

**REPORT ON THE ANALYSIS OF BEST PRACTICES IN THE
APPLICATION OF "FIT AND PROPER" STANDARDS IN THE
BANKING, INSURANCE AND SECURITIES SECTOR –
EXAMPLES OF SLOVENIA, AUSTRIA, BELGIUM AND UNITED
KINGDOM**

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1. INTRODUCTION

Within the framework of the Follow-up Project against Money Laundering and Terrorist Financing in Ukraine (MOLI-UA2) I have been asked by the Council of Europe to provide a report on the analysis of best practices in the application of “fit and proper” standards in the banking, insurance and securities sectors in four European countries. For this purpose I took into account the legislative best practices of the following 4 EU member countries: Slovenia, Austria, Belgium and United Kingdom.

Due to the fact that a lot of different financial institutions play an important role in the banking, insurance and securities sectors, for which different fit and proper standards may apply, I only included in the analysis the following key players in those sectors: banks, insurance undertakings, brokerage houses and stock exchange¹. Furthermore, this report only covers those elements of fit and proper standards that are important from the prevention of money laundering and terrorist financing point of view.

The present analysis is prepared on the basis of English texts of all relevant laws and regulations from above mentioned four countries that were available on the Internet and on the basis of the FATF 2005 Report on Observance of Standards and Codes - Belgium.

As far as international standards are concerned the following documents were used as a reference:

- The FATF Forty Recommendations on money laundering (June 2003);
- The EU Directive 2005/60/EC on the prevention of the use of financial system for the purpose of money laundering and terrorist financing (Oj L No. 309/15, 26. 10. 2005; hereinafter referred to as “the third EU Directive on the prevention of ML/FT”);
- The EU Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (hereinafter referred to as the EU Banking Directive);
- The EU Directive 2004/39/EC on markets in financial instruments (Oj No. L 145, 30. 4. 2004);
- The Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision (October 2006; hereinafter referred to as Basel Core Principles); and
- The IAIS Insurance Core Principles (October 2003).

¹ The latter only if the relevant data were available.

2. INTERNATIONAL »FIT AND PROPER« STANDARDS

The FATF 40 Recommendations

The FATF in its Recommendation 23 (part) requires countries “to ensure that financial institutions are subject to adequate regulation and supervision and that competent authorities take necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution”. It also requires that for financial institutions which are subject to the Core Principles, the same regulatory and supervisory measures that apply for prudential purposes, should apply in a similar manner for anti-money laundering and terrorist financing purposes. Examples of such measures include requirements for: licensing and structure, risk management process to identify, measure, monitor and control material risks, ongoing supervision and global consolidated supervision.

The Interpretative Note to Recommendation 23 further explains that the already existing shareholders suitability (or “fit and proper”) tests should be used and that there is no need for the introduction of a system of regular review of licensing of controlling interests in financial institutions merely for anti-money laundering purposes.

The third EU Directive on the prevention of ML/FT and other relevant EU Directives

The third EU Directive on the prevention of ML/FT (Article 36) contains a specific provision regarding the fit and proper standards, yet this provision only applies to currency exchange offices, trust and company service providers, casinos and money remittance offices. According to this article the competent authorities shall refuse licensing or registration of these entities if they are not satisfied that the persons who effectively direct or will direct the business of such entities or the beneficial owners of such entities are fit and proper persons.

In the case of credit and financial institutions the third EU Directive only requires competent authorities to have enhanced supervisory powers, including the power to conduct on-site inspections. This is because other EU Directives exist regulating the banking, insurance and securities sector that include also the fit and proper standards for management and shareholders of the entities that operate on those markets. For example, the EU Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (the EU Banking Directive) in articles 11, 12 and 15 requires that the competent authorities shall not grant an authorisation:

- to the credit institution if the persons who effectively direct the business of the credit institution are not of sufficiently good repute; and
- for the taking-up of the business of credit institutions if, taking into account the need to ensure the sound and prudent management of

credit institution; they are not satisfied as to the suitability of the shareholders or members.

The Directive² also requires the competent authorities to withdraw the license if the credit institution no longer fulfils the conditions under which he authorisation was granted.

The Core Principles

The Core Principles are a framework of minimum standards for sound supervisory practices and are considered universally applicable. National authorities are free to adopt supplementary measures that they deem necessary to achieve effective supervision in their jurisdictions.

Among the Basel 25 Core Principles that are needed for a supervisory system of credit institutions to be effective, the most relevant for this analysis is principle 3 which determines the licensing criteria. According to this principle the licensing process, at a minimum, shall consist also of an assessment of the ownership structure and governance of the bank and its wider group, including the fitness and propriety of board members and senior management. The licensing authority must have the power to set criteria and reject applications for establishments that do not meet the standards set. Moreover, also the following principles 4 (Transfer of significant ownership) and 5 (Major acquisitions) are relevant, because the supervisors have to check the fit and proper standards of possible new shareholders when reviewing the proposals to transfer ownership or controlling interests held in existing banks to other parties or deciding on major acquisitions or investments by bank.

Similarly the principle 7 (Suitability of persons) of the IAIS Insurance Core Principles requires that significant owners, board members, senior management, auditors and actuaries of an insurer are fit and proper to fulfil their roles. This requires that among other things they shall also possess the appropriate integrity.

3. LEGISLATIVE BEST PRACTICES

SLOVENIA

General information about the financial system

The banking, insurance and securities sectors in Slovenia are regulated separately and for each sector a different legislation apply. Each sector has its own independent regulator and supervisor, namely the Bank of Slovenia is responsible for banking sector, the Insurance Supervision Agency is responsible

² See also the EU Directive 2004/39/EC on markets in financial instruments.

for insurance sector, and the Securities Market Agency regulates and supervises the securities sector.

Banking sector

The fit and proper standards that are valid for all credit institutions in Slovenia are regulated in the Law on Banking. This law was adopted at the end of 2006 (Official Gazette of the Republic of Slovenia, No. 131/2006) and its following articles are relevant for the report:

- article 49 (Refusing a request for a decision on the authorisation for acquisition of a qualifying holding),
- article 63 (Conditions for membership of a bank's management board),
- article 65 (Authorisation for performing the function of a member of a bank's management board),
- article 68 (Revocation of the authorisation to perform the function of a member of a bank's management board), and
- article 72 (Conditions for performing the function of a member of the supervisory board of the bank).

Regarding the shareholders the Bank of Slovenia shall refuse a request for a decision on the authorisation for acquisition of a qualifying holding also³ if because of the legal or financial situation of the future qualified owner or because of activities or practices performed by the future qualified owner or by persons thereto connected, or because of actions taken by the future qualifying owner or by persons thereto connected with him, the operations of the bank in accordance with the regulations on risk management could be endangered.

Comparing with the shareholders the fit and proper standards for candidates that apply for a membership of a bank's management board are specified with more details in the law. A member of a bank's management board can only be a person who, among other things, has not been finally convicted of an intentionally committed criminal offence that was prosecuted *ex officio* or for one of the following criminal offences committed out of negligence, the sentence not been expunged: negligent homicide, aggravated bodily harm, grievous bodily harm, endangering security at work, concealment, disclosure of and unauthorised access to a business secret, money laundering, disclosure of an official secret, causing public danger and imparting state secrets. In this context it is also important to mention that a candidate for membership of a bank's management board must enclose evidence of fulfilment of all the conditions specified in the law in his request. However, the Bank of Slovenia may obtain the above mentioned information also from criminal records that are kept in the Ministry of Justice. If later on a member of the bank's management board is finally convicted for committing a criminal offence the Bank of Slovenia shall revoke its authorisation.

³ The Banking Law determines several reasons for a refusal of a request but the above mentioned reason is the only one which is relevant for this report.

Similar fit and proper provisions that apply for the member of the bank's management board also apply to members of the supervisory board of a bank. A candidate may only be appointed if he or she has not been finally convicted for the same criminal offences as mentioned above.

Insurance sector

Provisions dealing with the fit and proper standards for insurance sector are included in the Insurance Act (Official Gazette of the Republic of Slovenia, Nos.13/2000, 21/2002 and 50/2004). The most relevant articles are the following:

- Article 19 (Taking decisions with regard to granting an authorisation to acquire a qualified holding),
- Article 24 (Conditions for membership of the insurance undertaking's management board),
- Article 25 (Authorisation for performing the function of a member of the insurance undertaking's management board),
- Article 28 (Revocation of the authorisation to perform the function of a member of the insurance undertaking's management board), and
- Article 29a (Conditions for performing the function of a member of the supervisory board of an insurance undertaking).

The analysis of these provisions shows that they are heavily based on the Banking Law and literally the same as the provisions that apply in banking sector, thus there is no need for their repetition in this part of a report. The only exception is that in the insurance sector the fit and proper standards are checked and monitored by the Insurance Supervision Agency.

Securities sector

The Securities Market Act (Official Gazette of the Republic of Slovenia, Nos. 56/1999, 86/2004, 28/2006 and 51/2006) provides fit and proper standards for shareholders, management board members, supervisory board members and brokers of a brokerage house, and for the shareholders and management board members of a stock exchange. The relevant provisions could be found in the following articles of this act:

- Article 83 (Taking decisions with regard to granting an authorisation to acquire a qualified holding of the brokerage house),
- Article 84 (Sanctions and revocation of the authorisation to acquire a qualified holding of the brokerage house),
- Article 85 (Management board of the brokerage house),
- Article 86 (Authorisation for performing the function of a member of management board of the brokerage house),
- Article 88 (Revocation of the authorisation to perform the function of a member of a management board of the brokerage house),
- Article 88b (Conditions for performing the function of a member of the supervisory board of the brokerage house),
- Article 109 (Conditions for the provision of stockbroking services),

- Article 110 (Authorisation to provide stockbroking services),
- Article 112 (Revocation of the authorisation to provide stockbroking services),
- Article 220a (Authorisation for acquisition of a qualifying holding of the stock exchange),
- Article 222 (Management board of the stock exchange), and
- Article 224 (Revocation of the authorisation to perform the function of a member of management board of the stock exchange).

Brokerage houses

With regard to the shareholders of the brokerage house the Securities Market Agency shall refuse a request for a decision on the authorisation for acquisition of a qualifying holding if it appears from the supporting information that because of the legal or financial situation of the future qualified owner or because of activities or practices performed by the future qualified owner or by persons thereto connected, or because of actions taken by the future qualifying owner or by persons thereto connected with him, the operation of the brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence. On the same grounds, with the exception of a reference to the legal or financial situation of the future qualified owner, the Securities Market Agency shall also revoke its already granted licence.

As for the management board its member can only be a person who, among other things, was not given a non-suspended and non-expunged sentence for a criminal offence with imprisonment of more than three months. The Securities Market Agency shall refuse to grant an authorisation for performing the function of a member of management board if it appears from the supporting information that the activities or practices of that person or because of his/her actions taken, the operation of the brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence. Along the same lines goes also a provision which authorises the Securities Market Agency to withdraw its licence if a member of management board is convicted for committing a criminal offence and was given a non-suspended sentence of imprisonment of more than three months.

Similar fit and proper standards as above apply also for members of supervisory board of a brokerage house, namely a member may only be a person who has not been convicted for committing a criminal offence and has not been given a non-suspended and non-expunged sentence of more than three months imprisonment.

For no visible reasons in the same law a slightly more limited fit and proper provision apply for brokers. Among other conditions to obtain an authorisation to provide stockbroking services there is also a condition that a candidate must not have been finally convicted for any of criminal offences against property or economy and given a non-suspended and non-expunged sentence of more than three months imprisonment. The Securities Market

Agency shall refuse to grant such authorisation if it is evident from the supporting information that, with regard to the services or operations provided by the candidate or with regard to the actions carried out by that person, the operation of the brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence.

Stock exchange

Regarding the relevant fit and proper standards entirely the same conditions and obligations that relate to the shareholders and the management board of a brokerage house are also valid for the shareholders and the management board of the stock exchange. Here again it is the Securities Market Agency which, during a procedure of granting or withdrawing a license, is responsible to check the above mentioned conditions and to monitor if they change.

AUSTRIA

General information about the financial system

In Austria, like in most other countries, every financial sector has its own laws and regulations providing rules for the relevant industry. However, unlike a dispended supervisory system in Slovenia, the uniform supervisory system is in place in Austria with Financial Market Authority being the single statutory supervisory body ("single regulator") responsible for supervision in the fields of banking, insurance and pension funds, securities and stock exchanges. Its powers and obligations are regulated in the Austrian Financial Market Authority Act (Federal Law Gazette, Nos. 97/2001, 45/2002, 33/2003, 80/2003, 70/2004, 32/2005, 33/2005, 78/2005 and 48/2006). Besides, also the Austrian Central Bank plays an important role in the field of prudential supervision in the banking sector and the division of supervisory tasks between the Austrian central Bank and Austrian Financial Market Authority is governed by the Austrian Banking Act.

Banking sector

The Austrian Banking Act was adopted in 1993 and later on amended several times (Federal Law Gazette, Nos. 532/1993, 97/2001, 45/2002, and 104/2006). Among many other things it also contains rules on fit and proper standards that apply to persons who propose to acquire or already hold a qualifying participation in credit institutions, and to their managers. The relevant provisions for this analysis are contained in the following articles:

- Articles 4 and 5 (Granting of the license to a credit institution),
- Article 6 (Revocation of the license),
- Article 20 (Qualifying participations in credit institutions), and
- Article 70 (Supervision).

Furthermore, the Austrian Banking Act, as well as other relevant acts that regulate the insurance and security sectors, also refers to Article 13 of the Austrian Trade Act (Federal Law Gazette, No. 194/1994) which provides reasons for prohibiting a natural person from performing trade (see below).

According to the above mentioned acts a legal person that wants to get a licence for a new credit institution has to enclose to the Financial Market Authority (hereinafter referred to as the FMA) also the documents on the identity of persons that hold a qualifying participation in the credit institution and the information necessary to determine the reliability of these persons. The FMA shall grant a licence if, among other things, also the following conditions are met:

- the persons who hold qualifying participations in the credit institution satisfy the requirements imposed in the interest of sound and prudent management of the credit institution and no facts exist that may raise doubts as to the personal reliability of these persons; if such facts exist, the license shall be granted only if the doubts prove to be unfounded;
- no manager is disqualified because of a reason listed in paragraphs 1 to 6 of article 13 of the Austrian Trade Act (see below);
- no manager has been charged with committing an intentional act punishable by a prison term exceeding one year, starting with the legally binding indictment or the bringing of the criminal charges and ending with the final verdict that terminates the criminal proceedings; and
- no facts exist that may raise doubts as to the personal reliability of the managers; if such facts exist, the license shall be granted only if the doubts prove to be unfounded.

A similar procedure is in force also when a person proposes to acquire a qualifying participation in the already established credit institution, yet only a requirement mentioned above in the first bullet point applies in such case.

As it can be seen from the above the same article is regulating the fit and proper standards for qualified shareholders and for managers of the credit institution, yet they are defined differently. While for the qualified shareholders only a general provision related to the "existence of facts that may raise doubts as to their personal reliability" is in force, for managers a specific provision regarding their criminal records and possible involvement in committing certain criminal offences apply. According to the above mentioned article 13 of the Austrian Trade Act a natural person may not perform trade if:

1. he/she was finally convicted by the court for committing one of the following criminal offences:
 - fraudulent bankruptcy, damaging of foreign creditors, giving a priority to one creditor or grave negligent damaging of creditor's interests; or
 - any other criminal offence for which a sentence of imprisonment of more than three months or a fine for more than 180 days has been imposed;and the sentence has not yet been expunged;
2. a non-expunged sentence exists because of the violation of article 28 and 31 of the Law on Narcotics;
3. he/she was punished by the competent tax administration for committing a tax offence connected with smuggling, a VAT fraud, a

concealment connected with tax offences, a tax offence connected with monopoly, an intentional violation of a state monopoly or a concealment connected with a state monopoly, and a fine above EUR 726 or a fine and a sentence of imprisonment have been imposed, and less than 5 years have elapsed after a punishment.

The FMA shall revoke its license if the conditions described above are no longer met.

Insurance sector

The fit and proper standards in the insurance sector as well as the tasks and the powers of the FMA concerning the insurance supervision are on the whole stipulated in the Insurance Supervision Act (Federal Law Gazette, Nos. 569/1978, ... 93/2005 and 95/2006). The following provisions of the law are relevant for this report:

- Article 4 (License),
- Article 7b (Revocation of license), and
- Article 11a (Shareholders).

Like the Austrian Banking Act also the Insurance Supervision Act refers to article 13 of the Austrian Trade Act, which provides certain prohibitions due to committed criminal offences.

The FMA shall not grant a license to a legal person that want to register as an insurance company if the members of the management board or the administrative board or the managing directors do not have the required personal reliability and professional qualification to fulfil their duties. At any rate, the condition of personal reliability shall not be deemed fulfilled if a ground for exclusion is defined in article 13 of the Austrian Trade Act. The same applies if a criminal offence comparable with the aforementioned has been committed abroad. According to the same article 4 the FMA shall also refuse to grant the license if persons, who hold qualifying participating interests or can exert a decisive influence on the management, don't fulfil the obligations required in the interest of a sound and prudent management of the insurance undertaking. Like in the Austrian Banking Act the fit and proper standards for managers are here determined in the same article that deals with the conditions for granting the license to the insurance company.

The FMA shall revoke its license if the conditions for the issuing of the license are no longer met. This means that all requirements concerning the management board and the shareholders need to be fulfilled throughout the entire duration of the insurance company's business activities and the FMA shall monitor compliance with the licensing requirements.

As for the new shareholders the Insurance Supervision Act provides that any person who wishes to acquire qualifying participating interests in the insurance company shall fulfil also the conditions of personal reliability and

professional qualification. No ground for exclusion as defined in article 13 of the Austrian Trade Act shall exist.

Securities sector

Provisions that regulate the securities sector in Austria are contained in the Capital Market Act (Federal Law Gazette, Nos. 210/1991, 60/1998, ... and 80/2003), the Securities Supervision Act (Federal Law Gazette, Nos. 753/1996, ... and 48/2006) and in the Stock Exchange Act (Federal Law Gazette, Nos. 555/1989, 11/1998, 97/2001, ... and 141/2006). The latter provides also the fit and proper standards for brokerage houses and their shareholders, management, dealers and official brokers. This law was adopted already in 1989 and after several amendments it was lastly amended in 2006. Provisions regulating the fit and proper standards are the following:

- Article 3 (The Granting of Licenses),
- Article 4 (Withdrawal of Licenses),
- Article 14 (Membership of the Exchange),
- Article 20 (Dealers),
- Articles 33 and 34 (Official Brokers) and
- Article 43 (Supervision of the Exchange).

The Stock Exchange Act authorises the FMA to grant a license to a candidate company if the following conditions are met:

- the persons holding a qualified interest in the company fulfil the profile required in terms of a sound and prudent management of the company;
- no reasons for exclusion within the meaning of Article 13 of the Austrian Trade Code (see above) should exist in relation to any of the managing directors;
- no judicial investigations before trial have been instituted against any of the managing directors on grounds of a criminal offence committed intentionally, which is punishable by imprisonment of a term of more than one year, until the final decision terminating the criminal proceedings is reached; and
- no reasons for exclusion from the position as a managing director of a brokerage house as mentioned in second and third bullet points exist with regard to any of the managing directors who is a citizen of a foreign country.

The FMA shall revoke its license if all aforementioned requirements for granting of the license cease to be fulfilled after the license has been granted.

Moreover, the Stock Exchange Act also requires some fit and proper standards to be met if a company wants to become a member of the Austrian Stock Exchange. Among other requirements there is also a condition that the applicant or one of its officers should not have been convicted for a criminal offence pursuant to Article 13 of the Austrian Trade Act and as long as the sentence has not been abrogated, or it is not subject to restricted divulgence from the criminal record.

Dealers are also mentioned in the Stock Exchange Act as special category of persons that are authorised to place orders and to conclude dealings in the name of members of the stock exchange or within the trading system and have been admitted as dealers to the stock exchange by the brokerage house. Their admission to the stock exchange may only be granted to persons if none of the grounds for expulsion, including the one mentioned in the previous paragraph of this report, applies to them.

An additional category of players in the securities business in Austria are also official brokers, who are officially appointed self-employed intermediaries of the stock exchange. The same fit and proper standards that apply for dealers and members of the stock exchange apply also for official brokers. However, the FMA has the right to temporarily suspend an official broker from office if criminal proceedings have been initiated against him/her by a court of law and the character and severity of the allegations against him/her are capable of damaging the trustworthiness of the official broker or pose a danger for persons who make use of the broker's services. This provision is supplemented with the obligation of the FMA to remove the official broker from office if he/she is sentenced for a criminal offence according to Article 13 of the Austrian Trade Act.

BELGIUM

General information about the financial system

Like Austria Belgium also has a single supervisory authority – the Banking, Finance and Insurance Commission (hereinafter referred as to the CBFA) for banking, insurance and securities sectors, that oversees how the financial institutions comply with the AML/CFT obligations. According to the FATF Report on Observance of Standards and Codes, dated 21 November 2005, Belgium has various licensing and registration procedures which appear sufficient to prevent criminals from taking control of financial businesses. The CBFA considers explicitly that preventing the financial system from being used for ML/FT purposes is an integral part of proper reputational risk management, and that as a result this lies fully within its realm of prudential supervision.

Banking sector

The Belgian Law of 22 March 1993 on the legal status and supervision of credit institutions contain several provisions dealing with the fit and proper standards, yet they are all very general by nature. The relevant provisions of the law are the following:

- Article 10 (Granting the authorization to the credit institution),
- Article 17 (Shareholders or members),
- Articles 18 and 19 (Management),
- Article 24 (Changes affecting capital structure), and
- Article 108 (Notification regarding criminal investigations).

According to this law the CBFA shall grant authorisation to the credit institutions if it meets certain conditions laid down in Section II of the law. However, this section only provides conditions in respect of shareholders when changes are affecting capital structure of the credit institution. When a natural or legal person proposes to acquire securities or shares of a credit institution the CBFA may object to the proposed acquisition if, in the need to ensure sound and prudent management, it is not satisfied as to the suitability of such natural or legal person. The same general language is used also in respect of granting a license to the initial shareholders who want to establish and register a credit institution.

Regarding the fit and proper standards for management the law⁴ contains more detailed provisions requiring that the following persons may not become members of the management board of the credit institution:

- persons who don't have the necessary professional reputation,
- persons convicted of certain offences and bankrupts as referred in the Royal Decree 22 of 24 October 1934⁵,
- persons sentenced to less than three months imprisonment or a fine for an offence foreseen in the above mentioned Royal Decree 22 of 24 October 1934,
- persons convicted by non-Belgian courts of law of offences similar to those set out in the above mentioned Royal Decree 22 of 24 October 1934.

The CBFA has to monitor the requirements described above and if it finds out that the credit institution is not operating in accordance with the provisions of the law and the implementing decrees and regulations it may take certain supervisory measures, which include the revocation of license. If any investigations or penal actions related to the offences mentioned in the law are initiated against directors, managers and managing directors of credit or financial institutions the competent Public Prosecutor, judicial or administrative authorities shall inform the CBFA.

More detailed rules on fit and proper are contained in the circulars issued by the CBFA, and as far as the fit and proper standards that apply to managers are concerned the most important is the circular "The Uniform Letter to credit institutions, investment firms, insurance companies, and subsidiaries of institutions governed by the law of a non-Member State of the European Economic Area", dated 31 March 2004. Another CBFA circular which deals with the fit and proper standards of the shareholders of credit institutions was issued on 13 April 1993.

The first circular is intended for the supervision of compliance with the fit and proper provisions of laws that apply to credit institutions as well as to investment firms, intermediaries, investment advisers and insurance companies. The circular is referring to provisions requiring that effective managers of financial institutions shall have the professional repute and it contains two

⁴ The law contains also other prohibitions related to committed administrative offences which were not taken into account in this report.

⁵ The above mentioned Royal Decree was not available.

application forms for granting a license to effective managers and non-executive members of the above mentioned financial institutions. Among the questions included in this form the applicants have to answer also if they have ever been condemned, or are aware of any investigation having been initiated against them for infringements as referred in relevant articles of the sectorial laws, or for similar infringements abroad. Moreover, they have to provide an answer as to whether any company in which they were or are effective managers, or in which they have held or currently hold significant interests, has been the subject of penal or administrative charges/sanctions. The applicants shall also enclose a certificate of good character.

In respect of the shareholders the second circular requires that natural or legal persons must have necessary qualities to ensure sound and prudent management of the credit institution.

Insurance sector

The fit and proper provisions for the insurance sector are contained in the Law of 9 July 1975 on the supervision of insurance companies, yet they are purely drafted.

Regarding the shareholders this law contains a similar provision as it is determined in the second CBFA circular from April 1993. They must have necessary qualities to ensure sound and prudent management of the insurance company. As for the senior managers the law doesn't require testing their fitness and propriety, but according to the above mentioned first CBFA circular from March 2004 the candidates for senior managers in the insurance companies must fulfil the form which includes questions on their possible involvement in criminal conducts and must enclose also a certificate of good character (see above).

Securities sector

Several legislative acts are regulating the conducting of securities businesses in Belgium but the most important in the context of the fit and proper standards for the stock exchange (a market operator) and investment firms, as well as for their shareholders, agents (brokers) and management, are the following laws:

1. Law on the supervision of the financial sector and on financial services (2 August 2002; articles 6,17 and 19), and
2. Law on the legal status and supervision of investment firms, on intermediaries and investment advisers (6 April 1995; articles 50, 59, 60, 61, 67, 73,104, 118 and 126).

In addition the above mentioned CBFA circular from March 2004 apply also to the management of investment firms.

In order to be recognized as a market operator (a stock exchange), a candidate shall among other criteria also possess the necessary qualities to ensure sound and prudent management of the company. The individuals charged with the effective management of the market operator shall also have the necessary professional reputation. The same provision regarding the "necessary qualities" apply when any natural or legal person intend to acquire securities or share certificates of a market operator.

Qualified intermediaries, some other categories of financial intermediaries and intermediaries in commodity investment instruments may be admitted as members of a Belgian regulated market if they satisfy certain conditions, which *inter alia* include the "necessary qualities" to ensure the protection of the investors and the proper operation, integrity and transparency of the market.

With regard to the investment firms, which under the Belgian laws include brokerage houses, portfolio management companies, financial instrument broking firms and financial instrument placing firms, the CBFA shall refuse the request for authorisation (license) if, taking into account the need to ensure the sound and prudent management of an investment firm, it is not satisfied as to the suitability of the natural or legal persons who own the qualified holdings in the investment firm's capital. The same procedure and standards apply when any natural or legal person proposes to acquire a qualified portion of securities or shares of an investment firm or when mergers and transfers of activities or the network are requested.

The fit and proper provisions that apply to managers of an investment firm are equal to those that apply to members of the management board of the credit institution. Namely, the candidates shall have the necessary professional reputation and shall not been convicted of certain offences and bankrupts as referred in the Royal Decree 22 of 24 October 1934, or sentenced to less than three months imprisonment or a fine for an offence foreseen in the above mentioned Royal Decree. Moreover, the CBFA shall not grant a license to persons being convicted by non-Belgian courts of law of offences similar to those set out in the above mentioned Royal Decree.

Although the Law on the legal status and supervision of investment firms, on intermediaries and investment advisers contain provisions regulating the activities of the agents (persons who act as a representative, broker or agent), it does not explicitly provide the fit and proper conditions for agents. According to this law the King may, in the interest of sound administrative and accounting organization lay down the rules applicable to such persons.

The same requirements concerning the fit and proper standards that are valid for investment firms are also regulated for the investment advice companies, the intermediaries for currency trading and for derivatives specialists (see the Royal Decree on the legal status of derivatives specialists, Belgian Official Gazette, 2 March 2004).

Like in other countries mentioned so far the CBFA shall revoke its license if the conditions for the issuing of the license are no longer met.

UNITED KINGDOM

General information about the financial system and the relevant legislation

Since December 2001 the UK financial services industry is regulated by one single regulator – the Financial Services Authority (hereinafter referred as to the FSA). The FSA is an independent non-governmental body which is entirely financed by the financial institutions. In addition to wide range of rule-making powers it also has investigatory and enforcement powers in order to meet its objectives as determined in the Financial Services and Markets Act 2000 (14 June 2000). Unlike in other countries described above in the UK all fit and proper standards for banking, insurance and securities sectors are included in the above mentioned law and in the regulations issued by the FSA. The FSA's legislative provisions are also set out in the FSA Handbook, which contains a consolidated version of all FSA's rule-making instruments. The fit and proper provisions are shown below in a different manner than before, following the system in force in the abovementioned legislative acts.

Fit and proper standards for regulated activities

The activities regulated by the Financial Services and Markets Act 2000 (hereinafter referred as the Act) include banks, insurance companies and stockbrokers. A permission to carry on regulated activities can be applied and granted to individuals, corporate bodies, partnerships and unincorporated associations depending on some threshold conditions that apply for some regulated activities. Among the threshold conditions that apply to banks, insurance companies and stockbrokers (brokerage houses) there is also a condition of suitability. Under this requirement the person concerned must satisfy the FSA that he is a fit and proper person having regard to all the circumstances, including:

- his connection with any person,
- the nature of any regulated activity that he carries on or seeks to carry on, and
- the need to ensure that his affairs are conducted soundly and prudently.

The emphasis of this threshold condition is on the suitability of the legal person itself, yet when assessing it the FSA may have regard to any person appearing to it to be, or likely to be, in a relevant relationship with this legal person. For instance, this includes assessing the suitability of shareholders and the reputation and experience of directors involved in the management of another entity in the same group.

When deciding about the request for a license the FSA shall also consider whether the legal person concerned conducts, or will conduct, its business with integrity and in compliance with proper standards. The relevant information may include matters to whether the legal person has been convicted, or is connected with a person who has been convicted, of any unspent offence involving fraud, corruption, perjury, accounting or other dishonesty, money laundering, market abuse or insider dealing, offences under legislation relating to insurance, banking or other financial services, companies, insolvency, consumer credit or consumer protection or any significant tax offence; where relevant, any spent convictions excepted for this purpose under the Rehabilitation of Offenders Act 1974 shall be taken into consideration.

Fit and proper standards for approved persons

The Act and the Handbook provide minimum standards for becoming and remaining an approved person. These standards are relevant when a bank, insurance company or any other financial institution submits an application for an employee or other person to become an approved person and for the purposes of assessing the continuing fitness and propriety of approved persons. According to the Act the FSA may grant an application for approval if it is satisfied that the candidate is competent to perform the controlled function⁶ to which the application relates. When assessing the fitness and propriety of a candidate the FSA has a lot of discretion and may treat each candidate on a case-by-case basis.

One of the most important considerations that the FSA shall take into account is the person's honesty, integrity and reputation. Among other matters this criteria also includes the following:

- whether the person has been convicted of any criminal offence; this must include any spent convictions excepted under the Rehabilitation of Offenders Act 1974; particular consideration shall be given to offences of dishonesty, fraud, financial crime or an offence under legislation relating to companies, building societies, industrial and provident societies, credit unions, friendly societies, banking and/or other financial services, insolvency, consumer credit companies, insurance, and consumer protection, money laundering, market manipulation and insider dealing;
- whether the person has been subject of any adverse finding or any settlement in civil proceedings in connection with investment or other financial businesses, misconduct, fraud or the formation or management of a corporate body;
- whether the person has been the subject of any existing or previous investigation or disciplinary proceedings, by any regulatory authorities, clearing houses and stock exchanges, or government bodies or agencies; and
- whether the person is or has been the subject of any proceedings of a disciplinary or criminal nature, or has been notified of any potential

⁶ Several controlled functions are described in the Handbook and they include governing functions, system and controls functions and significant management functions performed by any of the regulated activities.

proceedings or of any investigation which might lead to those proceedings.

The FSA may also withdraw its approval for carrying out specified controlled functions if it discovers that the person in respect of whom the approval was given is no longer fit and proper to perform the controlled function.

Fit and proper standards related to the stock exchange

In The Financial Services and Markets Act 2000 Recognition Requirements for Investment Exchange and Clearing Houses Regulation 2001 and its Amendment, adopted in December 2006, the FSA regulated the fit and proper standards that apply also to the stock exchange. According to this regulation *"the persons who effectively direct the business and operations of the exchange must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it"*. In addition the regulation also provides that *"the persons, who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, must be suitable"*.

4. SUMMARY

The report contains the analysis of best legislative practices in the application of "fit and proper" standards in banking, insurance and securities sectors of Slovenia, Austria, Belgium and United Kingdom. Amongst many financial institutions the banks, insurance undertakings, brokerage houses and stock exchange were taken into account. Since the emphasis is on the prevention of money laundering and financing of terrorism this report is focussed only on those elements of fit and proper standards that are important for this particular subject.

As a reference the following international documents were considered: the FATF Forty Recommendations on money laundering, the third EU Directive on the prevention of ML/FT, the EU Banking Directive, the EU Directive on markets in financial instruments, the Basel Core Principles and the IAIS Insurance Core Principles.

Slovenia

In Slovenia different legislation apply to banking, insurance and securities sectors and each sector has its own independent regulator and supervisor, namely the Bank of Slovenia, the Insurance Supervision Agency and the Securities Market Agency (the SMA).

- Fit and proper standards for all credit institutions are regulated in the Law on Banking. Regarding the shareholders the Bank of Slovenia shall refuse a

request for a decision on the authorisation for acquisition of a qualifying holding if because of the legal or financial situation of the future qualified owner or because of activities or practices performed by the future qualified owner or by persons thereto connected, or because of actions taken by the future qualifying owner or by persons thereto connected with him, the operations of the bank in accordance with the regulations on risk management could be endangered.

A member of a bank's management board can only be a person who has not been finally convicted of an intentionally committed criminal offence that was prosecuted *ex officio* or for some specified criminal offences committed out of negligence, the sentence not been expunged.

A candidate for a member of the supervisory board of a bank may only be appointed if he/she has not been finally convicted for the same criminal offences as mentioned above.

- Provisions dealing with the fit and proper standards for insurance sector are included in the Insurance Act. These provisions are heavily based on the Banking Law and literally the same as the provisions that apply in banking sector, yet they are supervised by the Insurance Supervision Agency.

- The Securities Market Act provides fit and proper standards for securities sector. With regard to the shareholders of the brokerage house the SMA shall refuse a request for a decision on the authorisation for acquisition of a qualifying holding if because of the legal or financial situation of the future qualified owner or because of activities or practices performed by the future qualified owner or by persons thereto connected, or because of actions taken by the future qualifying owner or by persons thereto connected with him, the operation of the brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence.

Members of the management board can only be a person who was not given a non-suspended and non-expunged sentence for a criminal offence with imprisonment of more than three months. The SMA shall refuse to grant a license if the activities or practices of that person or because of his/her actions taken, the operation of the brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence. The SMA has to withdraw its licence if a member of management board is convicted for committing a criminal offence and was given a non-suspended sentence of imprisonment of more than three months. A member of a supervisory board of a brokerage house may only be a person who has not been convicted for committing a criminal offence and has not been given a non-suspended and non-expunged sentence of more than three months imprisonment.

To obtain a license for a broker a candidate must not have been finally convicted for any of criminal offences against property or economy and given a non-suspended and non-expunged sentence of more than three months imprisonment. The SMA shall refuse to grant such authorisation if it is evident that, with regard to the services or operations provided by the candidate or with regard to the actions carried out by that person, the operation of the

brokerage house could be endangered in accordance with the regulations on risk management and/or due diligence. Entirely the same conditions that relate to the shareholders and the management board of a brokerage house are also valid for the shareholders and the management board of the stock exchange.

Austria

In Austria every financial sector has its own laws and regulations providing rules for the relevant industry, yet they have a uniform supervisory system. The Financial Market Authority (the FMA) is the single regulator and its powers are regulated in the Austrian Financial Market Authority Act. Besides, also the Austrian Central Bank plays an important role in the field of prudential supervision in the banking sector.

- The Austrian Banking Act contains rules on fit and proper standards that apply to persons who propose to acquire or already hold a qualifying participation in credit institutions, and to their managers. This act also refers to Article 13 of the Austrian Trade Act which provides reasons for prohibiting a natural person from performing trade. A legal person that wants to get a licence for a new credit institution has to fulfil the following conditions:

- the persons who hold qualifying participations in the credit institution shall satisfy the requirements imposed in the interest of sound and prudent management of the credit institution and no shall facts exist that may raise doubts as to the personal reliability of these persons;

- no manager is disqualified because of a reason listed in paragraphs 1 to 6 of article 13 of the Austrian Trade Act (see below);

- no manager has been charged with committing an intentional act punishable by a prison term exceeding one year, starting with the legally binding indictment or the bringing of the criminal charges and ending with the final verdict that terminates the criminal proceedings; and

- no facts exist that may raise doubts as to the personal reliability of the managers.

According to article 13 of the Austrian Trade Act a natural person may not perform trade if he was finally convicted for committing one of the specified criminal offences or a non-expunged sentence exists because of the violation specified provisions of the Law on Narcotics or he/she was punished by the competent tax administration for committing one of the tax related offences.

- The fit and proper standards in the insurance sector are on the whole stipulated in the Insurance Supervision Act. The FMA shall not grant a license to a legal person that wants to register as an insurance company if the members of the management board or the administrative board or the managing directors do not have the required personal reliability and professional qualification to fulfil their duties. At any rate, the condition of personal reliability shall not be deemed fulfilled if a ground for exclusion is defined in article 13 of the Austrian Trade Act. The FMA shall also refuse to grant the license if persons, who hold qualifying participating interests or can exert a decisive influence on the management, don't fulfil the obligations required in the interest of a sound and prudent management of the insurance undertaking.

The law also provides that any person who wishes to acquire qualifying participating interests in the insurance company shall fulfil also the conditions of personal reliability and professional qualification. No ground for exclusion as defined in article 13 of the Austrian Trade Act shall exist.

- Provisions that regulate the securities sector are contained in the Capital Market Act, the Securities Supervision Act and in the Stock Exchange Act. The latter provides also the fit and proper standards for brokerage houses and their shareholders, management, dealers and official brokers. The Stock Exchange Act authorises the FMA to grant a license to a candidate company if:
 - the persons holding a qualified interest in the company fulfil the profile required in terms of a sound and prudent management of the company;
 - no reasons for exclusion within the meaning of Article 13 of the Austrian Trade Code exist in relation to any of the managing directors;
 - no judicial investigations before trial have been instituted against any of the managing directors on grounds of a criminal offence committed intentionally, which is punishable by imprisonment of a term of more than one year; and
 - no reasons for exclusion from the position as a managing director of a brokerage house as mentioned in second and third bullet points exist with regard to any of the managing directors who is a citizen of a foreign country.

If a company wants to become a member of the Austrian Stock Exchange the applicant or one of its officers should not have been convicted for a criminal offence pursuant to Article 13 of the Austrian Trade Act.

Regarding the dealers their admission to the stock exchange may only be granted to persons if none of the grounds for expulsion, including the one mentioned in the previous paragraph of this report, applies to them. The same fit and proper standards that apply for members of the stock exchange apply also for official brokers.

Belgium

Belgium also has a single supervisory authority – the Banking, Finance and Insurance Commission (the CBFA) for banking, insurance and securities sectors.

- According to the Law on the legal status and supervision of credit institutions the CBFA shall grant authorisation to the credit institutions if, in the need to ensure sound and prudent management, it satisfied as to the suitability of its shareholders.

The persons who don't have the necessary professional reputation or were convicted of certain specified offences or were sentenced to less than three months imprisonment or a fine for such an offence may not become members of the management board of the credit institution.

More detailed rules on fit and proper are contained in the circulars issued by the CBFA. One of the circulars is intended for the supervision of compliance with the fit and proper provisions of laws that apply to credit institutions as well as to investment firms, intermediaries, investment advisers and insurance

companies. The circular is referring to provisions requiring that effective managers of financial institutions shall have the professional reputation and it contains two application forms for granting a license to managers. The forms contain also questions related to the applicant's or his company's criminal records. In respect of the shareholders another circular requires that natural or legal persons must have necessary qualities to ensure sound and prudent management of the credit institution.

- The fit and proper provisions for the insurance sector are contained in the Law on the supervision of insurance companies. The shareholders must have necessary qualities to ensure sound and prudent management of the insurance company. As for the senior managers the law doesn't require testing their fitness and propriety, but according to the above mentioned circular the candidates for senior managers in the insurance companies must fulfil the form which includes questions on their possible involvement in criminal conducts.

- The Law on the supervision of the financial sector and on financial services and the Law on the legal status and supervision of investment firms, on intermediaries and investment advisers contain the fit and proper standards for the securities sector. In order to be recognized as a market operator (a stock exchange), a candidate shall possess the necessary qualities to ensure sound and prudent management of the operator. The individuals charged with the effective management shall also have the necessary professional reputation. The same provision regarding the "necessary qualities" apply when any natural or legal person intend to acquire securities or share certificates of a market operator.

Qualified intermediaries, some other categories of financial intermediaries and intermediaries in commodity investment instruments may be admitted as members of a Belgian regulated market if they satisfy certain conditions, which *inter alia* include the "necessary qualities" to ensure the protection of the investors and the proper operation, integrity and transparency of the market.

With regard to the brokerage houses and other investment firms the CBFA shall refuse the request for authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, it is not satisfied as to the suitability of the natural or legal persons who own the qualified holdings in the investment firm's capital. The same standards apply when any person proposes to acquire a qualified portion of securities or shares of an investment firm or when mergers and transfers of activities or the network are requested.

The fit and proper provisions that apply to managers of the brokerage house are equal to those that apply to members of the management board of the credit institution. Belgian legislation does not explicitly provide the fit and proper conditions for agents - brokers. However the King may, in the interest of sound administrative and accounting organization lay down the rules applicable to such persons.

United Kingdom

The UK financial services industry is regulated by one single regulator – the Financial Services Authority (the FSA) which is an independent non-governmental body with a wide range of rule-making powers, investigatory and enforcement powers. Its objectives are determined in the Financial Services and Markets Act 2000 (the Act). Unlike in other countries in the UK all fit and proper standards for banking, insurance and securities sectors are included in the above mentioned law and in the regulations issued by the FSA. The FSA's legislative provisions are also set out in the FSA Handbook.

- The activities regulated by the Act include banks, insurance companies and stockbrokers. A permission to carry on regulated activities, including banks, insurance companies and brokerage houses, can be granted to applicants depending on some threshold conditions. Under a condition of suitability the person concerned must satisfy the FSA that he is a fit and proper person having regard to all the circumstances, including his connection with any person, the nature of any regulated activity that he carries on or seeks to carry on, and the need to ensure that his affairs are conducted soundly and prudently.

The emphasis of this threshold condition is on the suitability of the legal person itself, yet when assessing it the FSA may have regard to any person appearing to it to be, or likely to be, in a relevant relationship with this legal person. This includes the shareholders and the management.

When deciding about the request for a license the FSA shall also consider whether the legal person concerned conducts, or will conduct, its business with integrity and in compliance with proper standards. The relevant information may include matters to whether the legal person has been convicted, or is connected with a person who has been convicted, of any unspent offence involving some specified criminal offences.

- The legislation also provide minimum standards for becoming and remaining an approved person. The FSA may grant an application for approval if it is satisfied that the candidate is competent to perform the controlled function (this includes governing and managerial functions) to which the application relates. The FSA shall take into account the person's honesty, integrity and reputation, which include the criteria as to whether the person has been convicted of any criminal offence or has been a subject of some specified proceedings.

- In one of its regulations the FSA regulated the fit and proper standards that apply to the stock exchange. According to this regulation *"the persons who effectively direct the business and operations of the exchange must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it"*. In addition the regulation also provides that *"the persons, who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, must be suitable"*.