

GUIDANCE ON THE FITNESS AND
PROPERNESS ASSESSMENTS
APPLIED BY THE AUTHORITY

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FOREWORD

Fit and proper controls are a means of raising public confidence in the integrity of the financial services system and a key element of an effective supervisory regime. The "fit and proper" test is one which applicants for a licence and the persons involved therein are to satisfy on an ongoing basis.

The objective of this Guidance Document is to provide further detail on the fitness and properness assessments conducted by the Malta Financial Services Authority. The Guidelines aim to set out the Authority's expectations by communicating, clearly and transparently, the basis on which assessments are grounded. The *onus* of proving that a person is fit and proper rests with the entity proposing such person and is not the duty of the competent authority to prove the converse before it refuses to grant approval, or before it intends to suspend or withdraw an approval.

The satisfaction of the competence, reputation, conflicts of interest and independence of mind and time commitment criteria explained in this document, and forming the basis of a fit and proper assessment, provide a degree of assurance to the MFSA that the applicants are willing and capable to fulfil their obligations under the legal framework in force.

While it is not intended for this Guidance Document to be binding, consideration thereof by applicants and licence holders alike, prior to proposing persons for positions requiring regulatory approval, and by the proposed persons themselves is encouraged. It is important that it is read together with the legislative and regulatory instruments applicable to the person. This document does not provide for any derogation from any obligations that a subject person has to fulfil in terms of the applicable regulatory framework.

It is emphasised that this document is solely intended for its users' general guidance and should neither be considered nor construed as advice or in any way a commitment on the part of the MFSA. Should a conflict arise between this document and the applicable laws, regulations or rules, the respective laws, regulations or rules are to prevail.

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Title 1 Scope and Application

Section 1 Scope and Application

1.1.1 The carrying out of proper due diligence procedures is a fundamental first step which the Authority undertakes in order to determine whether a licence is to be granted by the Authority or if a person is to be approved to carry out a senior position within a licenced entity.

1.1.2 Due diligence measures are internal procedures carried out at application stage and thereafter, for the identification, verification and investigation of all persons involved in a regulated activity. The aim of due diligence measures is to ensure that all steps are taken so that a person is not appointed **or does not continue to hold an 'approved person' position** or licence for which they are not fit and proper.

1.1.3 This guidance document seeks to provide guidance with respect to the fitness and properness assessments which the Malta Financial Services Authority carries out under any regulatory framework falling within its remit.

1.1.4 This document is neither intended to be comprehensive nor to replace or override or subside any legislative provisions or legal requirements stemming either from applicable EU law or applicable national law. In this light, persons who are subject to the fitness and properness assessment must take due account and, where applicable, comply with any relevant EU Legislation as well as any Guidance Notes and Statements/Industry Best Practices which may be issued by the Authority and/or international standard setting bodies.

1.1.5 The Authority may update or amend this guidance from time to time, as appropriate.

Section 2 Definitions

1.2.1 **'Applicant'** means an applicant for an authorisation with the MFSA;

'Approved person' means a person whose role with a licenced entity requires the regulatory approval of the Authority;

'Fitness and properness assessment' means the assessment on competence, reputation, conflicts of interest and independence of mind and time

commitment, which the Authority conducts as part of its due diligence process;

'Licence Holder' means a person authorised by the MFSA;

'Malta Financial Services Authority', 'MFSA', or 'the Authority' refers to the Malta Financial Services Authority, as established by the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta;

'Senior Manager' means the person occupying the most senior role following that of Administrator. In the event of various management grades, it is the most senior manager.

- 1.2.2 In the event that the definitions contained in this Guidance conflict with those stipulated in primary legislation or the Regulations or Rules issued thereunder, the definitions set out in the respective Act or the Regulations or Rules issued thereunder shall prevail.

Title 2 High Level Principles

Principle 1 Fitness and Properness is Primarily the Responsibility of Applicants

2.1.1 Applicants or licence holders, as applicable, should only propose individuals for approved positions who in their opinion are fit and proper persons. The Authority expects such entities to carry out their own due diligence and assessment of such persons, not only prior to proposing such person to the authority, but also on an ongoing basis. The checks which should be conducted by the applicant/licence holder do not replace those conducted by the Authority, but should be considered as a first filter and an additional safeguard.

2.1.2 The *onus* of proving that a person is fit and proper is on the entity proposing such person. It shall not be the duty of the competent authority to prove the converse before it refuses to grant approval, or before it intends to suspend or withdraw an approval.

Principle 2 The Authority as Gatekeeper

2.2.1 Due diligence assessments aim to prevent persons who are not fit and proper and consequently posing a risk to the proper functioning of the sector from entering the system or from continuing in their role when an issue regarding their fitness and properness has arisen. In this respect, the Authority acts as a gatekeeper to the financial services sector.

2.2.2 The Authority will only approve persons who are fit and proper to enter the financial system.

Principle 3 Consistent Application

2.3.1 In order to ensure consistency, when conducting fitness and properness assessments, the Authority adopts, to every extent possible, an approach which is common across sectors.

Principle 4 Proportional and Case-by-Case Assessment

2.4.1 The principle of proportionality applies throughout the assessment of fitness and properness. Suitability criteria should be commensurate with the

size of the entity and the nature, scale and complexity of its activities, as well as the particular role to be filled.

2.4.2 Notwithstanding 2.4.1, the application of the proportionality principle cannot lead to the lowering of suitability standards. In all cases the assessment will come down to an individual analysis and supervisory judgement.

2.4.3 Further to 2.4.2 above, the principle of proportionality cannot apply to the reputation requirement or to the assessment of the reputation requirement, which should be conducted for all entities in an equal manner.

Principle 5 Due Process and Fairness

2.5.1 The fitness and properness assessment is one which is procedurally driven. Given that decisions on fitness and properness taken by the Authority can affect the rights of both the licence holder and the proposed person, the Authority has a duty to ensure that due process is followed.

2.5.2 Pursuant to 2.5.1, the Authority *inter alia* ensures that:

- i. Procedural guarantees, such as the rule against bias and the right to be heard, are followed;
- ii. Decisions are taken on the basis of information that is considered to be material and relevant to the fit and proper assessment; and
- iii. Fitness and properness assessments are strictly confidential.

Principle 6 Interaction with Ongoing Supervision

2.6.1 The fit and proper assessment feeds into the ongoing supervision of the governance of an entity, specifically with regard to the composition and functioning of the management body.

2.6.2 A fit and proper assessment may lead to a decision which needs to be followed up during ongoing supervision.

2.6.3 Ongoing supervision may provide input for a fit and proper assessment or lead to the reassessment of members of the management body.

Title 3 Assessment Criteria

Section 1 The four assessment criteria

3.1.1 The MFSA assesses fitness and properness against the following four criteria:

- i. Competence;
- ii. Reputation;
- iii. Conflicts of Interest and Independence of Mind; and
- iv. Time Commitment.

The fit and properness requirement is an ongoing requirement and therefore, once approved, the Applicant will be subject to ongoing supervision by the MFSA. There may be instances which may lead to the **reassessment of the applicant's suitability**.

Section 2 Competence

3.2.1 A person shall demonstrate and provide reasonable assurance to the satisfaction of the Authority of having an appropriate level of knowledge, professional expertise and experience.

3.2.2 Competence is assessed with reference to both practical and professional experience gained through previous occupations and academic knowledge through education and training. Persons should be equipped with the skills, knowledge and professional experience necessary to perform their duties. The level of knowledge varies according to level of responsibility and the type of regulated activity to be carried out.

3.2.3 Without limiting the generality of 3.2.1 to 3.2.2, the person must *inter alia* be able to demonstrate:

- i. adequate professional or other qualifications and capabilities appropriate to the proposed appointment;
- ii. appropriate skills and competence, whether through training or experience gained in an employment context;

- iii. sound knowledge of the financial services sector as a whole, that in which they aim to operate, as well as the specific responsibilities that will be undertaken;
- iv. the capability of identifying the risks relating to the sector which are relevant for the proposed appointment; and
- v. a clear and comprehensive understanding of the regulatory and legal framework, including that relating to AML/CFT.

3.2.5 In carrying out its assessment of the competence of a person, the Authority carries out its own verifications which may *inter alia* include confirming the veracity of the qualifications disclosed by the applicant by liaising directly with the respective universities or other educational bodies, both local and foreign.

3.2.6 When assessing the competence of a person, the Authority will *inter alia* take into account:

- i. theoretical experience; and
- ii. practical experience.

For purposes of this guidance document, theoretical experience is assessed **based on the level and profile of the person's education, which should relate** to financial services or other relevant areas. Practical experience is assessed *inter alia* **based on the person's work experience, taking into account the** positions held, the length of service, the size of the entity, responsibilities held, number of subordinates, nature of the activities carried out and relevance of experience gained and any other criteria which give added value to those aforementioned.

3.2.7 Members of the management body of an applicant or of a licence holder shall be able to demonstrate, both collectively and individually, that they are sufficiently competent to perform their role within an authorised entity.

Section 3 Reputation

3.3.1 An Assessment of integrity and solvency

3.3.1.1 A person shall demonstrate to the Authority and provide reasonable assurance to the satisfaction of the Authority that they are of good repute

as well of their intentions to act in an honest, ethical and trustworthy manner.

3.3.1.2 A person will be considered to be of good repute unless there is evidence to suggest otherwise or reasonable doubt about his or her good repute.

3.3.1.3 **The Authority's assessment of reputation shall be based on an assessment of:** [i] Integrity; and [ii] Solvency.

3.3.1.4 AML/CFT considerations are also an important aspect when assessing a **person's reputation. The MFSA will *inter alia*** take into account any AML/CFT concerns with respect to such person. In this respect, the Authority will liaise with the FIAU.

3.3.1.5 The principle of proportionality cannot apply to the reputation requirement or to the assessment of the reputation requirement, which should be conducted for all entities in an equal manner.

3.3.2 Integrity

3.3.2.1 When carrying out its assessment on the integrity of a person, the Authority shall take a holistic approach and will *inter alia* consider the following matters:

- i. Whether the person was found to be of poor reputation, character, reliability, or to be dishonest;
- ii. Whether the person was found guilty by a court or other competent authority with respect to matters which may impinge on his honesty, integrity and reputability;
- iii. Whether the person was convicted of a criminal offence or disqualified by any professional or regulatory body;
- iv. Whether the person has been subject to any civil suit;
- v. Whether the person has a tainted regulatory performance record with the Authority or any other competent authority whether in Malta or overseas;
- vi. Whether the person has been publically criticised with respect to matters relating to the financial services sector; and
- vii. Whether the person had been made to resign from any past employment or had been dismissed therefrom.

3.3.2.2 In carrying out its assessment on the integrity of a person, the Authority will *inter alia* require the person to submit documentation which will include but not be limited to an original Police Conduct Certificate, from the police authorities or an equivalent certification from the country of residence of the individual. The Authority will also require information on whether the individual has been found in breach of regulations or convicted of any offence, criminal or otherwise by any tribunal or court. Information obtained may be verified by the Authority.

3.3.2.3 Where a person is subject, or has been subject to legal proceedings, criminal or administrative, the Authority will *inter alia* consider:

- i. the nature of the charges or accusations;
- ii. the phase of proceedings reached;
- iii. the expected penalty if a conviction ensues;
- iv. **the time that has passed and the appointee's conduct since the alleged wrongdoing;**
- v. **details of the person's involvement** – this is particularly relevant where action was taken against a legal person within which the person undergoing the fitness and properness assessment was involved in;
- vi. **any understanding of and/or insight into the person's conduct** gained by the entity over time; and
- vii. any mitigating or aggravating factors (e.g. whether the person held a position of trust).

3.3.2.4 Members of the management body of an applicant or of a licence holder shall at all times be of sufficiently good repute to ensure the sound and prudent management of the supervised entity.

3.3.3 Solvency

3.3.3.1 A person shall demonstrate and provide reasonable assurance to the satisfaction of the Authority that it is financially sound. In this respect, persons should be able to demonstrate that they are capable of managing their affairs in a sound and prudent manner.

- 3.3.3.2 In the case of a legal person, it shall be demonstrated that proper financial controls are in place and management of liquidity will be applied at all times.
- 3.3.3.3 An applicant for a licence is to ensure that it is financially sound, providing the Authority with a detailed business plan and providing the necessary assurances that it is able to meet any capital requirements if the case may be.
- 3.3.3.4 The Authority will not be satisfied that a person is fit and proper person if that person:
- i. is currently subject to bankruptcy proceedings;
 - ii. has failed to meet any judgement debt; or
 - iii. is unable to meet any applicable financial or capital requirements.
- 3.3.3.5 In carrying out its assessment on the solvency of the applicant, the Authority may carry out its own verifications.

Section 4 Conflicts of Interest and Independence of Mind

- 3.4.1 Persons, in their proposed role, should be able to make their own sound, objective and independent decisions and judgments. Independence of mind can be affected by conflicts of interest. There is a conflict of interest if the attainment of the interests of a member may adversely affect the interests of the supervised entity.
- 3.4.2 A person will not be considered suitable if there exists a conflict of interest which poses a material risk which is not possible to prevent, adequately mitigate or manage.
- 3.4.3 Persons subject to the fitness and properness assessment shall declare any conflict of interest that they may have and the actions that they are taking to mitigate such conflict.
- 3.4.4 Where a conflict of interest is identified, the entity shall assess the materiality of the risk posed by the conflict of interest.
- 3.4.5 Where pursuant to 3.4.4, the conflict of interest is considered to be material, the supervised entity must adopt adequate measures, namely it must:
- i. perform a detailed assessment of the particular situation; and

- ii. decide which preventative/mitigating measures will be implemented, primarily based on internal conflicts of interest policy unless the legislative framework already prescribes which measures must be taken.

3.4.6 The entity should explain how the conflict of interest is being prevented, mitigated or managed.

3.4.7 On the basis of information provided, the Authority will assess the materiality of the conflict of interest and the adequacy of measures adopted by the entity.

3.4.8 Further to 3.4.7, if there are still concerns that could be overcome by the entity taking adequate action, conditions may be imposed by the Authority. These may include:

- i. prohibition to participate in any meeting or decision-making concerning a particular disclosed interest;
- ii. resignation of a certain position;
- iii. specific monitoring by the entity;
- iv. specific reporting to the Authority on a particular situation;
- v. cooling-off period for the appointee;
- vi. obligation on the supervised entity to publish the conflict of interest;
- vii. **any application of the “at arm’s length” principle; and**
- viii. specific approvals by the whole management body for a certain situation to continue:

Provided that a person cannot be considered to be suitable if the measures taken by the entity or the imposition of a condition are not sufficient to adequately manage the risks posed by the conflict of interest.

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- Section 5 Time Commitment
- 3.5.1 Persons, in their proposed role, must be able to commit sufficient time to performing their functions efficiently and effectively.
- 3.5.2 The time a person can dedicate to his or her functions can be affected by several factors, such as:
- i. the number of commitments held;
 - ii. the size and situation of the entities where the commitments are held and the nature, scale and complexity of the activities;
 - iii. the place or country where the entities are based; and
 - iv. other professional or personal commitments and circumstances (e.g. court cases).
- 3.5.3 In addition to quantitative assessments, an assessment of the qualitative aspect needs to be conducted by the entity.
- 3.5.4 Quantitative Assessment of time commitment
- 3.5.4.1 The quantitative assessment of time commitment involves an assessment of the number of commitments held by the person. The involvement in multiple roles is an important factor which may affect time commitment.
- 3.5.5 Qualitative Assessment of time commitment
- 3.5.5.1 Qualitative factors that determine the amount of time a person can dedicate to his/her function are also taken into account by the Authority. These include:
- i. the size and circumstances of the entity with whom the position is held;
 - ii. the nature scale and complexity of the activities of the respective entities;
 - iii. the place or country where the entities are based;
 - iv. the travel time required for the role;
 - v. the number of meetings scheduled for the management body;

- vi. the time needed for induction and training; and
- vii. the responsibility to be borne by the person.

Title 4 Expectations on Applicants

- 4.1 When assessing the fitness and properness of a person, the Authority will request that such persons submit a Personal Questionnaire and may request additional information therefrom.
- The Personal Questionnaire, together with the respective Guidelines thereto, are available on the [MFSA website](#).
- 4.2 Persons subject to a fitness and properness assessment may be asked to attend an interview, individually or with other persons subject to the assessment, with the Authority for it to be in a better position to assess their fitness and properness.
- 4.3 In this respect it is expected that such person acts in an honest and ethical manner by providing the Authority with information which is truthful and accurate in all respects and which to the best of his knowledge is not misleading.
- 4.4 Applicants who provide the Authority with information or statements which they know to be inaccurate, false or misleading in any aspect, or recklessly provide wrong information may be guilty of an offence and may severely prejudice his or her fit and proper status. If the Authority becomes aware of **any material information which had not been disclosed, the MFSA's decision** regarding the proposed appointment may be delayed or prejudiced. An open and honest relationship with the competent authority is thus essential.
- 4.5 It should not be assumed that information in the public domain, or which had been previously disclosed to the MFSA or to another regulatory body, is known to the MFSA. In case of any doubt about the relevance of information, this should still be disclosed to the MFSA.
- 4.6 Applicants have an ongoing obligation to notify the MFSA immediately when there is a change in the information provided.
- 4.7 Any documents submitted should be in English language, and if applicable, accompanied by an official translation.

Title 5 Decisions

- 5.1 The Authority will only approve persons who are fit and proper to enter the financial system. The **Authority's** approach when determining whether a person concerned is fit and proper is informed by a risk-based approach and is therefore cumulative. It may decide that a person concerned who is an individual has failed to meet the fitness and properness criteria on the basis of considering several situations, each of which on its own merit would not lead to that conclusion. When arriving at its decision as to whether a person concerned who is an individual has met the fitness and properness criteria, the competent authority will take account of all material facts, whether such facts are disclosed or otherwise.
- 5.2 After every fit and proper assessment, the Authority will take a decision and it will communicate the result to the person in question.
- 5.3 Once an individual is approved as fit and proper, new facts may become **known to the Authority to prompt the reassessment of an individual's fitness and properness**. On a case by case basis, the Authority may decide to prompt the reassessment if the fact is material for one of the above four assessment criteria.
- 5.4 Where a person fails to satisfy the fitness and properness assessment, this may *inter alia* lead to:
- i. an approval being refused, where **the Authority's** approval is being sought to permit a person to perform a role requires regulatory approval; and
 - ii. an approval being withdrawn, where a person is approved by the MFSA to perform a specific role.
- 5.5 **An appeal to the Authority's decision may be made to the Financial Services Tribunal in line with Article 21 of the Malta Financial Services Authority Act.**
- 5.6 Should the Authority, through its ongoing supervisory work, become aware of any personal or business conduct which may give rise to any doubt **regarding a person's fitness and properness, the Authority will re-assess such person's fitness and properness.**
- 5.7 Should any person, through the ongoing course of business, become aware of any personal or business conduct which may give rise to any doubt **regarding a person's fitness and properness**, such person should inform the Authority, which will assess the materiality of the circumstances.

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