

Employment in Financial Services

Contributing Editor

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02. Are there particular pre-screening measures that need to be taken when engaging a financial services employee? Does this vary depending on seniority or type of role? In particular, is there any form of regulator-specified reference that has to be provided by previous employers in the financial services industry?

Belgium

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Members of management should at all times be of good repute and possess sufficient knowledge, skills and experience to perform their duties (article 91, Directive 2013/36/EU; and article 9, Directive 2014/65/EU).

Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must exclusively be natural persons and must at all times have the necessary professional standing and expertise to perform their duties (article 19, Act of 25 April 2014). Since 2023, it is specified that “in particular, these persons must demonstrate honesty, integrity and independence of mind which, in the case of members of the legal administrative body, enable them to effectively evaluate and, if necessary, question the decisions of the actual management and to ensure the effective supervision and monitoring of the management decisions taken” (Art. 19, Act of 25 April 2014).

In addition, they must not have been convicted of any of the offences listed in article 20 of the Act of 25 April 2014. This concerns convictions with a professional ban and violations of financial legislation, company codes and insurance law.

The NBB will verify that these persons meet the conditions listed above. Forms for a new appointment, additional elements during the employment, termination of an appointment or renewal of an appointment are available on the NBB website (www.nbb.be). These forms require information mainly regarding education, past financial services experience, training, any criminal or administrative or civil proceedings or investigations, disciplinary decisions, bankruptcy, insolvency, potential conflicts of interest, and time commitments for the new appointment.

The NBB will assess the ability of the person based on five criteria:

- expertise, covering knowledge, experience and skills;
- professional repute;
- independence of mind;
- time commitment; and
- collective suitability for the board (ie, to verify whether the expertise within the said body is sufficiently guaranteed, given the person's knowledge, experience and skills (NBB Fit & Proper Handbook of 22 December 2022, 2:26, p. 16)).

Concerning "N-1" effective managers (managers who exercise direct and decisive influence over the management of the institution, but who are not members of the management committee) other than branch managers, the supervisory authority does not have to authorise them (NBB Fit & Proper Handbook of 22 December 2022, 2:9, p. 14). This does not mean that these persons must not have the required expertise and professional reputation, but only that the NBB will not conduct an assessment.

Last updated on 16/04/2024



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Different notification procedures exist before employees may take up their roles.

Investment firms may only entrust employees to provide investment advice if they are knowledgeable and have demonstrated the required reliability – as evidenced, inter alia, by not having a relevant and unspent prior criminal record. Furthermore, such employees' identities must be disclosed to BaFin before they commence their activities. The active registration of employees is intended to impart upon employers the significance of employee selection and responsibility for their decisions.

Representatives of regulated entities of the financial services sector (typically, members of management) must be approved by BaFin before they can take up their role (colloquially known as BaFin's "driver's licence"). To obtain approval, a request must be filed with BaFin, showing the experience and suitability of the candidate for the role. Depending on the financial services delivered by the company, information that must be filed include the following:

- a CV (including information on professional training, career, and references);
- information on reliability (a form or summary to be completed by the manager, including, for example, mandatory declarations on prior criminal or administrative offences);
- a "certificate of good conduct for submission to an authority", a "European certificate of good conduct for submission to an authority", or "corresponding documents" from abroad (depending on the countries of residence in the last 10 years);
- an extract from the central commercial register;
- an overview of other mandates as a managing director or in administrative and supervisory bodies; and
- information about the manager's ability to dedicate sufficient time to the role.

Non-management employees responsible for specific key functions at an insurance provider are subject to a similar notification process. Further, financial services employers must perform a risk analysis under the Anti-Money Laundering Act and take internal security measures, which also includes assessing the reliability of employees.

Last updated on 16/04/2024

03. What documents should be put in place when

engaging employees within the financial services industry? Are any particular contractual documents required?

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Regarding anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution, it is necessary to use the forms provided by the NBB to ensure that they are “fit and proper” and are authorised by the NBB (see question 2).

It is also recommended to foresee restrictive covenants in the employment contract, such as confidentiality, other professional activities, non-solicitation, non-competition and intellectual property provisions.

Last updated on 16/04/2024

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German law does not treat financial services employees differently from employees of other industries, in that an employment agreement does not necessarily have to be in writing to come into existence. It is, however, common (best) practice and highly recommended for risk mitigation and transparency reasons that parties enter into a written employment agreement. For some provisions to be valid, such as a post-contractual non-compete or a fixed-term agreement, a qualified electronic or wet-ink signature is mandatory.

Further, employers must also provide employees with a wet-ink signed certification document summarising the essential conditions of employment under the German Evidence Act. Failure to provide such a document does not render the employment contract invalid, but a breach of the documentation requirement constitutes an administrative offence that may trigger fines. The German government has proposed an Act to modify the wet-ink signature requirement and also allow for electronic signatures, but has not provided a clear timeline for it coming into force yet.

Remuneration is typically governed under the employment contract and references a firm’s remuneration policy, which must be put in place for regular staff as well as identified risk-takers, with a dedicated set of rules varying per industry sub-sector.

Finally, depending on the case, certain documentation may need to be filed with BaFin before an employee can take up their tasks (see question 2).

Last updated on 16/04/2024

04. Do any categories of employee need to have special certification in order to undertake duties for

financial services employers? If so, what are the requirements that apply?

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Anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution must, at all times, have the necessary professional standing and expertise to perform their duties.

This will be assessed by the NBB through standard forms to complete if there is a new appointment, new elements during employment, termination of appointment or renewal of appointment.

"N-1" effective managers must meet the same criteria, but authorisation by the NBB is not necessary (see question 2).

Last updated on 16/04/2024

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Taking on certain tasks requires prior proof of competence, which varies depending on the financial services sector and the role. As an example, investment services must notify BaFin of investment advisors, sales representatives, and compliance officers, who in each case must be knowledgeable and reliable, and whose expertise must be reviewed at least annually (section 87, WpHG and the corresponding Employee Notification Ordinance). Institutions must deliver proof of professional suitability (ie, sufficient theoretical and practical knowledge of the relevant business and management experience) and reliability for certain key employees, managing directors, and members of the supervisory or administrative board (sections 25c paragraph 1 and 25d paragraph 1 KWG, sections 20 and 21 WpIG).

Last updated on 16/04/2024

05. Do any categories of employee have enhanced responsibilities under the applicable regulatory regime?

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Specifically, employees holding executive, overall management, oversight or control functions in regulated companies are responsible for ensuring that the companies' organization ensures the continued compliance with applicable financial market laws. Swiss financial market laws do not have enhanced

responsibilities for different employee categories. Instead, a person's fitness and propriety are assessed within the context of the specific requirements and functions of a given company, the scope of activities at that company, and the complexity of that company.

Last updated on 16/04/2024



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Employees who qualify as risk-takers have enhanced responsibilities due to their influence on an institution's risk profile, including documentation requirements. Investment brokers advising private clients are also subject to strict rules and extensive documentation requirements, inter alia, on the investment advice provided and how the investment was tailored to the preferences, investment objectives, and other characteristics of the investor.

Last updated on 16/04/2024

06. Is there a register of financial services employees that individuals will need to be listed on to undertake particular business activities? If so, what are the steps required for registration?



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There is no list of financial services employees as such, but the NBB will assess, among others, the experience and the credibility of the person when granting the "fit and proper" authorisation.

This concerns anyone in an executive position (i.e. members of the legal administrative body, the effective management and independent controllers) at a financial institution (see question 2).

However, it should be noted that financial services institutions approved by the NBB are listed on its website. Moreover, banking and investment services intermediaries must be registered and file through an online application to the FSMA (www.fsma.be) documents attesting, inter alia, their knowledge, clean criminal record, and professional liability insurance.

Last updated on 16/04/2024



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Yes. Investment firms must disclose the identities of employees providing investment advice, as well as sales representatives and compliance officers, to BaFin, which maintains a non-public database of registered employees (section 87 WpHG).

As a first step of the registration process, companies need to register on the MVP notification and publication platform. After successful registration, they can apply for admission to the employee and complaints register. Different notification procedures are available, depending on whether employees are notified for the first time or amendments are being made.

Last updated on 16/04/2024

07. Are there any specific rules relating to compensation payable to financial services employees in your jurisdiction, including, for example, limits on variable compensation, or provisions for deferral, malus and/or clawback of monies paid to employees?



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Specific rules apply to personnel whose professional activities have a significant impact on the company's risk profile (article 92, 2. Directive 2013/36/EU; article 67, Act of 25 April 2014), including:

- all members of the legal administrative body and senior management;
- staff members with supervisory responsibility for control functions or business units;
- employees who received significant remuneration during the previous year (ie, 500,000 EUR or more and equal to or greater than the average remuneration of members of the legal administrative body and senior management) and the employee performs the professional activity in a critical business unit and the nature of the activity is such that it has a significant impact on the risk profile of the business unit concerned.

Variable remuneration is capped at 50% of the fixed remuneration or 50,000 EUR, without exceeding the fixed remuneration, whichever is higher (article 1, Annex II, Act of 25 April 2014). Moreover, it is forbidden to have a guaranteed variable remuneration (article 5). 40% of variable remuneration is delayed for four to five years, with a minimum of five years for members of the legal administrative body and senior management. When the variable remuneration is very high, the percentage of the delayed variable remuneration is 60% (article 7).

The total variable remuneration will be significantly reduced if the company generates a reduced or negative financial return. This applies to variable remuneration not yet earned, variable remuneration earned but not yet paid, and variable remuneration that has already been paid. It occurs through malus or clawback schemes, in particular when the person has participated in practices that have resulted in significant losses, has not respected the “fit and proper” duties or has set up a specific mechanism for tax fraud (article 8).

A termination indemnity is considered a variable remuneration, except for a legal indemnity in lieu of notice or a non-compete indemnity (based on the calculation provided by the Employment Contracts Act). Furthermore, a termination indemnity higher than 12 months, or 18 months for a motivated decision from the remuneration committee, can only be granted subject to the approval of the first ordinary general meeting following the termination (articles 12 and 12/1).

For companies that benefit from government intervention, there is in principle no variable remuneration, except for the person recruited after the public intervention to carry on the restructuring. Moreover, the

termination indemnity is capped at nine months, unless the legal indemnity in lieu of notice (based on seniority) is higher (articles 16 and 17).

Last updated on 16/04/2024



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Yes, there are specific sets of rules on remuneration in the financial services sector, varying in detail per sub-sector. Rules are particularly strict for material risk-takers of significant institutions in light of the increased risk profile of their activities for the entire organisation.

Variable and fixed remuneration must have an appropriate ratio to each other. For financial institutions, the ratio is appropriate if the variable remuneration both complies with an upper limit of 100% of the fixed remuneration (up to 200% maximum based on a shareholders' resolution) and provides an effective behavioural incentive. Further, variable remuneration may need to be spread over deferral periods. Depending on the sector, remuneration may have to be made subject to malus, holdback or clawback provisions in case specific risks materialise or the employee is found guilty of misconduct. Further, certain remuneration elements must be granted in instruments instead of cash payments, with restrictions around this element again varying by sub-sector.

Last updated on 16/04/2024

08. Are there particular training requirements for employees in the financial services sector?



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To keep the "fit and proper" authorisation, the concerned persons must ensure that they follow the relevant training.

Regarding the prevention of money laundering, financial institutions must ensure that personnel whose function requires it is aware of the legislation, knows the internal policies, is aware of the internal reporting procedure and receives special continuing education programmes (article 11, §1, Act of 18 September 2017).

At a sectoral level, JC Nos. 310 and 341 provide for an individual right to five days of training per year per full-time equivalent employee.

Last updated on 16/04/2024



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Qualification requirements exist for specific roles (eg, traders), and employers must ensure they comply

with them by only contracting employees with the required skills, certifications and experience. The expertise of employees providing investment advice, sales representation, and compliance advice must also be continuously maintained and regularly updated.

Last updated on 16/04/2024

10. Are there any circumstances in which notifications relating to the employee or their conduct will need to be made to local or international regulators?



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If a new element occurs that can influence one or more of the five criteria assessing the suitability of a person for the “fit and proper” authorisation (see question 2), the financial institution must file the adequate form with the NBB.

Notification to the NBB is also required in the event of termination or reappointment.

Last updated on 16/04/2024



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Yes. Under section 87 WpHG, investment firms must notify BaFin of any changes regarding employees providing investment advice, sales representation, and compliance advice. This includes, for example, personal data or a change of the responsible sales representative, but also the termination of the activity. Changes must be communicated to BaFin within one month.

Further, investment firms must notify BaFin as soon as a substantial customer complaint is made against one or more employees based on his or her activities in connection with investment advice. This applies, for example, to allegations of incorrect investment advice. The notification to BaFin must be submitted within six weeks of receipt of the complaint. Details on the content of the notification are governed by section 8 paragraph 4 of the Securities Trading Act Employee Notification Ordinance.

There are further notification obligations if there are doubts about an employee’s reliability under the relevant statutory rules. For example, in their initial declaration of reliability under section 24 paragraph 1 No. 1 KWG and section 5b Ordinance on Notifications and Submission of Documents under the KWG, future managing directors and persons acting as sole representatives of credit institutions and financial services institutions must immediately report to BaFin in writing any subsequent changes that may be relevant to their reliability. This applies to all facts that were also relevant for the initial reliability assessment (eg, because an employee was convicted of certain financial crimes). In addition, BaFin must also receive notifications of preliminary proceedings, indictments and convictions of certain financial sector employees according to the Order on Notifications in Criminal Matters.

Last updated on 16/02/2024

11. Are there any particular requirements that employers should implement with respect to the prevention of wrongdoing, for example, related to whistleblowing or the prevention of harassment?

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EU Directive 2019/1937 on whistleblowing has been transposed in Belgium by the Act of 28 November 2022. Financial services are included in its material scope (article 2, 1°, b)). In general, companies with more than 250 employees had to create an internal whistleblowing system by 15 February 2023. For companies with between 50 and 250 employees, the deadline was 17 December 2023. However, these thresholds do not count for legal entities who are active in financial services, therefore they needed to install an internal whistleblowing system no matter their employee count and respect the deadline of 15 February 2023 (article 57, §3). The FSMA will have to verify whether the financial institutions are respecting their whistleblowing obligations (article 36). Furthermore, persons who report violations relating to financial services receive better protection and are awarded higher lump sum compensation if they are the victim of a retaliation measure (six months gross remuneration; article 27, §3).

Regarding the prevention of money laundering, financial institutions were already required to provide a procedure to enable their personnel, agents or distributors to report a violation of the legislation, through a specific, independent and anonymous channel (article 10, Act of 18 September 2017).

The employer must ensure the wellbeing of its employees, which includes the prevention of harassment. If harassment has occurred, they must provide appropriate support, including remediating measures, protection against dismissal and investigation by a prevention advisor specialising in psychosocial risks (Wellbeing Act of 4 August 1996, Wellbeing Code of 28 April 2017). The procedure must be detailed in the work rules of the financial institutions.

Last updated on 16/04/2024

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Employers are generally required under German law, regardless of their industry, to exercise a duty of protection regarding their employees. If they become aware of allegations of employee harassment, the employer must investigate and take appropriate steps to either dispel the suspicion (and protect the employee incorrectly accused of harassment) or sanction the perpetrator. As such, many employers have a process or policy in place governing this.

From July 2023, employers must observe the mandatory regulations of the Whistleblower Protection Act, implementing the EU Whistleblower Directive. This regulation applies automatically to many institutions in the financial sector, and beyond that to others based on their number of employees (starting with a headcount of over 50) or by virtue of belonging to the public sector. In corporate groups, multiple employers can set up a joint office to receive reports and conduct further investigations. Public sector employers must, in principle, establish an internal reporting office regardless of the number of employees. In addition, employees will also have the option to report breaches externally. The purpose of the new

legislation is to strengthen the protection of whistleblowers and ensure that they do not face any disadvantages within the framework of the legal requirements – including, inter alia, where the whistleblowing concerns matters such as breaches of European law concerning financial services, financial products and financial markets, as well as the prevention of money laundering and terrorist financing.

An office at the Federal Ministry of Justice will be established as the governing body for the new law. In addition, the Federal Antitrust Office and BaFin will be responsible for sanctioning certain breaches under their respective remit (antitrust and financial services, respectively).

Last updated on 16/04/2024

12. Are there any particular rules or protocols that apply when terminating the employment of an employee in the financial services sector, including where a settlement agreement is entered into?



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If the person concerned is subject to “fit & proper” authorisation from the NBB (see question 2), a form must be filed with the NBB to inform it of the termination.

Furthermore, the settlement agreement cannot include payments that would not respect the caps for remuneration and termination indemnities (see question 7).

Finally, job security clauses have been negotiated at a sectoral level, meaning a specific procedure must be followed for individual or collective dismissal under JC No. 310, with a sanction of six to nine months’ remuneration.

Last updated on 16/04/2024



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Employment relationships with risk-takers of significant institutions whose annual fixed remuneration exceeds three times the contribution assessment ceiling for general pension insurance can be terminated more easily, in return for a severance payment, even if a unilateral dismissal is not socially justified. For this purpose, the institution needs to file a motion to the labour court to terminate the employment relationship during an ongoing dismissal protection dispute. The court will then terminate the employment relationship and award a severance payment of up to 12 months’ salary.

Where employers wish to amicably terminate an employment relationship, they will usually offer a termination agreement that provides for a severance payment as consideration for the job loss. Severance payments offered by institutions under the German Banking Act are, in principle, treated as variable remuneration from a regulatory perspective. Unless certain exceptions and privileges apply, this means that severance payments are subject to the regulatory remuneration rules that apply to variable remuneration, meaning that, for example, the bonus cap and ex-post risk adjustment mechanisms of IVV apply (section 5 paragraph 6 sentence 1 IVV). Exceptions are permissible, inter alia, if severance payments are granted in line with the company’s general policy on severance payments, payments to which there is

a legal entitlement, and severance payments to be made based on a final judgment or court settlement.

Last updated on 16/04/2024

13. Are there any particular rules that apply in relation to the use of post-termination restrictive covenants for employees in the financial services sector?

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There are no specific rules for the financial services sector, except that they cannot have an effect that does not respect the caps for remuneration (see question 7).

Last updated on 16/04/2024

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Post-contractual non-compete obligations will typically only be binding when a severance payment is agreed upon that amounts to at least 50% of the pro-rated annual remuneration that the employee received before the obligation comes into force). It is advisable to regularly review for which roles such arrangements are agreed upon as they can be costly, and a unilateral waiver does not automatically eliminate the obligation to pay compensation, only if sufficient advance notice is given.

In the financial services sector, the severance payment for non-competition covenants is considered variable remuneration and subject to the same regulatory compensation rules (for example, section 5 paragraph 6 sentence 1 IVV, section 6 paragraph 4 No. 2 Investment Firm Remuneration Ordinance). However, severance payments do not have to be factored into the ratio of variable to fixed remuneration according to section 25a paragraph 5 sentences 2 to 5 KWG if, subject to section 74 paragraph 2 of the German Commercial Code, the payments do not exceed the total fixed remuneration originally owed.

Last updated on 16/04/2024

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