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Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Level 2 Regulation
Directive 2017/593 - MiFID II Delegated Directive

Level 3 Regulation
ESMA/2013/606 - Guidelines - Remuneration (MiFID)

Topic
Remuneration

Subject Matter
Payments to be considered as remuneration

Question

When calculating remuneration for small closely held company where the majority owner is also an employee, a member of management and the board, should the dividends he/she earns from his/her shares in the company be added to remuneration?

ESMA Answer

28-02-2025

Original language

Answer provided by the European Commission

Art 2(5) of Commission Delegated Regulation (EU) 2017/565 defines remuneration as “all forms of payments or financial or non-financial benefits provided directly or indirectly by firms to relevant persons in the provision of investment or ancillary services to clients”.

Art 27 of Commission Delegated Regulation (EU) 2017/565 stipulates that the remuneration policies and practices of the firm is applicable “to all relevant persons with an impact, directly or indirectly, on investment and ancillary services provided by the investment firm or on its corporate behaviour, regardless of the type of clients, to the extent that the remuneration of such persons and similar incentives may create a conflict of interest that encourages them to act against the interests of any of the firm's clients.”

In the case of a closely held company that provides investment service to clients, where a person, being a majority shareholder, also cumulates different functions involving important decision-making, notably those of a manager and member of the board, the risk of conflict of interest or impact on the corporate behaviour can be considered as high since the payment of dividends may incentivise this person to consider and give preference to his/her own interest over the company’s client interests. Therefore, in that context, the payment of such dividends is to be considered as a ‘remuneration’ defined under Article 2(5) of Commission Delegated Regulation (EU) 2017/565 which triggers the requirements under article 27 of Commission Delegated Regulation (EU) 2017/565 on remuneration policies and practices.

By analogy, in Case C-352/20, the Court ruled that “a dividend policy of a fund manager may fall within the scope of the provisions of the Directives regarding remuneration where the payment policy of those dividends is such as to induce those employees to take excessive risks which are detrimental to the interests of the UCITS or AIFs managed by that company and to the interests of their investors and is capable of facilitating the circumvention of the requirements flowing from those provisions.

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