FMA Circular

on the assessment of suitability of executive directors, non-executive directors and key function holders

Fit & Proper Circular
Disclaimer: This circular does not constitute a legal regulation. It is intended to serve as guidance and reflects the FMA's legal interpretation. No rights and obligations extending over and above the provisions of the law can be derived from this circular.

All English translation of the authentic German text is unofficial and serves merely information purposes. All translations are prepared with great care, but linguistic compromises may have to be made. The reader should also bear in mind that some legal provisions mentioned in this circular will remain unclear without certain background knowledge of the Austrian legal and political system. Please note that the cited legal provisions are subject to change in the future.

Translator's Notes to assist in reading of this Circular:

**Executive directors** are always members of the management body in its management function (i.e. the management board).

**Non-executive directors** are always members of the management body in its supervisory function (i.e. the supervisory board).

**Management body** implies both the management board and the supervisory board.
# FIT & PROPER CIRCULAR

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I. INTRODUCTION

A. SUBJECT MATTER

(1) This FMA Circular is intended to serve as guidance for the assessment of the suitability of executive directors, non-executive directors and key function holders in credit institutions and reflects the FMA's legal perspective with regard to the relevant legal provisions.

(2) This circular does not constitute a legal regulation. It is intended to serve as guidance and reflects the FMA's legal interpretation. No rights and obligations extending over and above the provisions of the law can be derived from circulars.

B. LEGAL BASIS AND APPLICABLE FRAMEWORKS

1. AUSTRIAN BANKING ACT (BWG)

(3) In addition to general conditions, Article 5 para. 1 nos. 6 to 13, Article 28a and Article 30 para. 7a BWG also define personal requirements for the members of the management body in its management function (management board) and the management body in its supervisory function (supervisory board) of credit institutions, financial holding companies, and mixed financial holding companies. These provisions cover, inter alia, the reputation, honesty, and impartiality (independence of mind) (in particular with regard to illegalities in relation to their professional activities or in their personal sphere), independence, knowledge (having sufficient theoretical and practical knowledge), sufficient requisite experience to perform the duties required by a management or supervisory role (either in the banking sector or in a comparable entity).

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1 Cf. Chapter III
2 Article 69 para. 5 of the Austrian Banking Act (BWG; Bankwesengesetz) as published in Federal Law Gazette No. 532/1993 as amended states that the FMA is required in the enforcement of its tasks to apply the Guidelines, Recommendations, Standards and other measures issued by the European Banking Authority (EBA); therefore the BWG is interpreted by the FMA in accordance with the meaning of the publications by the EBA. In the event that such publications are substantively amended or supplemented in the future, then the FMA’s interpretation of the BWG might also change.
3 As defined in Article 1 para. 1 BWG.
4 As defined in Article 4(1) (20) of Regulation (EU) No 575/2013 ("CRR");
5 As defined in Article 2(15) of Directive 2002/87/EC or Art. 2 no. 15 of the Financial Conglomerates Act (Federal Act on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms within a Financial Conglomerate (FKG; Finanzkonglomerategesetz)) published in Federal Law Gazette I No. 70/2004 as amended.
as well as **sufficient time commitment** to perform such duties and the **collective suitability** of the respective board.

(4) **Specific members of the supervisory board** (in particular the members of the audit committee pursuant to Article 63a para. 4 BWG, the remuneration committee pursuant to Article 39c para. 3 and the risk committee pursuant to Article 39d para. 3 BWG) must in addition also possess the required specialist and **detailed knowledge** and experience required for their specific defined area of responsibility.

(5) The Austrian Banking Act (BWG) also prescribes specialist and experience-based requirements for employees working in the internal audit function, the risk management department as well as the compliance function of credit institutions.

(6) The enforcement of **Article 5 para. 1 nos. 6 – 13, Article 28a, Article 30 para. 7a, Article 39 paras. 5 and 6 and Article 42 BWG** falls pursuant to Article 77d BWG only within the FMA’s competences, as the performance of such tasks is **not conferred upon the European Central Bank (ECB)** pursuant to Regulation (EU) No 1024/2013. In Article 4(1) point e SSM-R, which lists the scope of the ECB’s competences, ensuring compliance with the requirements imposed for credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, is particularly mentioned. Furthermore, the ECB's competences also include the fit and proper assessment of key function holders. In conjunction with Article 6 SSM-R there is therefore a **direct ECB competence** for the **fit and proper assessments of members of the management body and key function holders** of “significant institutions” as defined in the SSM-R. The ECB shall **apply relevant Union law** pursuant to Article 4 (3) SSM-R. Where Union law exists in the form of Directives that are transposed into national law, the latter

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6 **Staff members of the internal audit function of investment fund management companies** must according to Article 16 of the Investment Funds Act 2011 (InvFG 2011; Investmentfondsgesetz 2011), published in Federal Law Gazette I No. 77/2011 as amended hold the necessary specialist knowledge and experience in the investment fund industry; see also the FMA Minimum Standards for Internal Auditing of 18.02.2005 (FMA-MS-IR).

7 Cf. Article 39 para. 6 BWG.

8 With regard to the requirements for the compliance function pursuant to Commission Delegated Regulation (EU) 2017/565 in conjunction with the Securities Supervision Act 2018 (WAG 2018; Wertpapieraufsichtsgesetz 2018) we refer to the FMA Circular regarding the organisational requirements of the Securities Supervision Act 2018 and Delegated Regulation (EU) 2017/565 (hereafter the “WAG 2018 Organisational Circular”).

shall apply. This means that the ECB directly applies the Fit & Proper provisions contained in the BWG within its scope of competence.

2. EBA GUIDELINES

(7) The “Guidelines on the assessment of the suitability of members of the management body and key function holders” published by EBA and ESMA (EBA/GL/2017/12, “F&P-GL”) determine minimum requirements for the individual and collective assessment of reputation, knowledge and experience, time commitment, independence of mind and the independence of persons in management and supervisory functions (executive directors, non-executive directors, as well as holders of so-called “key functions”) in credit institutions, financial holding companies and mixed financial holding companies, both in material and formal terms (fitness and propriety criteria and assessment process). The F&P-GL are addressed towards the competent supervisory authorities and the supervised credit institutions in equal measure and have been applicable since 30.06.2018. Further reaching requirements with regard to the internal governance of credit institutions are also contained in the EBA “Guidelines on Internal Governance” (EBA/GL/2017/11, “IG-GL”), which have also been applicable since 30.06.2018.

(8) Pursuant to Article 16 (3) of the EBA Regulation, competent authorities and financial institutions shall make every effort to comply with the Guidelines issued by EBA.

C. STANDARD ADDRESSEES AND SCOPE OF APPLICATION

(9) The personal requirements in accordance with Article 5 para. 1 nos. 6 to 9a and 13 BWG shall apply for executive directors; the requirements in accordance with Article 28a paras. 1 and 3 BWG refer to the chairperson of the supervisory board and the requirements in accordance with Article 28a para. 5 nos. 1 to 5 BWG apply to all

10 The ECB is however not bound to the administrative practices of national authorities, and therefore also is not bound to this Circular. With regard to the ECB’s administrative practices, please consult the ECB Guide to fit and proper assessments (https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705_rev_201805.en.pdf).

11 Pursuant to Art. 69 para. 5 BWG as well as Art. 16(3) of Regulation (EU) No 1093/2013 (“EBA Regulation”) the FMA shall take European convergence in respect of supervisory tools and supervisory procedure into account when performing its duties. For this reason, the FMA shall participate in the activities of the EBA and apply the Guidelines, Recommendations, Standards and other measures passed by the EBA. Based on the specific legal amendment in this regard it has not been possible to implement the requirements for the composition of the nomination committees (independent members). Consequently, the FMA’s compliance declaration to the EBA was one of partial compliance with regard to this point.
members of the supervisory board (or the members of the competent supervisory body under law or the statutes) of credit institutions.

(10) Pursuant to Article 30 para. 7a BWG, the personal requirements pursuant to Article 5 para. 1 nos. 6 to 9 BWG and Article 28a para. 5 nos. 1 to 4 BWG – shall, taking into account any differences in terms of business model and organisational structure, also be applied accordingly to the directors and members of the supervisory board of (mixed) financial holding companies.

(11) The BWG additionally also stipulates personal requirements for the Heads of Control Functions. Article 42 paras. 1 and 2; BWG focus on the head of the internal audit function, and Article 39 paras. 5 and 6 BWG define the rules for the head of the risk management function and the BWG compliance function.12

(12) Pursuant to Article 6 para. 2 no. 13 of the Investment Fund Act 2011 (InvFG 2011) the conditions defined in Article 5 para. 1 no. 6, 7, 9 to 14 BWG are also to be fulfilled by the executive directors of investment fund management companies; in accordance with Article 10 para. 6 InvFG 2011 the conditions defined in Article 28a BWG shall also apply to the non-executive directors of investment fund management companies.13

(13) The F&P Guidelines address all members of the management body in its management or supervisory function (in the diction of the BWG: “directors” and “supervisory board members” respectively) as well as all key function holders.14 The F&P GL in particular cover the checking of the suitability of the heads of internal control functions (risk management department, internal audit function, BWG compliance-function)15; the Guidelines are applicable to credit institutions, financial holding companies and mixed financial holding companies. The scope of application of the F&P-GL thereby not only refers to the suitability of the relevant persons in

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12 The compliance function pursuant to Article 39 para. 6 BWG is called the “BWG compliance function”. To ensure a clear delineation the compliance function referred to in the WAG (Securities Supervision Act) shall be referred to in this circular as the WAG Compliance Function.

13 It should be noted that ESMA Guidelines and interpretations have primary relevance for investment fund management companies under the InvFG 2011 in conjunction with the BWG, while simultaneously hold an authorisation under the UCITS Directive, and real estate investment fund management companies under the ImmolInvFG in conjunction with the BWG, which simultaneously hold an approval under the AIFM Directive.

14 e.g. the heads of important business segments or areas, the persons with overall responsibility for the internal control functions (in particular the internal audit function or risk controlling or risk management department, the heads of the respective compliance functions, the anti-money laundering officer) as well as the directors of significant branches as defined in Article 18 BWG and subsidiaries that belong to the group etc.; see also the more detailed information in MN 126 et seq.; regarding the anti-money-laundering officer see the FMA circular on internal organisation for the prevention of money laundering & terrorist financing.

15 With regard to the head of the WAG compliance function, please see the FMA Circular regarding the organisational requirements of the Securities Supervision Act 2018 and Delegated Regulation (EU) 2017/565 (“WAG 2018 Organisational Circular”).
management and control functions at the time of their appointment, but also on an ongoing basis, for which reason a repeated suitability check and further education measures may be necessary.

(14) The F&P GL as well as the associated IG-GL shall be applicable by the institution both on an individual basis as well as on a consolidated basis and taking into account the differences with regard to the business model and organisation accordingly also by financial holding companies as well as mixed financial holding companies, provided that both of the latter are part of a group of credit institutions as defined in Article 30 BWG.

(15) This circular is therefore addressed to all credit institutions as defined in Article 1 para. 1 BWG, with the exception of those listed in Article 3 para. 1 nos. 1 to 9 BWG, as well as to financial holding companies as defined in Article 4 (1) (20) CRR and mixed financial holding companies as defined in Article 2 no. 15 FKG. It also applies to Austrian credit institutions active in other Member States (Article 2 no. 5 BWG) under the freedom to provide services or the freedom of establishment (Article 10 BWG).

(16) Furthermore, the circular is also addressed to all wind-down units as defined in Article 2 no. 56 BaSAG and Article 2 GSA as well as wind-down entities as defined in Article 162 BaSAG, since Article 84 para. 2 BaSAG and Article 3 para. 4 GSA refer to the provisions of Articles 5, 28a and 42 paras. 1 to 5 BWG. Wind-down entities and wind-down units as defined in BaSAG and the GSA respectively are however only authorised to perform banking and leasing business, provided that the provision of such businesses serve the purpose of portfolio wind-down. The BWG and other laws in relation to banking supervision are therefore only applicable to them in a substantially restricted scope. The requirements stated in the circular for executive directors, non-executive directors and the head of the internal audit function in such entities and units are therefore to be read taking into account the restricted scope of activity and the reduced degree of applicability of bank supervision laws.

(17) In the interest of ensuring a consistent terminology, the terms “executive director” and “non-executive director” shall be used to apply to all members of the management body in its management function (management board) or in its supervisory function (supervisory board) respectively, the term “supervisory board” for the competent supervisory body under law or under the entity’s articles of association and the umbrella

16 This circular is addressed to promotional companies as defined in Art. 3 para. 1 no 11 BWG in relation to the requirements in relation to the directors stipulated in Article 5 para. 1 nos. 6 to 13 BWG.
term “institutions” for credit institutions, financial holding companies and mixed financial holding companies pursuant to MN 15; in the event of deviations from such terms, separate references shall be made.\(^{17}\)

II. REQUIREMENTS FOR EXECUTIVE DIRECTORS AND NON-EXECUTIVE DIRECTORS

A. OVERVIEW

(18) To ensure full responsibility is taken in the management board or that monitoring or controlling tasks are performed in an orderly manner in the supervisory board, it is essential that every member of the management board as well as of the supervisory board of a supervised institution – taking into consideration the competences of the respective person – has adequate knowledge with regard to the supervisory rules that are applicable for the respective institution. All members of the management board and the supervisory board shall possess, both on an individual basis as well as collectively, the necessary knowledge and experience (“Fitness”), which is appropriate in relation to the nature, scope and complexity of business activities as well as the institution’s risk profile.

(19) The expertise-based qualification (in particular with regard to theoretical knowledge) and the adequate knowledge of executive directors and non-executive directors are assessed by the FMA following an initial assessment on the basis of the submitted curriculum vitae as well as other documents submitted (e.g. proof of having attended training and continuing education programmes) are assessed as a rule in a personal “hearing”, known as a (theoretical and practical) “Fit & Proper - Test”.

(20) In addition to their technical suitability, executive directors and non-executive directors shall also have the necessary reputation, honesty and independence of mind (“Propriety”). This shall not be considered the case, where personal circumstances relating to their general life experience give rise to the assumption, that their prudent and orderly performance of their executive or non-executive directorship could be affected. Conflicts of interest of the executive directors or non-executive directors, in

\(^{17}\) To improve readability, gender-neutrality is to be assumed; any masculine formulation also infers a feminine form.
particular in conjunction with their own financial activity, may also constitute such circumstances. This should not be confused with independence, that is expected to apply to a certain number of non-executive directors, and which is determined in accordance with criteria that are determined within the law.

(21) The FMA reviews both the reputation and the independence of the members of the management board or the supervisory board primarily based on the submitted documentation (such as an excerpt from the criminal record register, their curriculum vitae, sworn declaration).

(22) Prudent and proper business management requires, as is also the case with the prudent and proper performance of monitoring and controlling tasks, the sufficient time commitment of the appointed executive director or non-executive director (or of the supervisory body that is otherwise appointed in accordance with the law or the articles of association). As a basic rule, executive directors and non-executive directors shall dedicate sufficient time to the performance of the tasks conferred upon them in the credit institution. By so doing, executive directors and non-executive directors shall take into account, if concurrently performing multiple managerial and/or supervisory activities, the prevailing circumstances on a case-by-case basis as well as the nature, scope and complexity of the transactions as well as the institution's risk profile. These requirements shall apply for the executive directors and non-executive directors of all credit institutions.18

(23) Sufficient time commitment is primarily checked based on a qualified self-assessment including a sworn declaration by the person in question, that sufficient time resources exist to permit the orderly and diligent performances of a managerial or supervisory function.

(24) Over and above the qualitative assessment described in MNs 22 and 23, there is also a quantitative assessment based on the limits on the number of directorships held simultaneously for the executive directors or non-executive directors of credit institutions “of significant relevance”19 stipulated in Article 5 para. 1 no. 9a or Article 28a para. 5 no. 5 BWG.

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18 The nomination committee that is to be established in credit institutions of significant relevance as defined in Article 5 para. 4 BWG (see MN 102) shall when filling vacant positions in the senior management and the supervisory board must also state the time required for performance of the duty (Article 29 no. 3 BWG).
19 See also the more detailed information in MN 102 et seq.
B. REQUIREMENTS FOR PERSONAL REPUTATION, HONESTY AND INDEPENDENCE OF MIND

1. PRELIMINARY REMARK

(25) Irrespective of the nature, scope and complexity of the transactions that are conducted by the institution, all persons holding management and control functions must at all times display personal reputation, honesty and independence of mind. The FMA always uses the same benchmark for evaluating reputation, honesty and independence of mind ("propriety")\(^{20}\) of executive directors, the chairpersons of supervisory boards, and non-executive directors, which is as follows.

2. REASONS FOR EXCLUSION

(26) Reasons for exclusion under commercial law primarily exist for the function of an executive director or a non-executive director with regard to Article 5 para. 1 no. 6, Article 28a para. 3 no. 1 or Article 28a para. 5 no. 1 BWG in conjunction with Article 13 GewO 1994 particular in regard to convictions for fraudulent bankruptcy, injury of the interests of third party creditors, preferential treatment of a creditor or for interference with creditor's interests by gross negligence as well as convictions for another punishable offence carrying a custodial penalty of longer than three months or a fine of more than 180 per diem rates. Convictions for the criminal offences listed above exclude the convicted person from activities as an executive director or a non-executive director. The personal requirements are also no longer deemed to exist, if the (potential) executive director or non-executive director has had their licence to trade removed in accordance with Article 13 para. 6 in conjunction with Article 87 GewO (i.e. because of serious breaches of the legal provisions and the protection of interests associated with the trade in question) or whose licence to trade has been revoked as a result of a verdict passed by a court.

(27) Moreover, no insolvency proceedings are allowed to have been initiated for the assets of the executive director or non-executive director or another legal entity than a natural person, upon whose business the executive director or non-executive director has or has had a decisive influence. The existence of comparable circumstances in a foreign

\(^{20}\) Regarding the suitability requirements for key function holders please see the statements contained in MN 122 ff.
country shall also constitute a reason for exclusion (Article 5 para. 1 no. 6, Article 28a para. 3 no. 1 or Article 28a para. 5 no. 1 BWG).

3. ORDERLY FINANCIAL SITUATION AND PROPERITY

(28) Executive directors and non-executive directors shall be required to have orderly financial situations and no circumstances shall be allowed to exist, from which doubts shall arise about their personal reputation, honesty and independence of mind for conducting banking business or for exercising a supervisory function (Article 5 para. 1 no. 7, Article 28a para. 3 no. 2 BWG or Article 28a para. 5 no. 2 BWG; cf. also Chapter 8 F&P-GL). In this way, the necessary financial solidity, economic independence and personal integrity with regard to the banking business that is to be executed, should be guaranteed.

(29) An orderly financial situation shall be deemed not to exist – in addition to the cases listed in Article 5 para. 1 no. 6, Article 28a para. 3 no. 1 and Article 28a para. 5 no. 1 BWG – in any case where an incapacity to pay exists or where there is a risk of this occurring, or in the case of having a conviction for a relevant financial crime (see also Chapter 8 of the F&P-GL).

(30) Illegalities in relation to the professional activities or the personal assets of the executive director or the non-executive director (e.g. convictions for other criminal offences than those captured by Article 5 para. 1 no. 6, Article 28a para. 3 no. 1 or Article 28a para. 5 no. 1 BWG or failures to act; pending criminal proceedings, administrative penalties – especially for breaches of provisions under supervisory law – tax-related offences, but also being found guilty of offences under civil law; see also para. 77 et seq. F&P-GL) may constitute circumstances that may substantiate doubts about the reputation, honesty and independence of mind especially depending on the nature of the banking business being conducted. Furthermore other concluded or pending investigations or actions, that have been imposed by the FMA or the ECB, other supervisory authorities or professional associations for failure to observe relevant regulations (especially in relation to regulatory norms in the banking, financial, investment or insurance industries) may also constitute such a circumstance. However, all circumstances are captured, which nevertheless, even though they do not constitute the aforementioned activities, justify concerns in relation to propriety in relation to the specificities of the banking business conducted; this especially includes circumstances that destroy confidence in the safety of assets that have been entrusted, the particular due diligence obligations
and limitation of risks in accordance to Article 39 BWG or Articles 29 and 30 InvFG 2011 in particular, and which affect the confidence in the ability to function in the national economic interest as well as the confidence in the upholding of the legal order as a legal interest.21

(31) In accordance with the F&P-GL a member of the management board or the supervisory board shall also be considered as not being proper, where their personal or professional behaviour give rise to doubt their ability to manage the credit institution in a sound and prudent manner. This covers the previous business performance, and shall be assessed based on the previous meeting of liabilities, the financial and commercial success of a company that is or was under the management, significant influence, significant participation or ownership of the member. In so doing, insolvency or reorganisation procedures are in particular to be taken into consideration, as well as large investments, exposures and credits, provided they may have an impact on the soundness of the entity.

4. INDEPENDENCE OF MIND

(32) Every executive director and every non-executive director must be in a position to act with independence of mind, which means in the performance of the respective function being able to make a rational, objective and independent assessment and to make a decision taking into consideration all the relevant facts. On the one hand, this is reflected in the individual’s behavioural capabilities, and on the other hand, by the absence of conflicts of interest.

(33) It is therefore necessary that the respective member displays the necessary personal qualities, to be able to assess and critically challenge proposed decisions both autonomously and independently, as well as being able to ask suitable questions to the executive directors, and also possessing the ability to be able to resist “group-think” (see also para. 83 F&P-GL). In particular, the respective member’s past and ongoing behaviour is to be taken into account. Conflicts of interest of executive directors or non-executive directors, especially in conjunction with their own economic interests, may constitute circumstances that place doubt on the affected person’s orderly financial interests and/or their ability to act with independence of mind of the institution that

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21 Additional examples of circumstances that may place propriety in doubt, may be found in the legal materials regarding Article 5 BWG (see the explanatory remarks to the draft of the government bill no. 641 in the Annex to the stenographic protocols of the National Council, 21st Legislative Period, p. 75f).
is to be managed or monitored. The **existence of a conflict of interests**, the **suitable actions for dealing**\(^{22}\) with such a conflict of interests as well as the effect on the independence of mind of the respective member, and therefore the materiality of the conflict of interest, is to be reviewed on a **case-by-case basis**. All **actual and potential conflicts of interest** are to be **communicated** within the body, to be **documented** and to be **treated in an orderly manner** (a discussion as well as a decision with regard to the suitable measures) as well as being brought to the FMA's attention, including (mitigating) actions.

(34) In the following cases, as a rule, a potential conflict of interest is to be assumed (cf. para. 84 F&P-GL)\(^{23}\):

- economic interests (e.g. shares, other ownership rights, memberships, holdings and other economic interests in commercial customers; intellectual property rights, loans granted to an entity that the member has a close relationship\(^{24}\) to);\(^{25}\)
- personal or professional relationships with the owners of qualifying holdings;
- personal or professional relationships with staff of the institution or entities within the scope of prudential consolidation;\(^{26}\)
- other employment and previous employment within the last five years;\(^{26}\)
- personal or professional relationships to external stakeholders (e.g. advisers, service providers, etc.);
- shares, holdings, memberships or ownership rights in an entity, that has conflicting interests with the institution;
- political influence or political relationships.

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\(^{22}\) Pursuant to Chapter 12 of the IG-GL institutions shall implement guidelines for employees for the handling of conflicts of interest. In addition to the potential situations and constellation should also define suitable processes, measures, documentation obligations and responsibilities for the determination of and avoidance of conflicts of interest.

\(^{23}\) This list is demonstrative, but not taxative. Whether or not a conflict of interest exists must also be assessed on a case-by-case basis.

\(^{24}\) An entity is deemed to have a close relationship to the member, where the member or a person listed in Article 28 para. 1 no. 5 BWG is its beneficial owner.

\(^{25}\) A conflict of interest that compromises the independence of mind may especially exist, if an executive director/non-executive director - or an entity, for whom the person is question is active or has a holding – is a **borrower in danger of default** of the institution to be managed or monitored. A borrower shall be deemed to be in danger of default, where indications exist (see Article 178 (3) CRR) that the borrower is unable to pay its liabilities without recourse to collateral. Independence of mind is also to be placed in doubt, if a member of the management body or the supervisory body, a close relative of a member, or an entity run by a member has business relationships of such a nature or magnitude to the institution to be managed or to be monitored, that an economic dependency on the institution may arise. Irrespective of that when reviewing whether the performing of certain activities (such as an office in another management body or supervisory body) consists a conflict of interest that affects the independence of mind of the executive director/non-executive director, and whether any **group or association interest** is taken into account (for example in the case of parent-subsidiary relationships between institutions the exercising of a supervisory activity in the subsidiary by a member of the management body of a parent undertaking regularly does not constitute a conflict of interests that is not permissible).

\(^{26}\) An exception exists for employee representatives in the supervisory body pursuant to Article 110 of the Labour Constitution Act (ArbVG).
As a rule, personal loans issued at market conditions (i.e. at non-preferential terms) secured and serviced in an orderly manner (e.g. a mortgage-based loan) as well as other types of personal loans (whether secured or unsecured) granted at market conditions up to a value of € 200,000 as well as holdings or other investments of up to 1%, do not trigger material conflicts of interest. This assumption also extends to everyday banking transactions performed under market conditions. A communication to the FMA may also be omitted, where a management transaction as defined in Article 28 BWG is concluded during the duration of the appointment (and therefore once the notification of the appointment has been submitted) and all of the regulations set out in Article 28 BWG are observed.

5. COOLING-OFF PERIOD FOR (FORMER) EXECUTIVE DIRECTORS

To avoid conflicts of interest arising from an “on-the-fly change” from being an executive director to the chairperson of the supervisory board a cooling-off period is prescribed in Article 28a para. 1 BWG. Former executive directors may not assume an activity as the chairperson of the supervisory board within the same entity in which they were previously active as an executive director prior to two years having lapsed since they ceased to have the function of an executive director. This stipulation covers all previous executive directors, rather than just the former chairperson of the management board.

The material intention of the cooling-off rules relates to the activity as the chairperson of the supervisory board, and is therefore also addressed to their deputies, especially since they have also performed the (same) activity as the chairperson, in the case of the chairperson’s absence. Cooling-off periods are also prescribed by law for the role of chairperson in the remuneration, risk and audit committee of the supervisory body, in order to prevent potential conflicts of interest: Article 39c para. 3, Article 39d para. 3 and Article 63a para. 4 BWG stipulate temporary impediments to appointment for the chairperson of the committee.27

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27 Their deputies may performance their role on a restricted basis, provided they are subject to a temporal impediment to appointment.
6. ASSESSMENT OF PERSONAL REPUTATION

(38) In the assessment of the personal reputation of the (potential) executive director or non-
executive director the institution shall, like the FMA, make use of every relevant accessible piece (or source) of information (cf. Annex III Chapter 4 F&P-GL):

- in the first instance criminal record certificates or relevant files in relation to administrative cases will be taken into account, with cumulative effects arising from several more minor breaches of the law - in particular breaches of provisions contained in supervisory law - possibly having significant consequences;
- in addition, particular attention shall be paid to pending or previous investigative procedures by government (supervisory or regulatory) authorities that relate to the person appointed as an executive director or a non-executive director;
- moreover information from credit protection associations, as well as records and observations about prior cooperation with the supervisor (transparency) etc. are also to be included in the assessment;
- procedures relating to the approval, surrendering, revoking, disqualification or other ways of termination of the approval to exercise a trade or any form of professional approval as well as memberships of a trade association;
- having lost a job or a significant trustee relationship (or a position where a comparable degree of trust being transferred);
- previous outcomes of suitability assessments conducted by the FMA, the ECB or other competent supervisory authorities as well as other authorities that are not responsible for banking supervision;
- with regard to gaining an overall picture, (mitigating) accompanying circumstances, rehabilitation measures or the behaviour of the person in question at the time of the occurrence of a damaging act as well in the intervening period of time that has elapsed since the act was committed shall also be taken into account in the assessment of propriety.

7. DECLARATION AND DUTY TO COOPERATE

(39) The respective institution as well as (on a subsidiary basis) the person appointed as a member of the management body or the supervisory body are duty-bound to cooperate in determining that requirements relating to that person are met. In this regard executive directors or non-executive directors shall act in an honest, transparent and open manner towards the FMA and shall make relevant information accessible in a proactive manner.

(40) The executive director or the non-executive director shall therefore disclose, where doubts exist in relation to their financial position and or their economic independence (from the institution to be managed or monitored), their personal financial situation to the
FMA, in order to be able to provide proof of the existence of orderly financial circumstances.

(41) Furthermore, the executive director or the non-executive director **confirms** his/her **integrity** and independence of mind, and above all that he/she possesses the necessary propriety in terms of the responsibility for the performance of the management function or the supervisory function by means of a sworn declaration. In the case of reports from the past or justified reasons in connection with previous business transactions, which give rise to objections with regard to the personal reliability of an executive director or a non-executive director, particularly high requirements shall be set in regard of demonstrating the personal reputation, honesty and independence of mind of the person in question.

(42) Executive directors or non-executive directors shall check the correctness of the submitted information, and shall inform the institution of any changes, that could have a bearing on whether personal requirements are fulfilled. The institution shall confirm to the FMA that the submitted information is to the best of their knowledge correct (cf. Article 28a para. 4, Article 73 para. 1 nos. 2, 3 and 8 BWG).

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28 In the case of foreign executive directors/non-executive directors, a confirmation is also required from the banking supervision authority in their home country or (alternatively) of another country, in which the person in question was or is active within the financial sector, is also necessary, to ensure that no reasons for exclusion as the executive director/non-executive director of a credit institution exist (cf. Art. 5 para. 1 no.9 and Art. 28a para. 3 no.4 BWG respectively).
C. REQUIREMENTS IN TERMS OF THE FITNESS AND NECESSARY EXPERIENCE OF EXECUTIVE DIRECTORS

1. OVERVIEW

(43) Based on their prior training, executive directors are required to have suitable professional qualifications and to possess the necessary experience in relation to the operations of the institution, to be in a position to actively participate on an informed and expert basis in the business activities of an institution and to take decisions (Article 5 para. 1 no. 8 BWG or Article 6 para. 2 no. 10 InvFG 2011 respectively; see also Chapter 6 F&P-GL and para. 29 IG-GL). An executive director’s professional qualification requires the person in question to have sufficient theoretical and practical knowledge about the institution’s activities (including those that may be allowed to be performed under the scope of the legal licence held) as well as sufficient managerial experience; professional qualification for the managing of a credit institution is assumed to exist, where the person has held a management position for at least three years in an entity of a comparable size and type of business – however an activity performed only on a sporadic basis for three years shall not suffice.

2. KNOWLEDGE AND EXPERIENCE

(44) While theoretical banking knowledge can be proven in the fields of financing, accounting and bookkeeping, auditing as well as supervisory law may be proven by the completion of relevant courses of studies and/or by completion of relevant external and (sector-) internal trainings and seminars or training courses (by means of certificates, diplomas, confirmation of attendance etc.), practical banking knowledge in relation to the institution’s activities requires the relevant professional experience (see Chapter 6 F&P GL).

(45) The theoretical knowledge of an executive director must be appropriate with regard to the nature and size of the respective institution both in terms of the intended activities; it should be noted in this context that even activities in (even where only locally active) special credit institutions regularly require specific knowledge (see e.g. Article 6 para. 2 nos. 10 and 12 InvFG 2011). Irrespective of this, the management body of a special credit institution also requires knowledge about the core supervisory laws, in particular the CRR (provided that and to the extent that it is applicable to the respective institution),
the BWG (cf. only Article 10 para. 6 InvFG 2011), BaSAG\textsuperscript{29}, BSpG\textsuperscript{30}, InvFG 2011, ImmolInvFG\textsuperscript{31}, BMSVG\textsuperscript{32} and where applicable BörseG 2018\textsuperscript{33} and WAG 2018\textsuperscript{34} as well at the relevant provisions under company law.

(46) Any "division of tasks" within the management body should in principle be taken into account during the assessment of suitability; however, the other executive directors are not absolved from being jointly responsible (which exists on the basis of collective responsibility). Every executive director must therefore at least have basic (legal and economic) knowledge relating to all areas of the institution.

In any case, the professional qualification of an executive director necessitates having a mastery ("knowledge and application") of the following legal materials:

- The central provisions of the BWG (in particular the parts covering: general provisions, licencing provisions, provisions on ownership and approvals, regulatory standards, liquidity, company law, bodies, consolidation, banking secrecy provisions, risk management, internal auditing and deposit guarantee schemes);
- The central provisions of the Financial Markets Anti-Money Laundering Act (FM-GwG)\textsuperscript{35};
- The central provisions of the Beneficial Owners Register Act (WiEReG)\textsuperscript{36};
- The central provisions of the Deposit Guarantee Schemes and Investor Compensation Act (ESAEG)\textsuperscript{37};
- The central provisions of the VZKG\textsuperscript{38}(provided that this is applicable to the supervised credit institution);

\textsuperscript{29} Bank Recovery and Resolution Act (BaSAG; Bundesgesetz über die Sanierung und Abwicklung von Banken), published in Federal Law Gazette I No. 98/2014 as amended.
\textsuperscript{30} Building Society Act (BSpG; Bausparkassengesetz), published in Federal Law Gazette No. 532/1993 as amended.
\textsuperscript{31} Real Estate Investment Fund Act (ImmoInvFG; Immobilien-Investmentfondsgesetz) published in Federal Law Gazette I no. 80/2003 as amended.
\textsuperscript{36} Beneficial Owners Register Act (WiEReG; Wirtschaftliche Eigentümer Registergesetz), published in Federal Law Gazette I No. 136/2017 as amended.
\textsuperscript{37} Deposit Guarantee Schemes and Investor Compensation Act (ESAEG; Einlagensicherungs- und Anlegerentschädigungsgesetz) published in Federal Law Gazette I No. 117/2015 as amended.
\textsuperscript{38} Consumer Payment Accounts Act (VZKG; Verbraucherzahlungskontogesetz), Federal Law Gazette I No. 35/2016 as amended.
- The central provisions of the ZaDiG 2018\(^ {39} \) (provided that this is applicable to the supervised credit institution);
- The central provisions of the CRR (in particularly the parts covering: general provisions, own funds, own funds requirements, large exposures, liquidity, leverage and disclosure) and the relevant Commission Delegated Regulations supplementing the CRR\(^ {40} \);
- The central provisions of BaSAG;
- The central provisions of the respective special laws to the extent that they are applicable to supervised institutions (e.g. Savings Bank Act (BSpG), the Investment Fund Act of 2011 (InvFG 2011), the Real Estate Investment Fund Act (ImmoInvFG) or the Company Employee and Self-Employment Provisions Act (BMSVG));
- The central provisions of the BörseG 2018 and the WAG 2018 in particular including Commission Delegated Regulation (EU) 2017/565 and Regulation (EU) No. 600/2014 (MiFIR) (dependent on business model and the scope of activities);
- Other relevant provisions and content of European banking supervision law (SSM-R, SSM Framework Regulation, CRD IV, CEBS or EBA Guidelines\(^ {41} \), Binding Technical Standards\(^ {42} \)) – provided that and to the extent that these have been transposed into national law or are applicable towards supervised institutions;
- The material contents of FMA Regulations, of FMA Circulars and of FMA Minimum Standards as well as the FMA Guides in the areas named.
- Basic knowledge of company law; as well as
- Knowledge of the articles of association of the institution and the Rules of Procedure of the management or supervisory bodies.

Para. 66 F&P-GL contains a demonstrative list of those areas that are particularly to be taken into account in the assessment of the necessary knowledge and experience of a member of the management board (in addition to the aforementioned areas, they include capital market law, understanding of the entity’s business strategy or the business plan as well as their respective implementation; risk management; effective


\(^{40}\) e.g. Delegated Regulation (EU) No. 241/2014 as amended (CRR-DR on own funds) and Delegated Regulation (EU) No. 183/2014 as amended, (“CRR-DR on credit risk”).

\(^{41}\) Since EBA takes over all existing and pending activities from CEBS (Article 8 of the EBA Regulation), the Guidelines, Recommendations and Standards issued by CEBS up until 31 December 2010 also continue to apply after 31 December 2010 and should continue to be applied by the FMA or the Oesterreichische Nationalbank (OeNB) and, where aimed at supervised institutions shall also continue to apply to them.

\(^{42}\) Since 1 January 2011, EBA has been authorised to draw up directly applicable legally binding regulatory standards and implementing standards (collectively known as Binding Technical Standards (BTS)).
governance rules (and assessing and ensuring their effectiveness), oversight and controls; interpretation of the key (financial) information and results of a credit institution, as well as applying them to identify and take appropriate measures). The knowledge and experience requirement also includes, depending on the entity’s business model and taking into consideration the competences of the person in question, the necessary (foreign) language skills. Furthermore, a demonstrative list of further skills to be considered in the assessment of suitability is contained in Annex II to the F&P-GL.

(48) Knowledge and experience shall not only be required to exist at the time of appointment, but also to continually exist throughout the entire duration of the appointment. Institutions are therefore obliged to make adequate resources available for the corresponding continuing training in the form of trainings on an ongoing basis, and the executive directors shall be personally responsible for ensuring that they always take decisions based on the latest information (see Chapter V).

(49) If a credit institution is authorised to conduct custody business (Article 1 para. 1 no. 5 BWG), and is appointed as the depositary bank for a capital investment fund as defined in the InvFG 2011, then it should also be noted that pursuant to Article 41 para. 2 InvFG 2011 (at least) two executive directors of the depositary bank are required to possess sufficient experience in relation to the type of capital investment fund for which deposits are to be taken. Furthermore, the rules set forth in Delegated Regulation (EU) 2016/438 shall also apply. Specific knowledge with regard to the settlement of securities (with regard to the investment instruments contained in the assets of the fund) and custody business are thus required, which should be backed up with the necessary proof. A comprehensive knowledge must also be held about the duties and obligations of a custodian bank in accordance with the InvFG 2011.

3. NECESSARY MANAGEMENT EXPERIENCE

(50) When assessing management experience of the potential executive director obtained in previous positions, the nature, scope and complexity of the entity as well as the duties performed there (duration of activity, the scope of the competence, powers and responsibilities held, specialist knowledge acquired as well as the number of people reporting to them) are to be considered as appropriate (for further detail, see para. 67

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43 Regardless of other foreign language skills that are required, pursuant to Art. 5 para. 1 no. 11 BWG at least one of the executive directors must have a command of the German language.

F&P-GL). The **necessary management experience** shall as a rule be deemed to exist, where the affected party was already executive director for a **corresponding timeframe** of a credit institution supervised by the FMA or the national competent authority of a state within the EEA (this also includes the ECB).

(51) For the **legal assumption of necessary knowledge and experience** in accordance with Article 5 para. 1 no. 8 BWG to be deemed to exist for the intended banking activities, the entity at which the **three years’ management activity was performed** must, in addition to its **size** (measured i.a. based on total assets, the number of branches or subsidiaries and organisational structure) and the type of business (especially in banking and financing), also be generally **comparable** in terms of the **nature, scale and complexity of business activities**. The management position must have entailed a far-reaching internal competence as well as an external power of representation, and must be suitable on the basis of its significance, performance and in particular in terms of the responsibility associated with it, to provide the necessary proof that the potential executive director is qualified to now fully manage the respective institution under their own responsibility.

(52) Should the conditions for the legal assumption not be met, then an adequate justification is necessary about why the person is nevertheless suitable. In so doing it may particularly be taken into consideration to what extent the other executive directors contribute extensive experience in the various areas and whether specific planned trainings will suffice to overcome the specific practical deficiencies. Furthermore, the specific skills and characteristics of the relevant member shall also be taken into consideration, provided they contribute towards the addressing of prevailing deficits in terms of collective suitability.

4. **ASSESSMENT OF NECESSARY KNOWLEDGE, SKILLS AND EXPERIENCE**

(53) Professional qualification and practical vocational experience will be assessed on the basis of the details given in this regard in the **curriculum vitae** as well as the other information contained in the **submitted documentation and documents** in relation to vocational experience (see the details to be submitted in relation to a first time appointment as well as details on the **Incoming Platform pursuant to Article 73 para. 1 no. 3 BWG** as well as **Annex 1**).
On the other hand, the assessment of the requirements in relation to knowledge, skills and expertise, in particular theoretical knowledge, occurs during the “Fit&Proper - Test”. The composition and thematic focus of the questions in the test is determined on a case-by-case basis (e.g. In relation to the executive director’s competence), and in accordance with the principle of proportionality, so that the nature, scale and complexity of the activities as well as the risk structure of the institution in which the function as executive director is to be performed, are duly considered. In the interests of a targeted checking of having the necessary knowledge, in addition to general questions about supervisory and company law (see above) as well as about the respective institution, in-depth specific questions shall in any case also be asked about the relevant thematic areas. Potential questions may especially be asked about the following subjects:

- **“Know your structure” principle**: i.e. Comprehensive knowledge of the structure (including the policies of the institution as well as its responsibilities) as well as the potentially arising conflicts of interest in the institution or the group of credit institutions or group of credit institutions as well as the institutional protection scheme (IPS), to which the respective institution belongs;

- **Committee structure** of the supervisory body: the nature and functioning of the committees prescribed by law for the respective institution;

- significant **rights and obligations** of the management body or the supervisory body;

- **The interaction** between the management body, internal audit function and the bank auditor; or

- between the management body and risk management (and where applicable the risk management department); or

- between the management body, fund management and risk management;

- the role of the **management body** in conjunction with the establishment of a functioning compliance function\(^{45}\) as well as with regard to the **prevention of money laundering and terrorist financing**.

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\(^{45}\) In this instance the term applies to both the BWG and the WAG “compliance function”.
D. PARTICULAR REQUIREMENTS FOR THE CHAIRPERSON OF THE SUPERVISORY BOARD

1. OVERVIEW

(54) Article 28a para. 3 no. 3 BWG explicitly requires the chairperson of the supervisory board to possess the professional qualifications and the experience necessary for performing their function (cf. Also Chapter 6 of the F&P GL). Adequate knowledge is especially required in the areas of finance and accounting with regard to banking operations, and to the level and scope that is appropriate as the chairperson of the supervisory board of a credit institution. Knowledge of banking activities or banking operations and relevant financing and accounting must - in order to be "adequate" in legal terms - always allow the chairperson to be in a position to be able to make an assessment about the business activities of the institution and the associated risks and to assess the content and meaning of financial and accounting documentation.

2. NECESSARY KNOWLEDGE

(55) Theoretical knowledge acquired through training and further education, along with practical knowledge acquired from professional activities and skills are understood as "necessary knowledge", at an appropriate level for the supervision of the institution in question. This will be based on subject-relevant university degrees and courses or external and internal trainings and relevant proof (e.g. diplomas, certificates of attendance, references etc.) are requirement to ensure that the appropriate knowledge was actually gained. In addition, the skills necessary for the performance of duties as the chairperson of the supervisory board must exist (see the demonstrative list contained in Annex II of the F&P-GL).

(56) What level of knowledge is “appropriate” or necessary is dependent in accordance with the principle of proportionality on the nature, scope and complexity of the activities, as well as the risk structure of the credit institution, in which the function as chairperson of the supervisory board is to be pursued.

In any case it is necessary to have a mastery (“knowledge and application”) of the following legal materials:

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46 The relevant theoretical and practical knowledge that is necessary for chairing of the supervisory board may also be acquired by holding the position of a non-executive director for several years in combination with self-study.
- the **central provisions** of the **Austrian Banking Act** (BWG; Bankwesengesetz) (in particular the parts covering general provisions, licencing provisions, ownership provisions and approvals, regulatory standards, due diligence obligations, provisions on risk management, on internal auditing and on the compliance function);
- **The central provisions of the Financial Markets Anti-Money Laundering Act (FM-GwG)**;
- **The central provisions of the Beneficial Owners Register Act (WiEReG)**;
- **The central provisions of the Deposit Guarantee Schemes and Investor Compensation Act (ESAEG)**;
- **The central content and regulatory areas** of the **CRR** (in particular own funds, own funds requirements, large exposures and liquidity) as well as the relevant Commission **Delegated Regulations** supplementing the CRR;
- **Other relevant provisions and content of European banking supervision law** (SSM-R, SSM Framework Regulation, CRD IV, CEBS or EBA Guidelines, Binding Technical Standards) – provided that and to the extent that these have been transposed into national law or are applicable towards supervised institutions;
- **The central provisions of the Bank Recovery and Resolution Act (BaSAG)**;
- **The central provisions of the respective special laws to the extent that they are applicable to supervised institutions** (e.g. The Savings Bank Act (BSpG), the Investment Fund Act of 2011 (InvFG 2011), the Real Estate Investment Fund Act (ImmoInvFG) or the Company Employee and Self-Employment Provisions Act (BMSVG));
- **The central provisions of the Stock Exchange Act 2018 (BörseG 2018) and the Securities Supervision Act 2018 (WAG 2018)** (dependent on the business model);
- **The material content for supervisory activities of the FMA Regulations, FMA-Circulars and FMA Minimum Standards**;
- **Basic knowledge of company law**;
- Knowledge of the institution’s **Articles of Association** and the **Rules of Procedure** of the management and supervisory bodies;
- Knowledge and comprehension of the specific relevant provisions in corporate and supervisory law with regard to the (chairperson) function of a supervisory body (e.g. with regard to **large exposures, transactions with management and related parties** and other transactions requiring the **approval of the management body in its supervisory function**; the provisions concerning **internal audit function**, their reporting obligations towards the chairperson of the management body in its supervisory function or the provisions relevant for **bank auditing**, and the relevant
reporting obligations, as well as, if applicable the regulations relating to committee structures).

3. NECESSARY EXPERIENCE

(57) In contrast to knowledge, where the emphasis is on the skills, education and theoretical knowledge acquired in this way, the "necessary experience" relates to the practical knowledge of the chairperson of the supervisory board, such as, in particular mastery of specific processes that allow him/her to challenge the decisions of the management board constructively and to supervise them effectively.

(58) In evaluating the necessary experience it is necessary to focus upon the relevant practical professional experience, which are acquired in addition to education and training in terms of "knowledge". The necessary experience shall in particular be assumed if the chairman of the supervisory board has sufficient management or control experience within the banking sector (e.g. previous or current activities as an executive director or having performed another executive activity within the banking sector). It is also possible for the necessary experience to be gained through having performed managerial activities in an entity outside the financial sector, while taking into consideration the nature, scope and complexity of the transactions and risk structure of the credit institution, in which the position of chairman of the supervisory board is to be performed.

(59) The necessary knowledge and experience shall not only be required to exist at the time of appointment, but also to continually exist throughout the entire duration of the appointment. Institutions are therefore obliged to make adequate resources available for the corresponding continuing training in the form of trainings on an ongoing basis, and the non-executive directors shall be personally responsible for ensuring that decisions are always taken based on the latest information (see Chapter V).

4. ASSESSMENT OF NECESSARY KNOWLEDGE, SKILLS AND EXPERIENCE

(60) Knowledge, skills and experience will be assessed on the basis of the details given in this regard in the curriculum vitae as well as the other information contained in the submitted documentation and documents in relation to education and training as well
as professional experience (see the details to be submitted in relation to a first time appointment as well as details on the Incoming Platform pursuant to Article 28a para. 4 BWG as well as Annex 1).

(61) On the other hand, the assessment of the requirements in relation to knowledge, skills and experience, in particular theoretical knowledge, occurs during the “Fit&Proper - Test”. The composition and thematic focus of the questions in the test is individually tailored and in accordance with the principle of proportionality, so that the nature, scope and complexity of the activities conducted, as well as the risk structure of the credit institution, in which the function in the supervisory board is being performed, are taken into account.

To ensure a targeted checking of the required knowledge, in addition to general questions on supervisory and company law (see above) other questions are also asked in greater depth about the institution in question about relevant topics. Potential questions may especially be asked about the following subjects:

- **“Know your structure” principle**: i.e. Comprehensive knowledge about the structure (including the institution’s policies and responsibilities) and the potential conflicts of interest that may arise in the institution and the group of credit institutions or groups of affiliated credit institutions as well as the institutional protection scheme (IPS) to which the respective institution (in any case) belongs;

- **Committees** of the management body in its supervisory function: the nature and functioning of the legally prescribed committees (nominations, remuneration, risk and audit committees);

- significant **rights and obligations** of the management body in its management function or in its supervisory function;

- **Interplay** of the management body in its supervisory function, the internal audit function and the bank auditor or

- of the management body in its supervisory function, fund management and risk management (division).
E. PARTICULAR REQUIREMENTS FOR NON-EXECUTIVE DIRECTORS

1. OVERVIEW

(62) Every non-executive director must have adequate knowledge, skills and experience to be able to understand the business activities of the credit institution in question including the risks associated therewith to such an extent that they are able to challenge the decisions taken by the management board constructively, to monitor them effectively and to control them. In order to collectively be able to perform this monitoring and controlling function (Article 28a para. 5 no. 3 BWG), every non-executive director must contribute basic (specialist) knowledge and the corresponding experience for all areas, including also for those where the supervisory board has a shared responsibility (see also paras. 60 and 68 F&P-GL). Basic general individual knowledge, in particular in the areas of banking operations, banking activities and law, is essential in order to be able to develop adequate comprehension of interconnections, to be able to challenge decisions by the executive directors and proposals (by executive directors, by the committees of the supervisory board etc.) both critically and objectively, and therefore to be able to actively participate in the process of arriving at and making a decision.

(63) The delegation of specific issues and duties to the competence of committees does not lead to individual members not being required to prove any basic experience, knowledge or skills. This is necessary in light of the background that the core duties not only of the supervisory board, especially the monitoring of the management board, may not be delegated to a committee, but also that the remaining members of the supervisory board are not released from the obligation to review the work of the committees and that the supervisory board in its entirety always bears ultimate responsibility for the resolutions passed in the committees.

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48 The individual member is not required to be an expert in all areas, but should far more be in the position (if necessary following consultation with experts) to evaluate the information put in front of him/her.
49 Cf. Kalss in Doralt/Nowotny/Kalss, AktG Article 92 MN 132.
2. NECESSARY KNOWLEDGE AND EXPERIENCE

(64) With regard to the increasing complexity of banking activities the members of the supervisory board must always be in a position to understand the activities conducted by the institution, to assess the risks that they pose and if need be to make changes to the management board. For this reason, in principle all non-executive directors of an institution - independent of the personal reputation that is in any case necessary - are required to possess the requisite fitness and propriety (see in particular Article 28a para. 5 no. 3 BWG).

(65) All non-executive directors having the same level of knowledge and experience as prescribed for executive directors is not a decisive requirement for fulfilling these requirements, since their role is not of a managerial nature, but is one that consists of monitoring and controlling. Basic knowledge of the applicable supervisory and regulatory rules for the institution in which they perform a supervisory function shall, however, be required in all cases as well as financial expert knowledge, as a minimum to the extent, that the person is capable of contributing towards a collective decision being made by the supervisory board as a whole in relation to the field that has been conferred upon it, namely the monitoring and controlling of the management board in conducting institution-specific banking transactions.

(66) With regard to the members of the supervisory board possessing sufficient knowledge it shall apply that such knowledge depends under principle of proportionality upon the nature, scale and complexity of the activities and the risk structure of the credit institution in which the role as a member of the supervisory board is to be performed, and that various specialist expertise and in-depth knowledge must only be required to exist in some sub-areas, especially in the case of nominations to a committee.

It is necessary that non-executive directors have basic knowledge of the following legal materials:

- the central provisions of the Austrian Banking Act (BWG; Bankwesengesetz);
- the central provisions of the Financial Markets Anti-Money Laundering Act (FM-GwG);
- the central provisions of the Beneficial Owners Register Act (WiEReG);
- the central content and regulatory areas of the CRR (in particular own funds, own funds requirements, large exposures and liquidity) as well as the relevant Commission Delegated Regulations supplementing the CRR;
the central provisions of the respective special laws to the extent that they are applicable to supervised institutions (e.g. Building Society Act (BSpG), the Investment Fund Act of 2011 (InvFG 2011), the Real Estate Investment Fund Act (ImmoInvFG) or the Company Employee and Self-Employment Provisions Act (BMSVG));

Other relevant provisions and contents of European banking supervision law (SSM-R, SSM Framework Regulation, CRD IV, CEBS or EBA Guidelines, Binding Technical Standards) – provided that and to the extent that these have been transposed into national law or are applicable towards supervised institutions;

do the central provisions of the Bank Recovery and Resolution Act (BaSAG);

do the material content for supervisory activities of the FMA Regulations, FMA-Circulars and FMA Minimum Standards;

do company law

do knowledge of the articles of association of the institution and the rules of procedure of the managerial or supervisory bodies.

(67) The necessary knowledge and experience shall not only be required to exist at the time of appointment, but also to continually exist throughout the entire duration of the appointment. Institutions are therefore obliged to make adequate resources available for the corresponding continuing training in the form of trainings on an ongoing basis, and the non-executive directors bear personal responsibility for ensuring that decisions are always reached on the basis of the latest information (see Chapter V).

3. COMMITTEES

(68) Where a legal obligation exists to establish (specialist) committees for the supervisory board (nomination committee$^{52}$, remuneration, risk and audit committee pursuant to Articles 29, 39c, 39d or 63a para. 4 BWG respectively), then irrespective of applicable special conditions for the respective (remuneration or finance respectively) experts, it should be ensured with regard to the composition of the respective committee that the committee members possess adequate in-depth (specific) knowledge as well as experience in the respective area, so that the committee as a whole has the necessary expertise required for its duties covered in an orderly manner and that the (individual) member is able to fulfil resulting obligations with appropriate due care.

$^{52}$ See MN 156ff for detailed information about the nomination committee.
Taking into consideration the size of the supervisory board, when making appointments to committees it is important to ensure that committees do not consist of the same group of members that already make up another committee and to ensure that one person is not the chairperson of all the committees.

4. PROOF AND ASSESSMENT OF NECESSARY KNOWLEDGE, SKILLS AND EXPERIENCE

Necessary knowledge, skills and experience will be assessed based on the details contained in this regard in the curriculum vitae as well as the other information contained in the submitted documentation and documents in relation to education and training as well as professional experience (see the details to be submitted in relation to a first time appointment as well as details on the Incoming Platform pursuant to Article 73 para. 1 no. 8 BWG as well as Annex 1). The necessary qualifications and experience is in particular to be assumed, if the potential non-executive director has sufficient managerial and supervisory experience in the banking sector (e.g. previous/current activities as an executive director or as chairman of the supervisory board of comparable credit institutions in terms of the nature, scope and complexity of business conducted).

Where the FMA considers it necessary for the assessment of the suitability of the persons appointed as non-executive directors, it may obtain an idea about the person in question during an interview (“Fit & Proper - Test”) (see also para. 182 F&P-GL). The composition and thematic focus of the questions in this case are individually tailored in accordance with the principle of proportionality, so that the nature, scope and complexity of the activities conducted, as well as the risk structure of the credit institution, in which the function in the supervisory board is being performed, are taken into account.

In addition to general questions about the institution in question and the applicable supervisory law (see above) to ensure that necessary knowledge is tested in a targeted manner, test questions are also asked about specific testing modules covering relevant topics. Questions that might arise, may for example cover the following areas:

- “know your structure” principle: i.e. Knowledge about the structure (including the institution’s policies, as well as the responsibilities of the risk management department, the BWG and WAG compliance functions, the AML officer and the
5. EMPLOYEE REPRESENTATIVES IN SUPERVISORY BOARDS

(72) The requirements for reputation, the necessary knowledge, skills, experience and sufficient time commitment of members of the supervisory board also apply in principle to employee representatives in supervisory boards of institutions, but in this instance are to be assessed in accordance with the Labour Relations Act (ArbVG; Arbeitsverfassungsgesetz). Article 28a para. 5 BWG therefore does not preclude the (central) works council's right to delegate such a representative pursuant to Article 110 ArbVG. In order to be able to perform their monitoring and controlling duties in the supervisory board in an orderly manner, and to always be able to reach decisions on the basis of current information, employee representatives are obliged to extend the relevant expertise during the course of their activity by means of training and educational measures. Such education and further training shall be undertaken in accordance with the principle of proportionality, and while taking into consideration (existing) individual knowledge. Training and educational courses provided by credit institutions pursuant to Article 28a para. 6 BWG shall also be available to employee representatives in supervisory board.
(73) In the notification pursuant to Article 73 para. 1 no. 8 BWG about the initial delegation of an employee representative in the supervisory board, a confirmation of suitability by the institution is not necessary; instead it shall be up to the works council, (as the body seconding the representative) to confirm the suitability of the delegated employee representative. The additional documentation to be submitted via the Incoming Platform during the notification of the first delegation to the supervisory board of the relevant credit institution are listed in Annex 1, and are the same as the documentation to be submitted together with the notification in the case of the initial appointment of other members of the supervisory board (shareholder representatives).

F. COLLECTIVE SUITABILITY

1. GENERAL

(74) All members of the management board and supervisory board shall not only on an individual basis, but also collectively, possess the necessary knowledge and experience, which is appropriate in relation to the nature, scope and complexity of business activities as well as the institution’s risk profile (cf. MN 18 et seq).

(75) When checking the collective suitability, on the one hand how the individual affects collective suitability must be checked, and on the other hand whether the management body is collectively suitable to perform its duties.

(76) The knowledge, skills and experience required for effective management or effective monitoring must reflect the composition of the management board and the supervisory board. The following areas in particular should be covered by an adequate number of members, in order to permit the corresponding discussion of the decisions to be taken:

- the business model and strategy of the institution and main risks related to it;
- each of the material fields of activity of the institution;
- relevant areas of sectoral/financial competence, including financial and capital markets, solvency and models;
- financial accounting and reporting;
- risk management, compliance and internal audit;
- information and communication technology and security (ICT);
- local, regional and global markets, where applicable;
- the legal and regulatory environment;
- managerial skills and experience;
- the ability to plan strategically;

53 See also Chapter 7 F&P-GL.
the management of (inter)national groups and risks related to group structures, where applicable.

(77) The requirements of diversity and the rules contained in the institution’s internal diversity policy are also to be taken into account in checking collective suitability (cf. MN 153)

(78) The supervisory board must collectively display all necessary specific knowledge, skills, expertise and experience in order to fulfil its duty pursuant to Article 28a para. 5 no. 3 BWG of comprehensive supervision of the management board and the risks to which the institution is exposed.

2. CHECKING OF COLLECTIVE SUITABILITY BY INSTITUTIONS

(79) The suitability matrix template contained in Annex I of the F&P GL may be used for the assessment of collective suitability of the management board or the supervisory board, and this template may be adapted in accordance with the criteria contained in Chapter 7 of the F&P-GL. Institutions may however instead develop and use their own matrix for this assessment, however in this case it is essential that the criteria depicted are taken into account accordingly in the assessment, and are adequately covered.

(80) Collective suitability is not only to be checked at the time of appointment of new executive directors or non-executive directors, but must be ensured at all times.

(81) Within a notification pursuant to Article 73 para. 1 nos. 3 and 8 and Article 28a para. 4 BWG, the member is question is to be classified with a view towards the collective suitability of the management board or the supervisory board. In the case of an ad hoc request by the FMA the suitability matrix or any other institution-specific methodology for the assessment of collective suitability must be submitted.

(82) The collective suitability is assessed based on the information contained in the suitability assessment of the individual members and by means of the information made available by the institution (using the suitability matrix template or using other institution-specific

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54 The necessary individual knowledge of the non-executive directors remain irrespective of this rule (cf. Chapter II.E.).

55 During the checking of collective suitability, the composition of the management body in its supervisory function is also to be considered with regard to it containing a sufficient number of independent members (see Chapter II.G).

56 The works council shall not be required to conduct a review of collective suitability in the case of a delegation. However, it may be taken into account in the institution’s assessment, to what extent the delegated employee representatives contribute towards the collective suitability.
methodology for the assessment of collective suitability) as well as observations during ongoing supervision. In this case, a comparison is conducted about the actual composition of the management board as well as the supervisory board and the actual collective knowledge, skills and experience against the requirements that seem necessary for the management and monitoring of the specific institution.

G. FORMALLY INDEPENDENT MEMBERS OF THE SUPERVISORY BOARD

1. OVERVIEW

(83) While the requirement of independence of mind is to be observed by all executive directors and non-executive directors at all times, Article 28a para. 5a BWG also stipulates a minimum amount of formally independent non-executive directors, with Article 28a para. 5b stipulating the relevant criteria. Therefore every institution is required to have at least one, while every institution of "significant relevance" as well as stock-exchange listed institutions are required to appoint at least two formally independent non-executive directors. The employee representatives do not count towards the number of formally independent non-executive directors.

(84) The formally independent non-executive directors are intended for ensuring effective reciprocal control in the making of decisions. In particular, this approach should prevent the dominance of individual members or groups, while also ensuring a balanced consideration of the interests of all stakeholders. In light of this, in decentralised sectors it is necessary to ensure that at least one member of the supervisory board does not have any connection to the sector. Furthermore, it is in particular the responsibility of such formally independent members, to perform the duty of all non-executive directors, namely to stimulate critical discourse with regard to important decisions and risk appetite in the institution’s supervisory committees. The observance of the legal mandate (also under company law) of the supervisory board as the institution’s internal

57 Pursuant to Article 107 para. 99 BWG, the new provisions contained in Article 28a in the version amended in Federal Law Gazette I No. 36/2018 only enter into force on 01.01.2019. Article 103w BWG states that institutions that change the personal composition from the time of the promulgation of the amendment shall be required to take the rules regarding independence into account, but that an adequate number of independent members shall have to be represented in management boards in their supervisory functions at latest as of 01.07.2019.
58 Cf. Chapter 9.3 of F&P-GL.
59 Cf. MN 102.
60 Austrian institutions that are neither stock-exchanged listed, nor of significant relevance, and which are a fully-owned subsidiary of an Austrian institution are excluded from this requirement.
61 In the case where a stake is held that is not significant, a sectoral connection is not yet to be assumed (see also MN 87).
supervisory body is thereby ensured. In order to permit an effective implementation of these objectives and to ensure an adequate flow of information, formally independent members are also represented in the risk committee in institutions of significant relevance.

(85) The formally independent members should be aware of their position and duties as well as the associated responsibility and role both in the supervisory board as a whole and in its committees.

2. INDEPENDENCE CRITERIA

(86) Any non-executive director, who is currently or was within the last five years an executive director of the relevant credit institution, shall not be considered as formally independent. Similarly, the activity for a continuous period of 12 years as executive director or non-executive director of the credit institution in question shall also lead to being classified as a non-independent member (directorship criterion). An activity as executive director (currently or within the last five years) within the group of institutions pursuant to Article 28a para. 5 no. 5 lit. a sublit. aa BWG\(^62\) shall also result in a classification as a non-independent member.\(^63\) The same shall apply for members of the senior management as defined in Article 2 no. 1b BWG (either currently or in the last three years) of the institution or the group of institutions\(^64\).

(87) A material financial or business relationship of the non-executive director to the institution also leads to the existence of dependency. Material financial and business relationships in particular include participations in the institution as well as other investments or other interdependencies\(^65\), that constitute a not insignificant beneficial interest for the member or the institution (Criterion of a material financial or business relationship). On the one hand, the ratio between the value of the relationship and the financial resources of the respective non-executive director, and on the other hand the ratio of the value of the customer relationship to the regulatory own funds of the institution are therefore decisive. Everyday banking transactions that are concluded in accordance with market conditions, as well as loans concluded at market rates, up to an amount of € 200,000.00 are not considered material. From the

\(^{62}\) See MN 106.
\(^{63}\) Cf. Article 28a para. 5b nos 1 and 10 BWG.
\(^{64}\) See MN 106.
\(^{65}\) This included for example loans, guarantees or any kind, commitment letters, suretyships and arrangements under civil law that representation an obligation to provide mutual assistance.
institution’s perspective, a business relationship is in any case to be classified as material, when its value reaches the equivalent of 1% of the institution’s eligible own funds. Where this percentage amount comes to less than €200,000.00 in value, then this amount shall apply. A business relationship may be considered as being material also for non-monetary reasons, especially in the case that it has an effect on the reputation, the financial development or the image of the contractual partner.

(88) Material financial or business relationships of a legal person to the institution affect the independence of the legal representatives of the legal person. In this way, the executive director of an undertaking that is in a material financial and business relationship with the institution is qualified as being a non-independent non-executive director. This arises from the executive director’s obligation under company law to act in the interest of the undertaking.

(89) Furthermore, a controlling shareholder pursuant to Article 22 (1) of Directive 2013/34/EU, its employees or a person who has a material business relationship to the controlling shareholder are also considered to be non-independent persons (Criteria of the controlling shareholder).

(90) Furthermore, employees of the credit institution or an undertaking within the group of institutions, to which the institution belongs, are not qualified as being independent. Excluded from these criteria are employee representatives, provided that they do not perform any executive functions or management activities and are not directly responsible and accountable to the management board with regard to everyday business (senior management as defined in Article 2 no. 1b BWG) (Criteria of the employee). Employee representatives may be considered as independent non-executive directors, provided no other circumstances exist that are detrimental to independence as defined in Article 28a para. 5 BWG. However, they do not count as such for reaching the necessary number of independent members, since they constitute a separate category of non-executive directors. By way of derogation from this provision, they do qualify as independent members in the committees, provided no other circumstances exist, that preclude independence as defined in Article 28a para. 5 BWG.

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66 The term Angestellter (employee) is not to be understood as defined in the Employees’ Act (Angestelltengesetz) or in Article 36 ArbVG. It covers all persons who are allocated to the controlling shareholder, especially its executive directors.

67 See MN 87f about material business relationships.

68 See MN 106.
(91) Anyone who has been the institution’s bank auditor 69 within the last three years or was for another member of the group of institutions, or who signed the audit opinion during this period of time, shall be considered to not be independent. All advisers – especially attorneys, external auditors, tax accountants and business consultants as well as the owners and external auditors of such consultancy firms and practices – who have been active to a material extent within the last three years for the institution or another member of the group of institutions are also deemed to be non-independent (Criteria of the adviser). A material extent does not already exist due to a temporary one-off activity (e.g. One-off representative in a legal matter in court), but instead there must be advice provided on multiple occasions (e.g. representation on a regular basis) or a one-off activity of a considerable scale (e.g. Advising on or conducting of restructurings, takeovers). Independence is no longer deemed to exist in particular in the case of where advice is provided, especially in the drawing-up or design of strategies or internal guidelines or with regard to the risk appetite.

(92) In addition, those persons, who are currently or who were material contractual partners of the institution or another member of the same group of institutions within the past year, as well as persons who have a material business relationship to such a contractual partner, are to be qualified as being non-independent (Criteria of the material contractual partner). This provision in particular covered persons in managerial functions of the material contractual party (cf. MN 91 lit. h of the F&P-GL and the explanatory remarks about Article 28a para. 5b BWG supplements to the stenographic protocols of the National Council (BlgNR) 106, 26th Legislative Period). A contractual partner may be classified as material for monetary (e.g. High level of deposits, high level of interest payments, other financial liabilities or substantial bank guarantee contracts) as well as for non-monetary reasons (publicity value or networking). Material contractual partnership may also arise on the basis of sectoral contractual relations 70.

(93) If a non-executive director receives additional payments in addition to their remuneration for their activity in the supervisory board from other material financial or business relationships to the institution or to another member of the group of institutions of a substantial amount or other material benefits, then they shall also be

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69 Pursuant to Article 61 bank auditors are considered to be the certified external auditors or external auditing companies appointed as external auditors of financial statements as well as auditing bodies (auditors, auditing unit of the Savings Bank Auditing Association) from legally competent auditing organisations. With regard to external auditing companies, all persons named in relation to the auditing of the respective institution shall not be considered as being independent non-executive directors.

70 IPS membership contracts fall under such sectoral relations.
considered non-independent. Payments shall be considered material, when they amount to (at least) 15% of the total annual gross income of the respective non-executive director. Where the actual equivalent value of another benefit corresponds to (at least) 15% of the total annual gross income of the respective non-executive director, or is to be assumed to be of such significance for the member that independent behaviour of the non-executive director would no longer be expected, then that person shall not be counted towards the number of independent members.\(^{71}\)

(94) In addition to financial and business connections, the criteria of independence also cover personal interdependencies. Spouses, partners\(^ {72}\), children, adopted children or foster children of executive directors or one of the persons named in MNs 86 to 93 do not qualify as independent members.

(95) Article 28a para. 5c BWG stipulates that at least one non-executive director must unconditionally fulfil all independence criteria. Where institutions are required to name further independent members, then the independence criteria are to be seen in the assessment of such additional members as a refutable presumption. If one of the situations described is fulfilled, then this member shall then be considered independent, if the credit institution proves that independence nevertheless exists. The argumentation must present in detail why the ability of reaching an objective and balanced verdict and taking decisions independently exists, while considering the interests of all stakeholders (the rationale listed in MN 84 is to be fulfilled).

3. FORMALLY INDEPENDENT MEMBERS OF THE COMMITTEES OF THE SUPERVISORY BOARD

(96) At least two independent members must be represented\(^ {73}\) in the risk committee, with the chairperson of the risk committee in all institutions being required to fulfil the criteria on independence set out in Article 28a para. 5b BWG. Furthermore, Article 39d para. 5 BWG also stipulates that in the case of credit institutions that have been classified as being systemically important pursuant to Article 23b and Article 23c BWG\(^ {74}\), the

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\(^{71}\) Where an employee representative is concerned, then their remuneration as an employee shall not be considered as material as defined in Article 28a para. 5b no. 9 BWG.

\(^{72}\) Partners as defined in Article 72 para. 2 StGB are persons living with one another in a domestic relationship; children and grandchildren of one of the domestic partners are treated as relatives of either partner.

\(^{73}\) Cf. Chapter 5.2 of the IG-GL and Chapter 9.3 of the F&P-GL. The legislator has defined the term “an adequate number” as being “at least two members” in Article 28a para. 5a BWG.

\(^{74}\) With regard to systemically important institutions cf. Article 7b of the Regulation of the Financial Market Authority (FMA) on the setting and recognition of the countercyclical capital buffer rate, on the setting of the systemic risk
majority of the members and the chairperson of the risk committee must be independent.\textsuperscript{75}

(97) The certificate and duty to cooperate (see MN 39-42) is extended to also cover information about independence.

H. SUFFICIENT TIME COMMITMENT OF EXECUTIVE DIRECTORS AND NON-EXECUTIVE DIRECTORS

1. QUALITATIVE ASSESSMENT

(98) An orderly, conscientious and dutiful management of the institution's business, in addition to the dutiful and orderly performance of monitoring and controlling duties also requires sufficient time commitment of the persons appointed as executive directors (Article 5 para. 1 no. 9a BWG) or non-executive directors (Article 28a para. 5 no. 5 BWG). As a basic rule, executive directors and non-executive directors are expected to dedicate sufficient time to the performance of the tasks conferred upon them in the institution (see also Chapter 4 F&P-GL). In so doing, executive directors and non-executive directors in the case of their performing several executive or non-executive activities have to take the circumstances into account in the specific case in hand and with regard to the nature, scope and complexity of business conducted as well as the institution's risk structure.\textsuperscript{76}

(99) Furthermore an additional commitment based on specific circumstances (for example: a merger, takeover or the acquisition of an undertaking (or parts thereof) or restructurings, as well as also in the case of the absence of a member for a longer period of time) as well as training and courses (see Chapter V) are also to be included in the calculation.

(100) The following criteria in particular are to be taken into account within the assessment\textsuperscript{77}:

\textsuperscript{75} Cf. AB 136 supplements to the stenographic protocols of the National Council (BlgNR) 26th Legislative Period.

\textsuperscript{76} Articles 5 para. 1 no. 9a or 28a para. 5 no. 5 BWG uses the term "activities" (Tätigkeiten); whereas in the material accompanying the legal text (Explanations in relation to Government Bill (ErlRV) 2438 in the supplements to the stenographic protocols of the National Council (BlgNR) no. 17 for the 24th legislative period (XXIV. GP) as well as in Article 91 (3) CRD IV the term "directorships" (Mandate) is used. In both cases the provisions address the fulfilment of roles within the management and supervisor bodies. The terms "duties" and "directorships" are therefore used synonymously in this circular.

\textsuperscript{77} Cf. also para. 43 of the F&P-GL.
the number of directorships that the person holds, that he/she holds concurrently in financial companies as well as non-financial undertakings as well as directorships of organisations that do not predominantly pursue commercial objectives;

- the nature, scope and complexity of the activities of the undertaking and the nature of the specific position as well as the responsibilities of the member including the performance of a certain functions (e.g. activities as the chairperson or as a member of a committee);
- the number of meetings (both meetings of the management body and its committees as well as meetings of the management body with persons from within the institutions as well as external persons);
- the member’s usual place of residence and the travel time required for the role;
- other external professional or political activities;
- necessary induction and training;
- any other relevant duties of the member that institutions consider to be necessary to take into account when carrying out the assessment of sufficient time commitment of a member; and
- As applicable available relevant benchmarking on time commitment, (e.g. the benchmarking provided by the EBA78).

(101) This requirement applies for executive directors and non-executive directors (or for members of the competent supervisory board, whether appointed in accordance with the law or the statutes) of all institutions.

2. LIMIT ON DIRECTORSHIPS

(102) For executive directors and non-executive directors of credit institutions “of significant relevance” Articles 5 para. 1 no. 9a or Article 28a para. 5 no. 5 (the third sentence of each respective case) BWG also defines, in addition to the general requirement of always having sufficient time for the performance of their duties in the institution, quantitative limits on the number of directorships regarding their activities in executive functions or as non-executive directors (‘limit on the number of directorships’). In total, in accordance with this provision, one activity in an executive function (Article 5 para. 1 no. 9a BWG) may be performed in combination with up to two non-executive directorships or – provided that the person in question does not perform any activity in an executive function – a maximum total of four activities as a non-executive director (Article 28a para. 5 no. 5 BWG). Pursuant to Article 5 para. 4 BWG a credit institution shall be considered as being of significant relevance, where its total assets on average as of the respective reporting dates of the last three concluded

78 Cf. MN. 43 F&P-GL.
financial years reaches or has exceeded Euro 5 billion.\(^79\) In any case, the following shall be considered to be credit institutions of significant relevance:

- credit institutions, which are not "less significant institutions" pursuant to Article 6(4) of Regulation (EU) No. 1024/2013 ("SSM-R"), or in the case of a significant supervised group pursuant to Article 2 no.22 of Regulation (EU) No 468/2014 ("SSM Framework Regulation") only the consolidating credit institution pursuant to Part One of the CRR, or
- credit institutions that have been classified by the FMA pursuant to Article 23b BWG as Global Systemically Important Institutions (G-SIIs) or pursuant to Article 23c BWG as Systemically Important Institutions (SIIs).

(103) Someone is active in an "executive function", if they are empowered under law, articles of association/statutes/memorandum of association to manage the business as well as acting as the legal representation of the organisation. In the case of a companies with a legal form of a limited liability company (GmbH), ordinary partnership (OG) or limited partnership (KG) the director(-shareholder); in the case of an joint stock company (AG), savings bank (Sparkasse), foundation (Stiftung) or an association (Verein) the management body; in the case of a credit cooperative the persons named as executive directors entrusted with executive functions in accordance with Article 2 no 1 lit. b BWG\(^80\); on the case of (another kind of) a cooperative society and a monistic Societas Europaea (SE) then in the assessment of the existence of an “executive function” then both the law as well as the articles of association shall be applied.

(104) Activities as a "non-executive director" are understood to mean all monitoring activities in supervisory bodies in accordance with laws and statutes (e.g. also in the supervisory body of a savings bank (Sparkassenrat)), but not in the advisory board (Beirat) of a cooperative society, joint stock company or a foundation, with it being irrelevant whether the appointment had been made by election, delegation or by legal appointment.

(105) Only temporarily performed executive functions, such as e.g. those of liquidator or the court commissioner, as are mainly performed by lawyers or external auditors, are not to be considered for the purpose of the limits of directorships held, but are, however, to be taken into consideration within the overall assessment.

\(^79\) When determining the total assets, in the case of groups of credit institutions, the financial statement on an individual basis shall be considered authoritative.

\(^80\) They may, but are not necessarily required to belong to the management body; voluntary members of the management body are not considered as executive directors as per the definition in the BWG, and are therefore also not active in an executive capacity with regard to the limitations on directorships held.
3. PRIVILEGES

(106) When calculating the maximum permissible number of directorships, the listed activities below in an executive function or as a numerator (hereinafter: activities): count in total as only one activity:

- Activities within the same group of institutions consisting of the EU parent institution, its subsidiaries and the institution's own subsidiaries or other undertakings that belong to the same group of credit institutions, provided that all of the aforementioned are including in supervision on a consolidated basis or are subject to supplementary supervision pursuant to Article 6 para. 1 FKG (“privilege for groups of institutions” pursuant to Article 5 para. 1 no. 9a lit. a sublit. aa or Article 28a para. 5 no. 5 lit. a sublit. aa BWG);81

- Activities within an “other kind of group” consisting of associated undertakings pursuant to Article 189a no. 8 UGB, Article 245a UGB or Article 15 AktG (“privilege for other groups” pursuant to Article 5 para. 1 no. 9a lit. a sublit. bb or Article 28a para. 5 no. 5 lit. a sublit. bb BWG);

- Activities in members of the same institutional protection scheme (IPS) pursuant to Article 113 (7) CRR (“IPS privilege” pursuant to Article 5 para. 1 no. 9a lit. b or Article 28a para. 5 no. 5 lit. b BWG) – the term “members” also covers the associated organisations that are also consolidated within the respective IPS in addition to credit institutions. A prerequisite for the fiction of the existence of only one activity is however the membership of one and the same IPS due to the clear wording of lit. b;

- All activities in undertakings within and outside of the financial sector, in which the credit institution holds a qualifying holding pursuant to Article 4 (1) (36) of Regulation (EU) No. 575/2013 (“privilege of participation” pursuant to Article 5 para. 1 no. 9a lit. c or Article 28a para. 5 no. 5 lit. c BWG) are counted as one further, additional directorship to the directorship held in the institution. Directorships in undertakings in which qualifying holdings are held by undertakings belonging to the group, shall be considered as a further directorship in addition to the directorship arising from the group83. Consequently, the directorships within the members of the group shall be counted as one directorship and those within the qualifying holding as a second additional directorship.

(107) Where directorships are held in different groups or institutions, then also directorship that are held within the same IPS are counted as one directorship. Where the application of the IPS privilege leads to a high number of directorships being counted than the application of the group privilege, then the lower number shall take priority.84

81 Pursuant to Article 30a para. 12 BWG Article 5 para. 1 no. 9a and Article 28a leg. cit. shall apply to an affiliation of credit institutions with the proviso, that the central body shall be considered as the superordinate institution and the affiliation of credit institutions as a group of credit institutions.
82 One directorship is therefore to be counted for the activity in the institution and an additional one for all directorships in the qualifying holdings that are held by the institution.
83 Cf. MN. 54 F&P-GL.
84 Cf. MN. 55 F&P-GL.
For the calculation of the upper limits of the number of permissible activities, this means the following: If the activities counted together pursuant to Article 5 para. 1 no. 9a lits. a to c or Article 28a para. 5 no. 5 lits. a to c BWG – in applying the aforementioned calculation rules – (along with activities as non-executive directors) also cover activities in executive functions, then such activities shall be counted in total as an activity in an executive function. When the activities that are counted together only cover activities as a non-executive director, then such activities shall be counted in total as a single activity as a non-executive director.

If the person in question is active in several associated credit institutions pursuant to Article 5 para. 1 no. 9a lits. a to c or Article 28a para. 5 no. 5 lits. a bis c BWG in an executive function or as a non-executive director (for example in both the parent and subsidiary institutions), then the “bird’s eye view” consideration is decisive: if depending on the perspective from which institution making the notification is considered to several different results regarding the directorships to be counted together, then the result shall apply for holder of the directorships in question that allows him/her to comply (most likely) with the legal provisions.

When calculating the limits on directorships activities in organisations that do not predominantly pursue commercial objectives, are not to be included (Article 5 para. 1 no 9a or Article 28a para. 5 no. 5 BWG fifth sentence respectively). For the interpretation of these exceptional provisions, in the first instance the term of having a commercial nature of Article 1 para. 1 BWG in conjunction with Article 2 para. 1 of the Value Added Tax Act (UStG; Umsatzsteuergesetz); the emphasis, however, lies on whether predominantly commercial objectives are pursued. Such organisations should in particular be excluded from the limits on mandates, that do not pursue profit-oriented aims, but which instead pursue non-for-profit, charitable or generally ideal acts (and which therefore do not have predominantly commercial objectives).

Examples of organisations that do not predominantly pursue commercial objectives (in the form of a demonstrative list), would accordingly be:

- **Associations** in accordance with the Associations Act 2002 (VerG 2002),
- **Communities for land reform and trustees of a residential estate** (Article 5 no. 5 Corporation Tax Act 1988 (KStG 1988 - Körperschaftsteuergesetz 1988), provided that

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85 Cf. MN. 50 F&P-GL.
86 By contrast associations for profit established under the 1852 Patent on Associations (Vereinspatent 1852), mutual insurance associations and pawn-broking institutions are assumed to predominantly pursue commercial aims.
they do not conduct any operating activities, extending beyond the scope of auxiliary (agriculture and forestry) operations or the leasing of operations;

- **Professional associations empowered to negotiate collective labour agreements** as defined in Article 4 para. 2 ArbVG or professional and advocacy groups (Article 5 no. 13 KStG 1988), provided that they do not conduct commercial activities (such as operations of a commercial nature);

- **Certain agricultural cooperatives** as defined in Article 5 no 9 KStG, namely on the one hand agricultural usage cooperatives, the purpose of which and their actual business operations is restricted to the communal use of farming and forestry plants or equipment by their members (e.g. Cooperative societies for breeding, pasturing and machinery) as well as wine-growing cooperatives, whose actual business operations are limited to the processing and using of agricultural products produced by the members themselves, provided that processing and using falls within the scope of agriculture;

- Corporations, associations of persons or pooled assets for the promotion of not-for-profit, charitable or religious purposes as defined in Article 34 et seq. of the Austrian Fiscal Code (BAO).

- **Statutory not-for-profit organisations** (e.g. Foundations for not-for-profit purposes as defined in the Federal Act on Foundations and Funds (BSStFG) or housing associations in the public interest as defined in the Limited Profit Housing Act (WGG));

- **certain corporations under public law**, provided that in their operations of a commercial nature they are not active in ones listed in Article 2 KStG or in agricultural or forestry operations;

- **Holding companies for participations** (holdings for the purpose of managing assets), provided that they are not active in a commercial manner over and above the duty of managing their own (participation) assets by trading of shares or providing economically valuable services of an administrative, financial, commercial or technical nature to their subsidiaries, or perform managerial and steering duties for the affiliation of undertakings or in other ways;

- uniform deposit guarantee system pursuant to Article 1 para. 1 ESAEG

- **(Private) foundations**, provided that any commercial activity does not extend beyond a purely ancillary activity.

(112) Whether an organisation predominantly pursues commercial objectives or not must always be assessed on the basis of the specific circumstances of the individual case in hand as part of an overall assessment.

(113) Activities in executive functions at organisations whose entire or majority of shares or voting rights are directly or indirectly held by the Republic of Austria and for whom the European Commission has approved a resolution or restructuring plan in accordance

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87 Deposit Guarantee Schemes and Investor Compensation Act (ESAEG; Einlagensicherungs- und Anlegerentschädigungsgesetz)
with the EU rules and decisions on government aid pursuant to Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU)\textsuperscript{88} shall not be included in the calculation pursuant to the third sentence of Article 5 para. 1 no. 9a third sentence shall be excluded (Article 103q no. 10a BWG). Activities as non-executive directors as representatives of the Republic of Austria shall also not be taken into account in calculating the number of directorships (third and fifth sentence of Article 28a para. 5 no. 5 BWG).

4. GRANDFATHERING CLAUSE FOR EXISTING DIRECTORSHIPS

(114) The transitional provisions in Article 103q nos. 10 and 15 BWG set a grandfathering provision for those activities as a non-executive director which were already being conducted on 31.12.2013 ("existing directorships"). While existing directorships are to also be counted in the counting of directorships, where they exceed the maximum number of permitted directorships, they are not required to be ‘reduced’. Such directorships may also be extended by reappointment, unless so doing leads to the limit on concurrently held directorships being exceeded, since directorships extended by reappointment after 31.12.2013 are to be counted fully from 1.7.2014 (when the limits on concurrent directorships entered into force). The grandfathering clause for existing directorships therefore ends with the first reappointment after 31.12.2013.

(115) By means on an explicit legal order, the grandfathering clause shall not apply for executive directors or non-executive directors of credit institutions about whom on the basis of an assessment by the FMA pursuant to Article 22 para. 3 BWG on an individual basis a systemic risk pursuant to Article 22 para. 2 BWG may be assumed (Article 103q nos. 10 and 15 BWG, second sentence in both cases).

5. APPROVAL OF AN ADDITIONAL NON-EXECUTIVE DIRECTORSHIP

(116) The FMA may, upon application by the notifying institution, approve the exceeding of the limits on directorships by one activity as a non-executive director (Article 5 para. 1 no. 9a and Article 28a para. 5 no. 5 BWG; penultimate sentence respectively). It

shall only be possible to take up the additional directorship once the approval has been granted by the FMA.

(117) In so doing, the circumstances in the specific case in hand, such as the extent to which the person in question makes use of privileges, exceptions and transitional provisions, as well as the nature, scale and complexity of the activities of the credit institution and its financial situation are to be taken into consideration. In any case the assessment is always focussed on the purpose of the legal limits, to ensure in the event that multiple directorships are held that sufficient time is always available for ensuring the diligent and orderly fulfilment of tasks in the credit institution. Therefore, in particular the documentation listed in the Annex is to be submitted with the application that prove sufficient time commitment as well as independence of mind (especially the non-existence of conflicts of interest). The FMA shall inform the EBA of such approvals on a regular basis (Article 5 para. 1 no. 9a and Article 28a para. 5 no. 5 BWG, final sentence respectively).

6. MAIN PROFESSION OF EXECUTIVE DIRECTORS

(118) In order to avoid any potential conflicts of interest, and to ensure the necessary time resources of the orderly performance of duties as an executive director, Article 5 para. 1 no 13 BWG more precisely defines for executive directors that they are not allowed to perform any other main profession outside of the financial sector (either outside the banking industry or outside of insurance undertakings, Pensionskassen, payment institutions, electronic money institutions, investment firms or investment services providers). Consequently it is possible to ensure that the activity as executive director of an institution is not performed only on a part-time basis. In determining that the activity is the person’s main profession, in addition to the necessary salary for covering lifestyle needs it is also necessary to primarily focus on the necessary time commitment. On the other hand, it is irrelevant under which legal basis the main profession is performed.

(119) Even when no main professional activity exists outside the financial sector, executive directors have in any case to observe the fundamental rule and when performing other activities to take into account the circumstances in the particular case in hand and the

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89 Cf. Chapter II.B.4
nature, scope and complexity of the business conducted as well as the institution’s risk structure.\textsuperscript{90}

7. CHECKING OF SUFFICIENT TIME COMMITMENT

(120) Sufficient time commitment of the (potential) executive directors and non-executive directors is primarily checked on the basis of a qualified \textit{self-assessment} including a \textit{sworn declaration} from the person in question, that \textbf{sufficient time is available and that sufficient time can be dedicated}, in order to perform the executive or non-executive function in an orderly manner and with the necessary diligence. The observance of the limit on number of directorships held for credit institutions of significant relevance is primarily assessed on the basis of the information supplied in the notification of the appointment/naming of the executive directors or non-executive directors (Article 73 para. 1 no. 3, Article 28a para. 4 or Article 73 para. 1 para. 8 BWG) (see the information on the \textit{Incoming Platform} as well as Annex 1\textsuperscript{91}).

(121) Credit institutions of significant relevance as defined in Article 5 para. 4 BWG shall check the number of directorships concurrently held by executive directors and non-executive directors that they have (re-)appointed at the time of their appointment, and shall ensure by means of \textit{appropriate procedures} that the statutory limits on concurrent mandates are constantly observed; they shall notify the FMA about any changes that (may) lead to the suitability requirements stipulated in Article 5 para. 1 no. 9a or Article 28a para. 5 no. 5 BWG ceasing to exist \textit{without delay} (Article 73 para. 1 no 3 or no. 8 BWG).

\textsuperscript{90} In order to assure proper business management and representation of institutions in Austria, the BWG also states that at least one executive director must have the \textit{centre of his/her vital interests in Austria} (§ 5 Abs. 1 Z 10 BWG), so that they are easily contactable for the supervisor (explanatory remarks of the government bill, 1130 BlgNR 18th legislative period 118).

\textsuperscript{91} There is a separate form on the Incoming Platform for institutions that fall under the direct supervision of the ECB.
III. REQUIREMENTS FOR KEY FUNCTION HOLDERS

(122) The F&P GL also contain personal requirements for key function holders, consisting of the staff members of an institution, who above all in light of their position exercise a material influence on the business activity of the institution, however without (formally) being members of the management body in its management function or supervisory function (executive director or non-executive director respectively). Members of the “senior management” as defined in Article 2 no. 1b BWG as a rule perform key functions, since they by definition perform managerial duties in an institution or executive duties and are responsible and accountable towards the management body in its management function for day-to-day business.

(123) In addition to the heads of the internal control functions (see MN 129 ff), the heads of significant business lines or divisions, the directors of significant branches as defined in Article 18 BWG and subsidiaries that belong to the group also qualify as key function holders. Key function holders are primarily to be identified by the institutions themselves and their suitability assessed pursuant to the bank’s internal guidelines (see Chapter VI) for the appointment and succession of persons with key functions.

(124) They must possess the requisite personal reputation and must hold suitable professional qualifications and possess sufficient experience taking adequately into account the nature, scope and complexity of the business of the institution as well as the competences of the relevant position (cf. Above all Chapter 5 F&P GL). This should be taken into consideration, both at the time of their appointment as well as during ongoing controlling. Key function holders may also be invited to the FMA for “Fit&Proper tests” (cf. MN 183 F&P-GL).

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92 With regard to the anti-money laundering officer (AML officer), please refer to the FMA Circular on internal organisation for the prevention of Money Laundering and Terrorist Financing.
93 The persons who are primarily responsible for internal control functions are “key function holders”, please see Chapter IV for the specific rules.
94 See also Chapter 6.1.2. of the FMA’s WAG 2018 Organisational Circular
IV. REQUIREMENTS FOR THE HEADS OF INTERNAL CONTROL FUNCTIONS

A. OVERVIEW

(125) Articles 39 and 42 BWG contain regulations for the establishment of internal control function in an institution and the requirements for the heads of such functions. In addition to the corresponding organisational provisions and general requirements for staff members of the internal control functions, the heads of the internal control functions shall also be required to have adequate suitability, that is to be measured in terms of their honesty, propriety and independence of mind as well as the existence of sufficient theoretical (necessary expertise) and practical (experience in banking) knowledge. For the heads of the compliance function in accordance with Delegated Regulation (EU) 2017/565 and the Securities Supervision Act 2018 (WAG 2018) we refer to the requirements for expertise stated in the FMA Circular on WAG 2018 Organisation.

1. FORMAL REQUIREMENTS

(126) The heads of the internal control functions are to be place at an appropriate hierarchical level, so that their competence comes with sufficient powers and the corresponding gravitas, and the direct access to and direct reporting to the executive directors is ensured. Furthermore, the independence of the internal control functions must also be guaranteed. For this purpose the corresponding organisational precautions are to be taken that ensure that the internal control functions are not subordinate to a person who bears that responsibility for the performance of activities that the internal control function monitors and controls. Furthermore the staff members of the internal control function shall not be allowed to be perform any operative activities, that fall in a scope of activity, which is monitored and controlled by the internal control function itself (prohibition of self-control). Documented processes are to be defined by the institution for the filling of the position of the heads of the internal control functions. The heads of the internal control function shall not only be required to be adequately qualified at the time of their appointment, but shall also be required to keep such qualifications up-to-date on an ongoing basis. Access to further training is therefore to be ensured.
2. ASSESSMENT OF TECHNICAL SUITABILITY

(127) Special requirements exist for the qualification of the heads of the internal control functions. The required expertise and experience in banks covers the necessary theoretical knowledge acquired by attending relevant education and training and the practical knowledge acquired during professional activities that are necessary for the performance of the activity of the respective internal control function. This will be presumed on the basis of completing university degrees and courses that are relevant to the subject or external and internal trainings and relevant proof (e.g. diplomas, certificates of attendance, and references etc.) are required to ensure that the appropriate knowledge was actually gained. The material requirements for the professional qualification of the heads of the internal control functions vary depending on the respective area of competence. The specific requirements are explained in greater detail under the respective internal control function.

(128) Regarding the assessment of prior experience in banking, the nature, scope and complexity of the undertaking as well as the duties that are specifically undertaken (duration of activity, scope of the competence held, powers and responsibilities, expert knowledge acquired) must be taken into account.

3. CHECKING OF TECHNICAL SUITABILITY

(129) Fitness and propriety is generally assessed on the basis of the necessary information in the applicant’s curriculum vitae as well as other information contained in the submitted documentation and documents regarding education and training and professional experience. It is especially to be assumed that the person possesses the necessary fitness and propriety, in the case that they were already active in the banking industry in a comparable position on a not merely sporadic basis.

4. HONESTY, PROPRIETY AND INDEPENDENCE OF MIND

(130) Irrespective of the nature, scale and complexity of the activities that the institution performs, the heads of the internal control functions must at all times act with propriety, honesty and independence of mind. The propriety, honesty and independence of mind of heads of the internal control functions shall be measured against the same benchmark as in the case of executive directors (see Article 39 para. 5 last sentence, Article 39 para. 6 no. 3 and Article 42 para. 1 last sentence BWG in conjunction with
Article 5 para. 1 nos. 6 and 7 BWG). At this juncture it is necessary to refer to the explanations contained in Chapter II C., which apply accordingly for the heads of internal control functions.

5. CHECKING AND CERTIFICATION AND DUTY TO COOPERATE

(131) The assessment of honesty, independence of mind as well as propriety, the information sources listed in MN 38 are applied. In addition, the heads of internal control functions may also be requested to attend “Fit&Proper - Tests” at the FMA.

(132) Refer to MN 39 et seq., which also apply accordingly in regard to the duty to cooperate, the disclosure and information requirements of the institution as well as the persons in question.

B. HEAD OF THE RISK MANAGEMENT DEPARTMENT

1. OVERVIEW

(133) The head of the risk management function is responsible for ensuring that comprehensive and comprehensible information on risks are made available. He/she has to advise the management body in such a way that it is able to understand the overall risk profile of the institution.

(134) In institutions of “significant relevance” there is a separate organisational unit entrusted with risk management duties that reports directly to the management body, with a dedicated manager to be appointed especially for the role as the head of the risk management department.

(135) At the request of a credit institution, the FMA may authorise that another manager in the institution performs this function, where the nature, scale and complexity of the activities of the institution would not justify the appointment of a person solely for this purpose, and where no conflict of interest exists. As result, when making the application it is necessary to state why the combination of this position with another position is proportionate. Furthermore it is necessary to prove that there is a lack of conflicts of interest and that adequate resources exist. In cases in which the Chief Risk

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95 The risk management department (“second line of defence”) must be strictly separated from the front office areas (“first line of defence”).
Officer (CRO) is the Head of the Risk Management Department, there is no obligation to seek approval as defined in Article 39 para. 5 BWG.

2. TECHNICAL SUITABILITY

(136) Head of the risk management function must be in a position to challenge decisions, which relate to the institution’s risk exposure taken by the executive directors.

(137) The assessment of expertise takes into account the specific role, responsibility and the specific duties of the risk management department. Knowledge and therefore in-depth knowledge are to above all be proven for the orderly performance of the following responsibilities and duties:

- Knowledge about risk management processes and procedures as well as markets and products and the detection and measuring of the manifestation of risks;
- Reporting of risks and the risk situation to the executive directors as well as proposing measures to be taken;
- Participation in defining the credit institution’s risk strategy and in all important decisions relating to risk management;
- A complete overview of the manifestation of existing types of risk and of the credit institution’s risk situation.

C. HEAD OF THE BWG COMPLIANCE FUNCTION

1. OVERVIEW

(138) The BWG Compliance Function pursuant to Article 39 para. 6 no. 2 BWG has the duty, under the management of the person to be appointed pursuant to Article 39 para. 6 no. 3 BWG, the constant monitoring and regular assessment of the appropriateness and effectiveness of policies and procedures pursuant to Article 39 para. 6 no. 1 BWG as well as the measures that must be undertaken to correct any deficiencies that arise. Furthermore the management body is to be advised accordingly in this regard.\(^{96}\)

\(^{96}\) In relation to the organisational requirements for the compliance function as well as the necessary expertise for WAG Compliance Officers, we refer to Article 29 WAG 2018 in conjunction with Articles 21 and 22 of Delegated Regulation (EU) 2017/565 as well as the FMA Circular regarding the organisational requirements of the Securities
Pursuant to Article 39 para. 6 no. 2 BWG, credit institutions of “significant relevance” are required to establish a permanent, effective and independently working BWG compliance function reporting directly to the management body.\(^\text{97}\)

The Head of the Compliance Function may be performed by another manager in the institution.\(^\text{98}\) In the course of the notification it is however necessary to prove that there is a lack of conflicts of interest and that adequate resources\(^\text{99}\) exist.

2. PROFESSIONAL QUALIFICATION

The assessment about having the specialist knowledge and experience in the banking industry should take place in taking into consideration the specific duties and responsibility of the BWG compliance function as well as their role in the company. A mastery of the relevant laws (for the respective institution) listed in Article 69 para. 1 BWG required for the performance of responsibilities and duties is a pre-requisite.\(^\text{100}\).

D. HEAD OF THE INTERNAL AUDIT FUNCTION

1. PROFESSIONAL QUALIFICATION

In addition to the general requirements of knowledge and experience, the head of the internal audit function shall be required to possess the following in-depth knowledge to be able to perform the following competences and duties:

- Checking of the compliance of all activities and units of an institution with the institution's policies and procedures as well as external requirements (such as specific relevant legal standards of the legal materials relating to banking, especially legal standards regarding internal governance, formal and material propriety of accounting, in particular valuation, and the relevant areas listed in Chapter II C);
- Responsibility for the drawing-up of an inspection/internal audit plan;
- The internal audit function must comply with national and international professional standards, for example the standards issued by the Institute of Internal Auditors (IIA).

\(^{97}\) See the explanatory remarks on item 106 BglNR of the 26th legislative period about Article 39 paras. 5 and 6 BWG.

\(^{98}\) With regard to the requirements about the independence of the Compliance Function and the compatibility of functions in accordance with WAG 2018 in conjunction with the Delegated Regulation, please consult Chapter 6.2. et seq. of the WAG 2018 Organisational Circular.

\(^{99}\) It is especially important to ensure that there is a separation of the BWG Compliance Function, as an internal control function (“Second Line of Defence”) from the activities that are to be assign to Front Office.

\(^{100}\) With regard to the Duties of the compliance function in accordance with WAG 2018 in conjunction with the delegated Regulation, please consult Chapter 6.3. et seq. of the WAG 2018 Organisational Circular.
2. HONESTY, PROPRIETY AND INDEPENDENCE OF MIND

(143) In addition to the general rules on honesty, propriety and independence of mind (cf. Chapter II B.) the BWG also prescribes specific, additional criteria for the honest, proper and independent of mind performance of the activities of the internal audit function.

(144) The staff members in the internal audit function are allowed to only be exclusively active in the internal audit function of the credit institution that they audit, and have such duties entrusted upon them. It is therefore not permissible under any circumstances to combine this function with other functions (also was other internal control functions).

(145) Additionally it is necessary to advise about the following circumstances, the existence of which place the ability to objectively perform the duties of the head of the internal audit function, and therefore independence of mind and/or orderly financial circumstances in doubt:

- The person in question has also been concurrently appointed as the bank auditor of the same credit institution, or by virtue of their activity in the internal audit function thereby satisfies one of the reasons for exclusion as bank auditor of the credit institution listed in Article 62 nos. 6, 12 and 13 BWG.
- The performance of the audit engagements in one year does not generally preclude taking up a role as an internal auditor for the immediately following year. In so doing, it should be ensured that the responsible person, within the scope of their audit activities as an internal auditor, does not audit those factual circumstances that they had already audited in their previous activity as bank auditor.
V. INDUCTION REGULAR TRAINING AND EDUCATION

(146) Since the appropriate suitability of the members of the management and supervisory bodies as well as the heads of internal control functions are required to exist both upon assuming the activity as well as on a continuous basis, which implies the necessity to hold regular trainings for such persons, credit institutions are obliged, to ensure that appropriate human and financial resources are made available for regular training and to also ensure that financial resources are constantly made available (Article 28a para. 6 BWG). For ensuring that the necessary training measures are conducted, both internal and external resources may be used for this purpose. Institutions must define objectives for both induction and training, as well as suitable policies and procedures for attaining such goals, which may form a component of the policy as a whole for the assessment of suitability (see Chapter VI). Existing relevant industry-specific benchmarks should be focused on in doing so. The results from the EBA benchmarking exercise are to be taken into account in particular with regard to the planning of the training budget.

(147) The executive directors and non-executive directors shall also take personal responsibility to always reach decisions based on up-to-date information. They are therefore required to familiarise themselves to changes to the environment of the institution (especially in relation to new legal regulations) on a continuous basis, and to continue to obtain education particular in the field of supervisory law. The policies and processes must prescribe a transparent process regarding induction or training to be applied for by the executive directors and non-executive directors, and be communicated to them accordingly.

(148) The induction of the executive directors and non-executive directors in their position should serve to ensure that they understand the structure, business model, risk profile and the governance rules of the institutions as well as their individual role within the system as a whole. Therefore, all material information is required to be communicated to the newly appointed directors within one month of their starting their role and the induction process and all necessary trainings to be concluded within six months.

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101 With regard to the requirements in relation to the compliance function under the WAG 2018 in conjunction with Delegated Regulation (EU) 565/2017, please consult Chapter 6.1.2 of the WAG 2018 Organisational Circular.
The objectives of induction and training should in particular be tailored towards the necessary specialist knowledge and skills that are required for the respective position, responsibility as well as participation in the committees of the supervisory body, and should be defined in an internal policy. If shortcomings are identified with regard to knowledge or skills during the suitability assessment, then the necessary trainings must be concluded as quickly as possible, where this is not possible prior to entering office then however at least within a year of entering office. Credit institutions shall inform the competent authority about the measures that have been identified as being suitable, and inform them about it about the timetable.

The quality, adequacy and observance of the policy and the process must be **reviewed** and **adapted where applicable**. Furthermore, in the case of there being changes to the governance structure and strategy, new products, current legislative or market developments or other developments then they must be updated.
VI. INTERNAL FIT & PROPER ASSESSMENTS AND POLICIES

A. GENERAL

(151) Whether (potential) executive directors or non-executive directors are individually and collectively suitable, and the heads of internal control functions and key function holders are suitable *(reliable, with suitable professional qualifications and sufficiently experienced)* is checked by the institutions pursuant to their internal policies for the selection and assessment of executive directors and non-executive directors, or for the assessment of the suitability of key function holders. These internal fit and proper tests are conducted regularly and documented, where applicable also during training (measures).

(152) The policies on the assessment of suitability are to be tailored to the governance framework of the institution for operations as a whole as well as the corporate culture and risk appetite, and when being drawn up and revised an in any case established nomination committee as well as the internal control functions are to be involved accordingly. Where the appointment occurs through the shareholders (at the main general meeting or a general meeting), then the results of the internal assessment of suitability should be made available to them. Furthermore access is to be provided to the shareholders to the result and the most significant considerations of the internal Fit &

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102 With regard to the requirements in relation to the compliance function under the WAG 2018 in conjunction with Delegated Regulation (EU) 565/2017, please consult Chapter 6.1.2 of the WAG 2018 Organisational Circular.
103 With regard to the requirements in relation to the AML officer, we refer to the FMA Circular on internal organisation for the prevention of money laundering and terrorist financing.
104 How and when the credit institution’s assessment should occur and which (corrective) measures taken, where it emerges that a person does not have the necessary characteristics necessary for the positions in question, is defined in Title II of the F&P-GL (especially in paras. 24, 28, 32, 33, 37, and 38) as well as Title VII of the F&P-GL. The criteria, based upon which the institutions are required like the supervisory authorities to assess the suitability of the potential executive directors or non-executive directors, can be found in Title III of the F&P-GL; the rules on diversity in Title V must also be taken into consideration.
105 Within group structures the consolidating institution should ensure that the group-wide policies on the assessment of suitability in all subsidiaries are observed pursuant to rules stipulated in Chapter 17 of the F&P-GL; in this chase the remarks contained in the FMA Circular regarding the internal organisation for the prevention of money laundering and terrorist financing should be observed.
106 Subject to the condition, that executive directors/non-executive directors regularly attend training courses/seminars on relevant subject matters or participate in ongoing training measures, the institution’s internal reassessments of having the necessary fitness may remain restricted to specific cases in hand (material changes or events that in any case make such a re-assessment necessary).
107 Cf. Chapter. 14 of F&P-GL.
Proper procedure (also to procedures with a negative outcome), in order to permit a review of individual and collective suitability.

(153) When **drawing up and revising** the policies for the assessment of suitability, the promotion and implementation of diversity in the management body may also be taken into account, unless a separate diversity policy has been implemented\(^{108}\). In so doing, gender, educational and professional background, age and origin are to be taken into account in order to therefore ensure that there are a diverse range of opinions and experiences existing within the respective management body\(^{109}\). Institutions of significant relevance as defined in Article 5 para. 4 BWG must state a **quantitative target for participation** of the under-represented gender, as well as a suitable **time frame for achieving this target**. In the event that the diversity target is not reached, then the institutions of significant relevance\(^{110}\) must document the reasons, measures and the timeframe for implementing the diversity policy.

(154) Together with a notification about the appointment/naming of an executive director, non-executive director or a head of an internal control function (Article 73 para. 1 no. 3, Article 28a para. 4 or Article 73 para. 1 no. 8, Article 73 para. 1 no. 11, Article 73 para. 1b no. 1, Article 73 para. 1b no. 2 BWG)\(^{111}\) the notifying institution shall submit to the FMA the **confirmation**, that a **positive assessment of suitability of the person in question** has been conducted pursuant to the **policies and procedures** defined for the assessment of suitability of such persons (confirmation of the internal fitness and propriety assessment).\(^{112}\)

(155) The written policies and processes about the bank’s internal assessment of suitability shall be submitted to the FMA upon request.

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\(^{108}\) See also the disclosure requirements of the diversity strategy in Article 435 (2) CRR.


\(^{110}\) See MN 102 for a definition of the term "significant relevance".

\(^{111}\) With regard to the notification of the compliance function in accordance with the WAG 2018 in conjunction with Delegated Regulation (EU) 565/2017 we refer to the WAG Organisational Circular 2018; see the FMA Circular about the internal organisation for the prevention of money laundering and terrorist financing regarding the anti-money-laundering officer.

\(^{112}\) In contrast to the confirmation of the assessment of suitability conducted internally in the bank, which should in any case be submitted, the **documentation** about the results of the bank’s internal *Fit & Proper* assessment are **only to be submitted** to the FMA if officially requested.
B. NOMINATION COMMITTEE

(156) The management body in its supervisory function must establish a nomination committee (Article 29 BWG) in credit institutions that are of “significant relevance” in Article 5 para. 4 BWG. When filling vacancies in the management board (no. 1) and in the supervisory board (no. 2), it must, inter alia, conduct an assessment of the size, composition and performance of the management board and supervisory board and regularly or where events indicate the necessity of the reassessment, and where necessary circulate proposed changes to the supervisory board (Article 29 no. 6 BWG). This shall also apply with regard to the knowledge, skills and experience of the executive directors and individual non-executive directors as well as the respective body in collective form (Article 29 no. 7 BWG). It is necessary for the nomination committee to have all necessary information at its disposal and where applicable for it to cooperate with other committees and the internal control functions.

(157) The nomination committee must be involved in the drawing up of the bank’s internal guidelines on Fit & Proper and training, and the content of the training programmes must be agreed upon with the relevant business areas and the internal control functions.

(158) In credit institutions that have not established a separate nomination committee, the duties and obligations described in Article 29 BWG are to be performed by the entire supervisory board, although the reviews listed in Article 29 nos. 6 and 7 BWG must only be conducted once every two years.

(159) During the course of the suitability assessment, the institutions shall at least review the documents listed in Annex I. Furthermore they shall also access different sources (certificates, letters of recommendation, meetings,...) to be able to conduct a corresponding review of the information.

(160) Institutions shall perform monitor on an ongoing basis about the individual or collective suitability of the executive directors and non-executive directors (as well as their committees). Where a reassessment appears to be necessary, the institution, under the lead of the nomination committee (or the supervisory board as a whole where such a committee is not established), shall conduct a comprehensive review (see MN 155 F&P-GL). Should the change however be necessary due to a specific event and

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113 See MN 102 for a definition of the term “significant relevance”.
114 See Guideline VII F&P-GL.
115 Cf. para. 126 of the F&P-GL.
116 Cf. MNs 28, 32, 38 of the F&P-GL.
where only parts of the suitability are affected then the review may be restricted to only focus on the relevant areas.

(161) If in the course of a regular or ad hoc review a shortcoming in the internal policies, processes or training plans arises, then the management board is to be informed about this and suitable measures are to be identified. This also covers identified (potential) conflicts of interest as well as insufficient treatment in the policies for the handling of conflicts of interest.

(162) Where such a review identifies that the individual or collective suitability of the management or supervisory board no longer exists, suitable measures are to be taken (including the removal of the affected person, the appointment of a new member, changes in the staffing of committees) and the FMA informed without delay117.

C. DISCLOSURE

(163) Credit institutions must state on their website in a transparent and comprehensible form, the manner and means by which they comply with the provisions of Article 5 para. 1 nos. 6 to 9a, Article 28a para. 5 nos. 1 to 5, Articles 29, 39b, 39c, Article 64 para. 1 nos. 18 and 19 BWG, and the Annex to Article 39b BWG (Article 65a BWG, “Disclosure concerning Corporate Governance and Remuneration”).

(164) Furthermore, credit institutions are obliged in accordance with Article 435 (2) lits. a to e CRR, to disclose certain information regarding their internal governance, which is explicitly listed in the provisions listed (“governance rules”) and to update this at least once a year.

(165) Subordinate credit institutions (as defined in Article 30 para. 1 nos. 1 to 7 BWG) included in the scope of consolidation in accordance with Article 18 CRR, and whose superordinate credit institution pursuant to Article 13 CRR observes disclosure obligations, are exempted at individual level from the disclosure obligations pursuant to Article 435 (2) CRR (cf. Article 6 (3) CRR). The exemption from disclosure obligations under Article 435 (2) CRR on an individual institution basis shall furthermore also apply for:

- superordinate credit institutions that observe disclosure obligations on a consolidated basis (cf. Article 6 (3) CRR);

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117 Please also consider the statements in Chapter 22 of the F&P-GL with regard to corrective measures.
- superordinate credit institutions, which are included in the scope of consolidation of an EU parent institution in accordance with Article 18 CRR, which complies with the disclosure obligations on a consolidated basis (Article 13 (1) first sentence CRR), as well as
- credit institutions that belong to an affiliation of credit institutions in accordance with Article 30a BWG, provided that the central body complies with disclosure obligations on a consolidated basis (cf. Article 18 (4) in conjunction with Article 10 CRR in conjunction with Article 30a para. 6 BWG).
VII. NOTIFICATION OBLIGATION

(166) The documentation to be submitted via the Incoming Platform in relation to notifications about changes in personnel (i.e. appointment/nomination for the first time) for executive directors (Article 73 para. 1 no. 3 BWG), the chairperson of the supervisory body (Article 28a para. 4 BWG) or a non-executive director (Article 73 para. 1 no. 8 BWG), the head of the internal audit function (Article 73 para. 1 no. 11 BWG), the head of the risk management department (Article 73 para. 1b no. 1 BWG) and the head of the compliance function (Article 73 para. 1b no. 2 BWG)118 are listed in Annex 1119.

(167) Furthermore, any change of the suitability requirements is to be notified and the necessary documentation duly supplied pursuant to Article 5 para. 1 nos. 6, 7, 9a, 10 and 13 BWG in the case of existing executive directors (Article 73 para. 1 no. 2 BWG), pursuant to Article 28a paras. 3 and 5 BWG in the case of existing non-executive directors (Article 73 para. 1 no. 8 BWG), pursuant to Article 42 paras. 1 and 2 BWG in the case of existing heads of the internal audit function, pursuant to Article 39 para. 5 BWG in the case of existing heads of the risk management department and pursuant to Article 39 para. 6 no. 3 BWG in the case of existing heads of the BWG compliance function.120

(168) Heads of risk management departments and heads of the internal audit function, who were appointed on or after 01.09.2018121 are required to be notified to the FMA with persons already appointed prior to that date not being required to be notified to the FMA.122

(169) Annex 1 lists the documentation mixed financial holding companies have to submit to the FMA together with a notification pursuant to Article 73 para. 1a nos. 1 and 2 BWG

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118 With regard to the notification of the compliance function in accordance with the WAG 2018 in conjunction with Delegated Regulation (EU) 565/2017 we refer to the WAG Organisational Circular 2018; see the FMA Circular about the internal organisation for the prevention of money laundering and terrorist financing regarding the anti-money-laundering officer.

119 The obligation to make a notification with regard to a reappointment of the same person as an executive director as a non-executive director or the chairperson of the supervisory board, was repealed in the amendment published in Federal Law Gazette I 59/2014 (however, see MN 172).

120 “Change in conditions” in this context means any change in circumstances that leads to the (suitability) requirements that had previously been satisfied are now no longer fully complied with, with the result that suitability no longer exists.

121 Pursuant to Article 107 para. 99 BWG the new notification provisions in Article 73 para. 1 no. 11 BWG and Article 73 para. 1b no. 1 BWG enter into force on 01.09.2018.

122 The (Fit & Proper) suitability of persons must however exist for the entire duration of their appointment and shall be ensured by the institutions.
about the (initial) appointment of an executive director or a non-executive director via the Incoming Platform.

(170) Article 5 para. 1 nos. 10 to 12 BWG stipulate specific requirements for the management body in its management function. **At least one executive director** is required to have the centre of his/her **vital interests in Austria**, at least one executive director must possess a mastery of the **German language**, and the management body in its management function must consist of **at least two members**. **A notification obligation by institutions towards the FMA** results from the provisions of Article 5 para. 1 no. 10-12 BWG in conjunction with Article 73 para. 1 nos. 2 to 3 BWG in the case of the **removal or withdrawal of executive directors for other reasons**.123

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123 Since comparable requirements are not defined for the chairperson of the management body in its supervisory function or for simple **non-executive directors**, there is **generally no requirement to notify** a removal or withdrawal of such officers. On the other hand, there is an **obligation to notify about non-executive directors pursuant to Article 73 para. 1 no. 8 BWG** (in particular in the case of the reappointment of members; changes in requirements in the case of members who have already been appointed, with such a change also existing where there is a change in the holder of the position of the chairperson of the management body in its supervisory function).
ANNEX 1 - NECESSARY DOCUMENTATION

Notifications about personnel changes in relation to the executive directors (Article 73 para. 1 no. 3 BWG), the chairperson of the supervisory board (Article 28a para. 4 BWG), a non-executive director (Article 73 para. 1 no. 8 BWG) or the head of an internal control function (Article 73 para. 1 no. 11, para. 1b nos. 1 and 2 BWG)\(^{124}\) of credit institutions or (mixed) financial holding companies must include the following information / documentation (cf. the corresponding information on the Incoming Platform)\(^{125}\):

1. **Name** of the person to be appointed
2. **Position** (executive director, non-executive director or the head of an internal control function)
3. Minutes from the meeting at which they were appointed as well as their contract
4. Details about the **timing** of the resolution regarding appointment or removal as well as the commencing or finishing of the activity;
5. **Curriculum Vitae containing the following details:**
   - 5.1. Date and place of birth
   - 5.2. Address
   - 5.3. Nationality
   - 5.4. A detailed description of general and professional education including the successful completion of trainings
   - 5.5. Professional experience including details about all organisations for which the person was active, as well as the type and duration for which duties were performed, taking into particular consideration activities that fall within the remit of the position to be filled. In the case of positions, which the person has held within the last 10 years, in describing the activities, the person should also include information about the powers conferred upon him, about internal decision-making powers and the business units that he controlled, including the number of employees in the business unit. In the event that voluntary activities were assumed, such as representing the management body, then this should also be mentioned in the curriculum vitae.
5.6. if available, proof of employer for at least the last three years.
6. **a sworn declaration from the person in question** and a confirmation from the institution, that for the person concerned, the **requirements**
   - in the case of executive directors: the conditions set out in Article 5 para. 1 nos. 6 to 11 and 13 BWG (as well as in the case of a custodian bank Article 41 para. 2 InvFG 2011)
   - in the case of the chairperson of the supervisory board: the conditions set out in Article 28a para. 1, para. 3 nos. 1, 2 and 4, and para. 5 no. 5 BWG.
   - in the case of non-executive directors: the conditions set out in Article 28a para. 5 nos. 1, 2, 4 and 5 BWG

\(^{124}\) The documents listed in nos. 1 to 5.5, 6.1 to 6.5, 8 to 10 and 15 are to be submitted with the notification for heads of internal control functions.

\(^{125}\) For significant credit institutions (SIs) the FMA acts as the point of entry in relation to Fit & Proper (Article 93 of Regulation (EU) No. 468/2014 "SSM Framework Regulation"). Instead of the aforementioned information and documentation, all significant credit institutions (SIs) should therefore download the ECB Fit & Proper Questionnaire that may be downloaded from the Incoming Platform in German or English - depending on the language chosen for communications by the credit institution, fill it out, and upload it again along with the documents listed in Point 1.4.
in the case of independent non-executive directors: the conditions set out in Article 28a para. 5b BWG
- in the case of additional independent non-executive directors: justification pursuant to Article 28a para. 5c BWG
- in the case of heads of the risk management department: the conditions set out in Article 39 para. 5 in conjunction with Article 5 para. 1 nos. 6 and 7 BWG
- in the case of the heads of the compliance function: the conditions set out in Article 39 para. 6 in conjunction with Article 5 para. 1 nos. 6 and 7 BWG
- in the case of the heads of the internal audit function: the conditions set out in Article 42 paras. 1 and 2 in conjunction with Article 5 para. 1 nos. 6 and 7 BWG

are fulfilled, in particular:

6.1. no reasons for exclusion exist as defined in Article 13 paras. 1 to 3, 5 and 6 GewO 1994 as amended;
6.2. **orderly financial circumstances** exist;
6.3. **no facts exist, from which doubt emerges** regarding **personal propriety**, **honesty** and **independence of mind** required for conducting banking business;
6.4. **no bankruptcy proceedings** have been opened against the assets of the person in question or another legal entity other than a natural person, upon the business activities of which the personal in question has or has had a decisive influence, unless a reorganisation plan was agreed upon and fulfilled in the bankruptcy proceedings, and no comparable situations have arisen in a foreign country;
6.5. **neither financial** (e.g. loans or share holdings) **nor non-financial interests or relationships** (e.g. close relationships as defined in Article 72 of the Austrian Criminal Code (StGB; Strafgesetzbuch) to members of the management board, the supervisory board or to key function holders of the institution making the notification, that **compromise the prudent and orderly performance** of the management function or supervisory function and may place the necessary financial solidity, economic independence and personal repute in doubt (in the event that this declaration cannot be without such reservations, specific information must be given about the nature of existing financial and non-financial interests or relationships);
6.6. in the case of the chairperson of the supervisory board and their deputies: **not having been appointed as an executive director** of the same entity **within the last two years prior to election** as the chairman or deputy chairman of the supervisory board of the institution making the notification;
6.7. **adequate time commitment is both available and used**, in order to perform the duties associated with the management function or the supervisory function in the institution making the notification in an orderly manner and with the required degree of prudence;**126**

Significant credit institutions (in addition):
- **Disclosure of all currently performed duties in a managerial position and/or as member of a supervisory board by the person in question (in the form of an organigram);** and
- where applicable a plausible justification explaining why a "privilege" and/or an exemption is necessary or where there is a need for protection of continuing business

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**126** In the case of (mixed) financial holding companies, the information listed under 6.7. is not required.
6.8. **Information about the role of the member in question in the collective suitability of the respective body**, in particular details to the contribution of the person in question to fulfilling of collective suitability;

7. In the case of persons who are not Austrian citizens: **Confirmation from the banking supervisor of their home country** and/or (subsidiary) of another country, in which the person in question was or has already been active within the financial sector about the lack of grounds for exclusion listed under 4.1. (Where such a confirmation cannot be obtained, then the relevant person must provide evidence to confirm that reasons for exclusion do not exist, and in any case to supply a declaration in this regard);

8. **A current extract of a judicial record** that is not older than six months (in the case of foreign citizens, whose permanent residence is not in Austria, providing a relevant document from their home country or a confirmation from the home country that comparable documents are not issued); as well as a declaration about whether criminal proceedings are currently pending.

9. **A new organisation chart**;

10. Confirmation of the notifying credit institution that a positive (internal) assessment of suitability in accordance with the credit institution's internal rules and procedures for the assessment of the suitability of such persons (= a confirmation following an internal fit and proper test).

In addition, the following information is to be submitted with notifications about the changes in personnel of the executive directors of credit institutions:

11. A description of all current professional activities both within and outside the financial sector (banking, insurance undertakings and pension companies, payment institutions, e-money institutions, investment firms or investment services providers) – and as necessary the amount of time spent on each (as necessary calculated per week, or at least per month);

12. In the case of the removal of an executive director: **the reasoning for the removal and a declaration about the continuing presence of a further two executive directors**;

13. for at least one of the executive directors of the institution, a **residency register excerpt** must be supplied as evidence of that person having the centre of their vital interests in Austria;

14. since at least one of the executive directors must have a command of the German language, in the case that only non-Austrian citizens have been appointed as executive directors, then the corresponding **proof of language skills** must be provided;

15. Where the head of an internal control function also holds another position and will hold another position (e.g. as head of another internal control function), then an explanation is to be included why any combination can be seen as being appropriate with regard to any conflicts of interest or adequate resources for the performance of duties.\(^{127}\)

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\(^{127}\) In the case notifications regarding the BWG compliance function, no information is required regarding the combination of this position with other positions.