment of guarantees in respect of the proper conduct of business (Annex 4). The use of the forms is mandatory.

12. Assessment of individual and professional suitability by the FMA

At the time of any application for a licence to operate an institution or upon the appointment of any new members to the Board of Directors or the Executive Board, the head of the internal audit department or any other key function holder (for significant banks and investment firms), all information and documentation necessary for the assessment as required under Annex 3 must be submitted to the FMA as enclosures to the form (see section 11 and Annex 4). These persons must be examined by the FMA before they can take up the position envisaged. In the event of reappointment, any important changes must be reported and confirmation must be provided to the FMA by affidavit that no changes relevant for the guarantee have occurred since the last assessment.

The FMA assesses the suitability of the persons based on the form provided and/or the documents accompanying the form, which present the assessment of suitability applying the relevant parameters pursuant to the EBA/GL/2021/06.

The FMA assesses the individual suitability of members of the Executive Board and the Board of Directors as well as key function holders and persons managing a (mixed) financial holding company, both upon application for a licence and also in the event that new members are appointed, on the basis of all information submitted (see Annex 3) as well as any other sources of information. The institution, all members of the Executive Board and the Board of Directors, the head of the internal audit department, key function holders at significant banks and investment firms as well as the governing bodies of (mixed) financial holding companies and of companies that have directly or indirectly acquired a qualifying holding must act towards the FMA at all times in an honest, transparent and open manner.

The FMA may request additional information and documentation where appropriate. The institution and the person concerned must confirm in writing the correctness of the information and documents submitted, in the document recording the institution's assessment of the person concerned, and/or in the form provided by the FMA.

If the FMA has any doubts as to individual suitability, the person concerned must disclose all relevant information in order to be able to furnish proof of personal suitability. In particular, in the event of any doubt in relation to the integrity and/or impartiality of a member of the Executive Board or the Board of Directors, the FMA may also require the disclosure of information relating to individual financial circumstances.

Additionally, the FMA may interview persons by way of a risk-based approach. The questioning may also serve to reassess the suitability of the person if any facts or circumstances give rise to doubt as to the suitability of the person concerned. The questioning procedure may serve to obtain additional information about the qualifications of a person proposed by an institution – either as part of the overall composition of the respective management body or at an individual level – and to assess his or her personal and professional integrity.

During the assessment of suitability, the FMA may take into account the assessment of other competent authorities within the framework of its supervisory activities. To this end, the FMA may share information with other authorities in Liechtenstein and abroad.

In making its assessment, the FMA is not bound by factual or legal assessments of facts by third parties, including those of government authorities and courts.

The assessment by the FMA will certainly include the assessment criteria in Annex 2, and in the case of collective bodies also those in Annex 1.

In addition, members of the Executive Board and the Board of Directors must confirm their integrity and impartiality by a written declaration. Members who are currently working or have previously worked abroad within the financial sector must also submit a declaration by the competent supervisory authority of the respective country confirming that no grounds for disqualification as a member of an Executive Board or a member of a Board of Directors apply.

13. Regulations of the institutions

The institutions must issue regulations which ensure an effective and prudent management of the institution. This ensures that the institution's regulations concerning assessment of suitability are adapted to the overall corporate governance framework of the institution, the corporate culture and risk tolerance, and that the procedures function completely as planned within the framework of the regulations. Moreover, the regulations ensure that the Board of Directors and the Executive Board of the institution – notwithstanding the required approvals from shareholders – issue and maintain regulations concerning the assessment of the suitability of members of the Board of Directors and the Executive Board (fit und proper policy).

The regulations for the assessment of suitability must at least contain principles for selection, monitoring and succession planning, and for re-election, and in any case regulate:

- The procedure for selection, appointment, re-appointment and succession planning of members of the Board of Directors and the Executive Board, and the applicable internal method for assessing the suitability of a member of these bodies, including the internal function which is responsible for supporting the assessment (e.g. personnel function)
- The criteria to be used in the assessment, which include the eligibility criteria set out in the present Communication (see Annex 2)
- The mode/type of procedure designed to ensure that during the selection process the aspect of diversity is given considerable importance in respect of members of the Board of Directors and the Executive Board of an institution
- The channel of communication with the competent authorities
- Details of how the assessment is to be documented

The regulations for the assessment of suitability must take into account the fact that a different range of experience is required for different positions in the Executive Board and in the Board of Directors.

Furthermore, the banks and investment firms must have regulations for the assessment of key function holders which regulate the type, scope and complexity of the business transactions of the institution and cover at least the following points:

- The job position or persons responsible for carrying out the assessment of suitability
- The criteria for reliability and experience based on which the assessment is made
- The specific key functions in the institution

In addition, institutions require regulations that promote diversity on the Executive Board and the Board of Directors (diversity policy). These regulations must expressly cover in particular career planning aspects and measures to guarantee equal treatment and equal opportunity for employees of different genders. The regulations must also ensure that no discrimination occurs on the grounds of sex, race, skin colour, ethnic or social origin, genetic features, religion or belief, membership of a national minority, wealth, birth, disability, age or sexual orientation.

The institution's regulations must be issued in written and binding form. They may also result from the totality of several written and binding individual provisions (in particular regulations, written instructions

and binding descriptions of processes), in which case the institution must ensure that the individual provisions are mutually consistent and without contradictions. The efficacy of the regulations must be regularly assessed and the documents updated where appropriate.

If a nomination committee or equivalent body has been set up within the institution, it should contribute to the introduction and further development of the regulations in accordance with this Communication.

14. Corrective measures of the institutions

If an institution comes to the conclusion that a person is not suitable for appointment as a member of the Board of Directors or the Executive Board or a key function holder, that person must not be appointed. If the person has already been appointed, the institution must take appropriate measures to replace him or her, unless the institution takes appropriate measures to ensure the suitability of the member in a timely manner.

If an institution, following a reassessment, comes to the conclusion that a member of the Board of Directors or the Executive Board or a key function holder is no longer suitable, the institution must take appropriate measures to remedy the situation, and in any case inform the FMA accordingly.

If the institution takes certain measures, it must take into account the particular situation and the shortcomings of the member of the Board of Directors, Executive Board or key function holder. The following measures, among others, may be suitable:

- Adjusting the responsibilities between members of the Board of Directors or the Executive Board
- Replacement of certain members; recruitment of additional members; possible measures to reduce conflicts of interest
- Training of individual persons or training of the Board of Directors or the Executive Board as a whole to ensure their individual and collective suitability

If a significant institution finds during the assessment that a holder of a key function is unsuitable, the institution must also take appropriate measures.

15. Procedure

The institutions assess the suitability of persons to be appointed before their appointment to the designated position (*ex ante* examination). The appointment is to be notified to the FMA, enclosing the form duly filled in (section 11) and the enclosures. If a person is re-elected, this must also be reported to the FMA. Notification concerning the re-election must be submitted along with an affidavit sworn by the person concerned confirming that no changes relevant for the guarantee have occurred since the last assessment. If any relevant changes have occurred, these must be reported accordingly, and the necessary documentation submitted where appropriate. Notification concerning an appointment or re-election must be made without delay, in any event within five working days from the passing of the resolution, and under all circumstances before the position is taken up and before any public announcement.

The FMA must complete its assessment of suitability as quickly as possible, not later than three months after all the required information and documents have been submitted, and inform the institution of its decision.

If insufficient information and documents are submitted for the assessment of the individual, or if they are not submitted within an extension period set by the FMA, the FMA will object to the appointment of the person concerned. The FMA will also lodge an objection to the appointment if, after a detailed examination of the documents, it has the impression that the person concerned is not suitable for the proposed position.

16. Data protection

The FMA processes personal data exclusively in accordance with the general data processing principles of the General Data Protection Regulation (Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data on the free movement of such data, and repealing Directive 95/46/EC) and in line with applicable data protection law.

All information regarding the processing of personal data, including details about the purpose of processing, the data controller and the rights of data subjects can be found in the FMA Privacy Policy, accessible at: www.fma-li.li/en/fma/data-protection/fma-privacy-policy.html

17. Entry into force

This Communication comes into effect on 1 June 2022.

Annexes

Annex 1 – Assessment Criteria for Collective Bodies (corresponds to Annex 1 of EBA/GL/2021/06)

Annex 2 – Knowledge and skills (corresponds to Annex 2 of EBA/GL/2021/06)

Annex 3 – Documentation required for the respective position (corresponds largely to Annex 3 of EBA/GL/2021/06)

Annex 4 – Form referred to in section 11

Annex 1 – Assessment Criteria for Collective Bodies (corresponds to Annex 1 of EBA/GL/2021/06)

The following information and/or accompanying documents must be forwarded to the FMA for every request for a suitability assessment concerning a collective body.



**Criteria for
Collective Bodies**

Annex 2 – Knowledge and skills (corresponds to Annex 2 of EBA/GL/2021/06)

In order to properly assess the capacities of the members of the Board of Directors and the Executive Board, institutions should consider using the following non-exhaustive list of relevant skills while considering the role and tasks of the position held by the member of the Board of Directors or the Executive Board:

- a. Authenticity: is consistent in word and deed and behaves in accordance with own stated values and beliefs. Openly communicates his or her intentions, ideas and feelings, encourages an environment of openness and honesty, and correctly informs the supervisor about the actual situation, at the same time acknowledging risks and problems.
- b. Language: is able to communicate orally in a structured and conventional way and write in the national language or the working language of the institution's location.
- c. Decisiveness: takes timely and well-informed decisions by acting promptly or by committing to a particular course of action, for example by expressing his or her views and not procrastinating.
- d. Communication: is capable of conveying a message in an understandable and acceptable manner, and in an appropriate form. Focuses on providing and obtaining clarity and transparency and encourages active feedback.
- e. Judgment: is capable of weighing up data and different courses of action and coming to a logical conclusion. Examines, recognises and understands the essential elements and issues. Has the breadth of vision to look beyond his or her own area of responsibility, especially when dealing with problems that may jeopardise the continuity of the undertaking.
- f. Client- and quality-oriented: focuses on providing quality and, wherever possible, finding ways of improving this. Specifically, this means withholding consent from the development and marketing of products and services and to capital expenditure, for example on products, office buildings or holdings, in circumstances where he or she is unable to gauge the risks properly owing to a lack of understanding of the architecture, principles or basic assumptions. Identifies and studies the wishes and needs of clients, ensures that clients run no unnecessary risks and arranges for the provision of correct, complete and balanced information to clients.
- g. Leadership: provides direction and guidance to a group, develops and maintains teamwork, motivates and encourages the available human resources and ensures that members of staff have the professional competence to achieve a particular goal. Is receptive to criticism and provides scope for critical debate.
- h. Loyalty: identifies with the undertaking and has a sense of involvement. Shows that he or she can devote sufficient time to the job and can discharge his or her duties properly, defends the interests of the undertaking and operates objectively and critically. Recognises and anticipates potential conflicts of personal and business interest.
- i. External awareness: monitors developments, power bases and attitudes within the undertaking. Is well informed on relevant financial, economic, social and other developments at national and international level that may affect the undertaking and also on the interests of stakeholders and is able to put this information to effective use.
- j. Negotiating: identifies and reveals common interests in a manner designed to build consensus, while pursuing the negotiation objectives.
- k. Persuasive: is capable of influencing the views of others by exercising persuasive powers and using natural authority and tact. Is a strong personality and capable of standing firm.
- l. Teamwork: is aware of the group interest and makes a contribution to the common result; able to function as part of a team.
- m. Strategic acumen: is capable of developing a realistic vision of future developments and translating this into long-term objectives, for example by applying scenario analysis. In doing so, takes proper account of risks that the undertaking is exposed to and takes appropriate measures to control them.

- n. Stress resistance: is resilient and able to perform consistently even when under great pressure and in times of uncertainty.
- o. Sense of responsibility: understands internal and external interests, evaluates them carefully and renders account for them. Has the capacity to learn and is aware that his or her actions affect the interests of stakeholders.
- p. Chairing meetings: is capable of chairing meetings efficiently and effectively and creating an open atmosphere that encourages everyone to participate on an equal footing; is aware of other people's duties and responsibilities.

Annex 3 – Documentation required for the respective position (corresponds largely to Annex 3 of EBA/GL/2021/06)

The following information and/or accompanying documents are required to be submitted to the FMA for each requested suitability assessment.

1. Personal details and details on the institution and the function concerned

- 1.1 Personal individual details including full name, name at birth if different, gender, place and date of birth, address and contact details, nationality, and personal identification number or copy of ID card or equivalent.
- 1.2 Details of the position for which the assessment is sought, whether or not the management body position is executive or non-executive, or if the position is for a key function holder. This should also include the following details:
 - a. the letter of appointment, contract, offer of employment or drafts thereof, as applicable;
 - b. any associated board minutes or suitability assessment report/document;
 - c. the planned start date and duration of mandate;
 - d. description of the individual's key duties and responsibilities;
 - e. if the person is replacing someone, the name of this person.
- 1.3 A list of reference persons including contact information, preferably for employers in the banking or financial sector, including full name, institution, position, telephone number, e-mail address, nature of the professional relationship and whether or not any non-professional relationship exists or existed with this individual.

2. Suitability assessment by institution

- 2.1 The following details should be provided:
 - a. details of the result of any assessment of the suitability of the individual performed by the institution, such as relevant board minutes or suitability assessment report/documents;
 - b. whether or not the institution is significant as defined in the Guidelines; and
 - c. the contact person within the institution.

3. Knowledge, skills and experience

- 3.1 Signed and dated CV containing the information indicated in 1.1 and 1.3 of this Annex and details of education and professional experience (including professional experience, academic qualifications and other relevant training, also knowledge of languages), including the name and nature of all organisations for which the individual has worked and the nature and duration of the functions performed, in particular highlighting any activities within the scope of the position sought (banking and financial sector and/or management experience).
- 3.2 The information to be provided should include a statement from the institution of whether or not the individual has been assessed as having the requisite experience as enumerated in these Guidelines and, if not, details of the training plan imposed, including the content, the provider and the date by which the training plan will be completed.

4. Reputation, honesty, integrity

- 4.1 Criminal records and relevant information on criminal investigations and proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director, bankruptcy, insolvency and similar procedures) especially through an official certificate or any reliable source of information concerning the absence of criminal conviction, investigations and proceedings (e.g. third-party investigation, testimony made by a lawyer or a notary registered in the EU).

- 4.2 Statement of whether or not criminal proceedings are pending or whether or not the person or any organisation managed by him or her has been involved as a debtor in insolvency proceedings or a comparable proceeding.
- 4.3 Information concerning the following:
- a. investigations, enforcement proceedings, or sanctions by a supervisory authority in which the individual has been directly or indirectly involved;
 - b. refusal of registration, authorisation, membership or a licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation, membership or a licence; or expulsion by a regulatory or government body or by a professional body or association;
 - c. dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position (excluding redundancies);
 - d. whether or not an assessment of reputation of the individual as a person who has acquired a direct or indirect qualifying holding or a governing body thereof, as a member of a Board of Directors or Executive Board, as the head of the internal audit department or as a key function holder has already been conducted by another competent authority (including the identity of that authority, the date of the assessment and evidence of the outcome of this assessment) and the consent of the individual where required to seek such information to be able to process and use the provided information for the suitability assessment; and
 - e. whether or not any previous assessment of the individual by an authority from another, non-financial authority has already been conducted (including the identity of that authority and evidence of the outcome of this assessment).

5. Financial and non-financial interests

- 5.1 All financial and non-financial interests that could create potential conflicts of interest should be disclosed, including but not limited to:
- a. description of any financial (e.g. loans, shareholdings) and non-financial interests or relationships (e.g. close relations such as a spouse, registered partner, cohabitant, child, parent or other relation with whom the person shares living accommodation) between the individual and his or her close relatives (or any company that the individual is closely connected with) and the institution, its parent or subsidiaries, or any person holding a qualifying holding in such an institution, including any members of those institutions or key function holders;
 - b. whether or not the individual conducts any business or has any commercial relationship (or has had over the past two years) with any of the above listed institutions or persons or is involved in any legal proceedings with those institutions or persons;
 - c. whether or not the individual and his or her close relatives have any competing interests with the institution, its parent or subsidiaries;
 - d. whether or not the individual is being proposed on behalf of any one significant shareholder;
 - e. any financial obligations to the institution, its parent or its subsidiaries (excluding performing mortgages negotiated at arm's length); and
 - f. any positions of political influence (nationally or locally) held over the past two years.
- 5.2 If a material conflict of interest is identified, the institution should provide a statement on how this conflict has been satisfactorily mitigated or remedied including a reference to the relevant parts of the institution's conflict of interest policy or any bespoke conflict management or mitigation arrangements.

6. Time commitment

- 6.1 All relevant and necessary details should be provided to show that the individual has sufficient time to commit to the mandate including:
- a. information about the minimum time that will be devoted to the performance of the person's functions within the institution (annual and monthly indications);
 - b. a list of the predominantly commercial mandates that the individual holds including whether or not the privileged counting rules³ in Article 91(4) of CRD V apply;
 - c. where the privileged counting rules apply, an explanation of any synergies that exist between the companies;
 - d. a list of those mandates which are pursuing predominantly non-commercial activities or are set up for the sole purposes of managing the economic interests of the individual;
 - e. the size of the companies or organisations where those mandates are held including for example, total assets, whether or not the company is listed, and number of employees;
 - f. a list of any additional responsibilities associated with those mandates (e.g. the chair of a committee);
 - g. estimated time in days per year dedicated to each mandate; and
 - h. number of meetings per year dedicated to each mandate.

7. Collective knowledge, skills and experience

- 7.1 The institution should provide a list of the names of the members of the management body and their respective roles and functions in brief.
- 7.2 The institution should provide a statement regarding its overall assessment of the collective suitability of the management body as a whole, including a statement on how the individual is to be situated in the overall suitability of the management body (i.e. following an assessment using the suitability matrix in Annex I or another method chosen by the institution or required by the relevant competent authority). This should include the identification of any gaps or weaknesses and the measures imposed to address these.

8. Any and all other relevant information should be submitted as part of the application.

³ This is where the individual avails himself or herself of the possibility of holding several mandates that are part of the same group, or within undertakings where the institution holds a qualifying holding or in institutions that are part of the same institutional protection schemes.

Annex 4 – Form referred to in section 11



**Form referred to
in section 11**