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|  5 October 2016 I ESMA/2016/1437 |

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| Reply form for the Consultation Paper on the Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers |
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| Date: 5 October 2016ESMA/2016/1437 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on the Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers, published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_ QUESTION\_MIFID\_MBG\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* contain a clear rationale, including on any related costs and benefits; and
* describe any alternatives that ESMA should consider.

**Naming protocol**

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_MiFID\_GMB\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_MiFID\_GMB\_ESMA\_REPLYFORM or

ESMA\_MiFID\_GMB\_ESMA\_ANNEX1

***Deadline***

Responses must reach us by **5 January 2017.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Legal notice’.

# Introduction

Please make your introductory comments below, if any:

< ESMA\_COMMENT\_MIFID\_MBG\_0>

CME Group would like to express its appreciation to ESMA for the opportunity to comment on its consultation paper on the guidelines (the **Guidelines**) on the management body of market operators and data reporting service providers (DRSPs) under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (**MiFID II**) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (**MIFIR**) (the **Consultation Paper**). We appreciate the efforts of ESMA to seek market feedback on its endeavours to provide guidance to market operators and DRSPs on compliance with Article 45 of MiFID II.

CME Group includes CME Europe Limited (“CME Europe”), which is a UK recognised investment exchange, MiFID regulated market and trading venue for the purposes of MiFID II.

CME Europe supports principles-based standards for market operators. The regulatory framework should be calibrated to ensure that market operators function safely and in support of the stability of the broader financial system, however in doing so the regulatory framework should still allow market operators the flexibility to manage the unique risks associated with their individual markets.

We are concerned that certain aspects of the Guidelines could have unintended negative impacts and weaken governance and risk management standards due to their prescriptive nature and in placing the governing/management body in the role of management versus that of an independent oversight body. A scenario where the board is responsible for the day-to-day management of the market operator would undermine the ability of the market operator to effectuate proactive, prudent risk management and would greatly diminish the value of the management body’s role in providing independent oversight. The management body would no longer be able to fulfill the role of serving as a check and balance to management because it would be performing the role of management. This would be in conflict with typical corporate governance principles where the board sets and oversees a company’s strategic objectives and ensures that the appropriate individuals with the necessary expertise are in place and that they have sufficient resources to fulfil the board’s defined strategy and adhere to the risk appetite as established by the management body. An overly prescriptive approach undermines the principles-based approach to corporate governance standards which has worked successfully for derivatives markets during past crisis events and fails to appropriately recognise the diversity of EU derivatives markets and their participants.

Given the diversity of market operators in the EU and the markets and participants they serve, it is highly unlikely that a prescriptive approach to standards for management bodies could successfully ensure that the management body of all EU market operators is best suited to address the risks that are currently managed by such management bodies. This approach could even constrain a market operator’s ability to manage risks in the future, as they will be burdened by adhering to prescriptive standards that are not reflective of the characteristics of the markets at that point in time. This could yield an unmanageable outcome where the prescriptive standards adopted would need to be continuously revised, creating great uncertainty in the marketplace.

We note that through the Guidelines ESMA seeks to ensure that corporate governance standards are harmonised for market operators within the EU by utilising practices already in existence (for instance the Spanish and Dutch corporate governance training requirements referenced within the cost benefit analysis) and by tailoring the guidelines where appropriate to integrate specific national requirements (e.g. references to supervisory boards). However, we are concerned that the proposal’s prescriptive approach would impose requirements that may be inconsistent with the national standards of the jurisdiction in which a market operator is located.  Furthermore, we would suggest that ESMA ensure that the Guidelines be reviewed, once implemented, to ensure that relief is granted in the event that implementation is found to be particularly onerous for a market operator as a result of such an inconsistency.

We also note the statements at paragraphs 4 and 20 of the Consultation Paper that in respect of market operators, the Guidelines apply to the person or persons who manage and/or operate the business of a regulated market. However, we note that in reality these Guidelines also have application to the shareholders of the market operator, including any parent entity. In particular, these Guidelines introduce a constraint on the ability of the shareholders to elect members of the management body. The commonly accepted basic rights of shareholders, as described by the Organisation for Economic Co-operation and Development (OECD), include the right to elect members of the management body[[1]](#footnote-2). We encourage ESMA to give further consideration to the proportionality of these Guidelines with respect to the constraints the Guidelines will impose on the rights of shareholders of market operators. A principles-based approach to these Guidelines would better address this point as compared to the prescriptive approach currently proposed.

CME Europe has prepared responses to the specific questions contained in the Consultation Paper. We welcome the opportunity to submit these comments. We hope our comments are useful to ESMA and remain at your disposal if any clarifications or further information is needed.

< ESMA\_COMMENT\_MIFID\_MBG\_0>

1. Do you agree with ESMA’s view regarding sufficient time commitment?

<ESMA\_QUESTION\_MBG\_1>

CME Europe broadly agrees with ESMA’s views regarding sufficient time commitment. However we would suggest it should be for the market operator to determine the particular time commitment based on its established governance practices, taking into account the particular appointments, including committees an individual will serve on and the obligations of the management body to effectively oversee the operations of the market operator in accordance with best practices and regulatory obligations.

We note in paragraph 31, that members of the management body of a market operator should notify the market operator of *any change* in the information provided to the market operator regarding outside interests. We consider that requiring notification of any change would result in an unnecessary administrative burden on members of the management body and on the market operator, and would not meaningfully assist in determining whether that member is appropriate for continued participation in the management body. We suggest revising the guideline to instead require notification of ‘any *material* change’.

<ESMA\_QUESTION\_MBG\_1>

1. Do you agree with ESMA’s view regarding the calculation of directorships?

<ESMA\_QUESTION\_MBG\_2>

No response.

<ESMA\_QUESTION\_MBG\_2>

1. Is there any other element in the calculation of the number directorships that should be clarified?

<ESMA\_QUESTION\_MBG\_3>

No response.

<ESMA\_QUESTION\_MBG\_3>

1. Do you agree with ESMA’s view regarding the adequate knowledge, skills and experience at collective and individual levels?

<ESMA\_QUESTION\_MBG\_4>

CME Europe broadly agrees with ESMA’s views regarding adequate knowledge, skills and experience at a collective and individual level. However we would suggest it should be for the market operator to determine the criteria against which this is assessed according to the specific needs of the business, rather than market operators being required to assess knowledge, skills and experience against a prescribed matrix.

In our view, the role of the board, which is our management body, is primarily one of oversight and responsibility. The board’s role is to provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed. The board should set the company’s strategic aims, ensure that the necessary financial and human resources are in place for the company to meet its objectives and review management performance.

In this context, we would like to comment on ESMA’s references to “being capable of setting up” the various functions listed below and how a market operator would demonstrate them:

* “Is capable of setting up the compliance function and/or assessing its set up, functioning and effectiveness”;
* “Is capable of setting up the internal audit function and/or assessing its setup, functioning and effectiveness”;
* “Is capable of setting up the risk management function and/or assessing its setup, functioning and effectiveness”
* “Is capable of setting up or overseeing the audit plan and of raising critical questions about it”

We assume that ESMA envisages that the members of the management body should have the skills and ability to organise and oversee the setting up procedure, with senior management rather than the management body being the main orchestrators of any set up process and the individuals with day to day responsibility for their functioning. We assume that ESMA does not expect all members of the management body to have set up one or more of those functions previously. We would therefore suggest that the emphasis and stress should be placed on “or”, rather than “and”, thus meaning that when assessing these capabilities they could be considered as future and potential capabilities rather than an activity which the member would have to carry out as part of their day to day role within the management body.

Additionally we would like to comment on the reference to “implementing” in the following criteria:

* “Is capable of understanding and implementing the policy on outsourcing”

We consider that in this context “understanding” refers to the management body’s oversight obligations to ensure the market operator has an established outsourcing function designed to address potential risks and needs of the organization, rather than this being a requirement for the management body to implement the policy on outsourcing themselves.

We also wish to make suggestions in respect of the following criteria:

* “Has insight into the internal expertise of the company (in the management body and at the internal audit department) with respect to the match of products with specific target groups”.
* “Is capable of implementing a succession planning”
* “Is capable of identifying the long-term interests of the company in assessing products, services and markets in which the company operates and to act accordingly”

It is unclear what the reference in the first line to the internal audit department means. We assume it could be a reference to directors who perform a role in the Audit Committee of the regulated market, in which case, we believe it would be better as “through the management body and/or through the internal audit department”. Secondly, the reference to the match of products is unclear but we assume this is not intended to create obligations similar to those that apply to investment firms under the product governance, suitability and appropriateness regimes as most market operators do not have a sufficiently proximate relationship with the users of their products to be able to comply with those types of obligation.

Similar to our prior comments, we believe it is the role of management body to review and monitor plans for the succession of key senior management positions; however, it is not the role of the management body to “implement.” We suggest that in respect of the third item listed above it should be for the management body to set the “tone from the top”.

We note the requirement in paragraph 47 to consider a member of the management body’s ‘education’, and the reference in paragraph 48 to consider their experience gained from ‘managerial positions’, whereas Article 45(2)(b) of MiFID II does not refer to either of these requirements. We do not consider it the case that a person must have a specific educational background, or managerial experience in order to satisfy the test in Article 45(2)(b) of MiFID II such that they have adequate knowledge, skills and experience to be able to understand the market operator’s activities, including the main risks of the market operator’s business. Market participants, including individual traders, will often have the most relevant and appropriate knowledge, skills and experience to be able to understand the market operator’s activities, including the main risks, whereas they may not always have a specific educational background or managerial experience. We suggest removing the requirement that market operators must *at least* consider the education and managerial experience of members of the management body. Instead these should be considerations the market operator *may take into consideration*.

<ESMA\_QUESTION\_MBG\_4>

1. Do you agree with ESMA’s view regarding honesty and integrity?

<ESMA\_QUESTION\_MBG\_5>

CME Europe broadly agrees with ESMA’s views regarding honesty and integrity. However we suggest it should be for the market operator to determine the criteria against which this is assessed.

We note the requirement that a market operator take into consideration whether a member of the management body has been part of the management body of an undertaking which has gone into insolvency or liquidation while the person was employed, or within a year of the person ceasing to be employed, by the undertaking. However we do not consider that having been a member of the management body of an undertaking which has gone into insolvency or liquidation necessarily means that a person lacks honesty and integrity.

Bankruptcy proceedings are a perfectly legal process which of itself does not necessarily call into question the honesty and integrity of any person involved. Participation in the management body of an entity which has undergone a corporate restructure, bankruptcy, insolvency or liquidation does not necessarily mean that such person has acted in a way that demonstrates a lack of honesty and integrity, or is otherwise incapable of providing sound and prudent management for a market operator.

We also note the requirement to look back over a year following the person ceasing to be employed by the undertaking. This level of specificity contradicts the overall approach taken of requiring that a market operator take *into consideration* the involvement of a person in the management body of an undertaking which has gone into insolvency or liquidation.

We suggest paragraph 50(e) of the Guidelines be deleted.

<ESMA\_QUESTION\_MBG\_5>

1. Is there any other parameter that should be considered in these guidelines with respect to the honesty and integrity required to the members of the management body of market operators/DRSPs?

<ESMA\_QUESTION\_MBG\_6>

No response.

<ESMA\_QUESTION\_MBG\_6>

1. Should market operators/DRSPs check the accuracy of the data provided by a member/prospective member of the management body? If yes, how should this be done?

<ESMA\_QUESTION\_MBG\_7>

CME Europe agrees that market operators should be required to check the accuracy of data provided by prospective members of their management bodies before they are appointed. However, we do not think it is reasonable or even necessarily possible for a market operator to do this during the tenure of their members’ offices. Article 45 of MiFID II requires that members of the management body of the market operator are of sufficiently good repute at all times. This could be interpreted to mean that the market operator must perform checks on the accuracy of the data provided by the member throughout his tenure. The additional cost of performing checks on the accuracy of data on a continuous or periodic basis would be high in both administrative and monetary terms and would impact on the costs which ESMA has identified within the cost/benefit analysis.

We would note that the Guidelines place the onus on the member/prospective member to provide the information in the first instance. We therefore feel that the onus should be placed on the member to provide updates when changes to the accuracy of the data occur at any point during their tenure. We feel that this could be managed by implementing policies and procedures which require the member to update the market operator when any changes occur to the documentation which was initially disclosed as part of the member’s on-boarding process. This could be combined with requiring members to sign an annual attestation that, unless they do so, the data provided by the member remains factual and correct.

<ESMA\_QUESTION\_MBG\_7>

1. Do you agree with ESMA’s view regarding the independence of mind of a member of a management body?

<ESMA\_QUESTION\_MBG\_8>

CME Europe broadly agrees with ESMA’s views regarding the need for a process to identify, address, and manage conflicts of interest involving members of the management body and the need to promote independent opinions and critical challenge within the management bodies of market operators, however we do not consider the circumstances identified by ESMA in paragraphs 59(a) to (e), or 60(a) to (f) to be circumstances in which a person *will* necessarily have an actual conflict of interest or be subject to undue influence. Paragraphs 59(a) to (e), and 60(a) to (f), are drafted in a way which implies that personal, professional or economic relationships, past or present positions held, economic interests, or family interests (amongst others) are demonstrative of a conflict of interest or indicative of a person being subject to undue influence, whereas we suggest it should be for the market operator to determine the criteria against which this is assessed according to the specific circumstances of the business.

Paragraphs 59(a), 60(a) and 60(d) refer to a situation where a person is or was a shareholder of a market operator, or has or previously had a personal, professional or economic relationship with a shareholder of a market operator or of a competing market operator, whereas it is in the interests of shareholders that the market operator is managed in a sound and prudent manner and in a way that promotes market integrity. We consider that in the situations described by ESMA the member of the management body would be incentivised to act in the interests of the market operator, the markets it serves, and the participants in those markets.

We note that it is common in the case of joint venture or partnership arrangements between market operators that each market operator be represented on the management body of the other market operator. The nature of the joint enterprise means that such a representative would be incentivised to act in a manner which is in the best interests of both market operators, the markets they serve, and the participants in those markets.

We also note the requirement to look back to shareholdings and relationships with shareholders in the past. There is no definition of “past” which potentially leads to an assessment of all previous shareholdings and relationships of the person. We consider this requirement to be unnecessarily burdensome and consider that it should be for the market operator to determine the appropriate look back period in light of the specific circumstances.

Paragraphs 59(b) and 60(b) refer to a situation where a person holds or has held other positions, in particular where the person is employed or has been employed in the previous 18 months in an executive capacity by a market operator or another entity of a market operator’s group, whereas we consider such position may provide that person with knowledge, skills and experience that supports the ability of the person to understand the market operator’s activities, including the main risks, and such a position could enable that person to better manage the business of the market operator in a way that aligns with the interests of the market operator and market participants.

With regards to positions held at other market operators, as discussed above we consider the nature of joint enterprise to mean that where an officer of one market operator is represented on the management body of another market operator that person is incentivised to act in a manner which is in the best interests of both market operators, the markets they serve, and the participants in those markets. Furthermore, where a market operator is part of a group, it is common for officers from other group entities to be elected to the management body of the market operator. This kind of arrangement is necessary in order for the group to function effectively and promotes the interests of the market operator within the group.

We note the requirement to look back to positions held in the past. In paragraph 59(b) there is no definition of “past”, or “position”, which potentially leads to an assessment of all positions held by the person throughout their professional career. We consider this requirement to be unnecessarily burdensome and as above consider this should be a matter for determination by the market operator in light of the specific circumstances.

Paragraph 59(c) refers to a situation where a person has personal, professional or economic relationships with other members of the management body or senior management of a market operator or other entities within the market operator’s group, whereas in many groups members of the management body are required to have a professional relationship with other members of the management body, senior management and other entities within the group in order to function effectively.

Paragraph 59(d) refers to a situation where a person has an economic interest in a member of the market operator [taken in this context to refer broadly to market participants], whereas officers of market participants, including individual traders, will often have the most relevant and appropriate knowledge, skills and experience to be able to understand the market operator’s activities, including the main risks, and such an interest could enable that person to better manage the business of the market operator in a way that aligns with the interests of the market operator and market participants. We consider that participation by market participants in the management body of a market operator should be encouraged.

Paragraphs 60(c), 60(e) and 60(f) refer to a situation where a person (1) is or has been within the past 18 months an employee of a material professional adviser or a material consultant to a market operator or another entity of a market operator’s group; (2) is or has been directly or indirectly associated with a material supplier or customer of a market operator or another entity of a market operator’s group; or (3) has or used to have a material contractual relationship with a market operator or another entity of a market operator’s group, whereas in these situations the outside activities of the person could enhance the person’s knowledge, skills and experience in a way that supports the ability of the person to understand the market operator’s activities, including the main risks, and such activities could enable that person to better manage the business of the market operator in a way that aligns with the interests of the market operator and market participants.

Notwithstanding that we do not consider a member of the management board *will* necessarily have a conflict of interest or be subject to undue influence in the circumstances identified by ESMA, we would expect to evaluate specific conflicts as they arise and decide on appropriate mitigating measures taking into account the relevant circumstances.

To address these comments, we suggest amending the Guidelines to refer only those relationships, positions or interests which give rise to *actual* conflicts of interest or subject the member of the management body to undue influence. This is in line with the approach taken in the current drafting of paragraph 59(e). In particular, we suggest deleting paragraphs 59(a) to (d)) and paragraphs 60(a) to (e) and amending paragraph 59(e) as follows: *“relationships, positions or interests that may create actual conflicts of interest.”*

<ESMA\_QUESTION\_MBG\_8>

1. In particular, do you agree with requiring a member or prospective member to identify whether it is or has been a shareholder whose participation reached or exceeded 5% of voting rights of a market operator/DRSP or an officer of, or otherwise associated directly with, a shareholder whose participation reaches or exceeds 5% of voting rights of a market operator/DRSP?

<ESMA\_QUESTION\_MBG\_9>

CME Europe notes that paragraph 60(a) is drafted in a way which implies that holding 5% of the voting rights of a market operator, or being an officer of or associated with a shareholder who holds 5% of the voting rights of a market operator, is demonstrative of a conflict of interest or indicative of a person being subject to undue influence, whereas we do not consider the circumstances identified in paragraph 60(a) to be circumstances in which a person *will* necessarily have a conflict of interest or be subject to undue influence.

For the reasons discussed in more detail in response to question 8 above, we disagree with the proposed requirement because: (1) we consider it is actually in the interests of shareholders that a member of the management body acts in a way that aligns with the interests of the market operator, the markets it serves, and the participants in those markets; (2) we consider the nature of joint enterprise to mean that where an officer of one market operator is represented on the management body of another market operator that person is incentivised to act in a manner which is in the best interests of both market operators, the markets they serve, and the participants in those markets; and (3) we consider that having representatives from other group entities on the management board of a market operator is necessary in order for the group to function effectively and promotes the interests of the market operator within the group.

<ESMA\_QUESTION\_MBG\_9>

1. Do you agree with ESMA’s view about induction and training of members of the management body of market operators?

<ESMA\_QUESTION\_MBG\_10>

No response.

<ESMA\_QUESTION\_MBG\_10>

1. Do you agree with ESMA’s view regarding diversity?

<ESMA\_QUESTION\_MBG\_11>

CME Europe broadly agrees with ESMA’s views regarding diversity and with the benefits that are achieved when a governing body incorporates a diversity of views, backgrounds and experience which may include gender, age and geographic location. However, we consider it should be for the market operator to determine the criteria against which this is assessed based on the overriding goal to ensure the composition of the board is right for the effective governance of the market operator.

We also consider the principles of proportionality should apply. For example, in a scenario where the market operator has compiled an initial list of nominees and found suitable candidates within their own jurisdiction who met some of the diversity areas, it is unclear whether the market operator would be required to search across a range of other jurisdictions to ensure their nominee list meets all the areas of diversity described within the Guidelines. If this were to be the case then there would be a significant cost impact on the market operator as they would have to engage consultancy firms abroad, as well as apply the new verification methods to non-familiar documentation provided by the prospective member if a decision was made to appoint that individual. We suggest that market operators should be able to take a proportionate approach and make a determination based on costs and benefits of the width of their search.

<ESMA\_QUESTION\_MBG\_11>

1. Do you agree with ESMA’s view regarding record-keeping?

<ESMA\_QUESTION\_MBG\_12>

No response.

<ESMA\_QUESTION\_MBG\_12>

1. Is there any additional element that should be considered for the purpose of these guidelines that has not been mentioned before?

<ESMA\_QUESTION\_MBG\_13>

No response.

<ESMA\_QUESTION\_MBG\_13>

1. Please provide any views with respect to the costs and benefits identified in the relevant annex.

<ESMA\_QUESTION\_MBG\_14>

Within our responses to questions 7 and 11 we have highlighted potential issues which may impact on the costs identified by ESMA. We would highlight the cost of being required to perform annual checks or periodic checks on the backgrounds of the management body, which would not provide much additional benefit, as something which has not been highlighted within the costs and benefits analysis conducted.

CME Europe would also like to highlight the additional costs which may be incurred if a market operator were required to widen its search for prospective members beyond its home jurisdiction in order to meet all the relevant diversity areas set out in the guidelines. The additional cost of recruitment consultancy services for compiling a more diverse nominee list or the ongoing cost of facilitating a member who resides in a different jurisdiction has not been considered in ESMA’s cost benefit analysis.

<ESMA\_QUESTION\_MBG\_14>

1. *OECD Principles of Corporate Governance,* OECD Publications, 2004 [↑](#footnote-ref-2)