

The guarantee of irreproachable conduct in practice

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The guarantee of irreproachable business conduct appears in the Banking Act and, in similar terms, in the Financial Institutions Act, the Insurance Supervision Act and the Financial Market Infrastructure Act. It is a permanent condition of the licence, which an institution and its senior persons must satisfy for as long as the licence exists. The concept is not defined in the statutes. Its content has been developed by FINMA's practice and by the case law of the Federal Administrative Court and the Federal Supreme Court over several decades.¹

According to this case law, the guarantee has two elements. The first is professional competence, which requires the knowledge and experience that the function demands. The second is personal integrity, understood as the disposition to comply with the law and with the internal rules of the institution. The assessment looks to the future, since the question is whether the person can be expected to act correctly in the function. Past conduct serves as evidence for this prognosis. Violations of supervisory law weigh most heavily, but criminal convictions, civil judgments and conduct outside the financial sector can also be relevant when they bear on the person's reliability.²

The courts have accepted that the guarantee may be lacking even when the person concerned has not personally committed the violation. A member of the executive management who tolerates serious deficiencies in the organisation of the area for which he or she is responsible can lose the guarantee. The decisive factors are the position and the actual responsibility of the person, together with the seriousness of the deficiencies. The courts have also held that the guarantee covers compliance with the whole legal order, which includes foreign law in cross-border business. This principle gained practical significance in the proceedings that followed the conflicts of Swiss banks with the American and other foreign authorities.³

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In practice, the guarantee is examined whenever a new member joins the board of directors or the executive management of a bank. The institution must report the change to FINMA and submit documentation on the person's career, criminal record and pending proceedings. For larger institutions, FINMA may hold an interview with the candidate before it approves the appointment. Lawyers who advise candidates or institutions in such procedures must assess at an early stage whether earlier events, such as investigations abroad or disputes with former employers, could affect the assessment. The vagueness of the concept has been criticised for its lack of legal certainty. Its defenders reply that its openness allows FINMA to address forms of misconduct that no catalogue of rules could anticipate.

1 Notes

1. On the guarantee of irreproachable business conduct (Gewähr für eine einwandfreie Geschäftstätigkeit) under Art. 3 para. 2 lit. c Banking Act, Art. 11 FinIA and the parallel provisions of the other sectoral laws, and its development in the case law of the Federal Supreme Court and the Federal Administrative Court, see the standard commentaries. To be verified. ↩
2. On the two elements of the guarantee (professional competence and integrity) and the forward-looking assessment on the basis of past conduct in the case law of the Federal Supreme Court and the Federal Administrative Court, see the standard commentaries on Art. 3 Banking Act. To be verified. ↩
3. On the responsibility of senior persons for organisational deficiencies within their area of responsibility and the extension of the guarantee requirement to compliance with foreign law in cross-border business, see the case law of the Federal Administrative Court and the Federal Supreme Court on industry bans under Art. 33 FINMASA. To be verified. ↩

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