



European Securities and  
Markets Authority

# Consultation Paper

**Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers**



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **5 January 2017**.

Please note that this consultation paper is closely linked to the consultation paper on Joint EBA-ESMA Guidelines on the assessment of suitability of members of management bodies and key function holders under CRD IV and MiFID II which is consulted in parallel.

Respondents are invited to use the reply form also published on the ESMA website. 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 responses received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. Public access to the responses for which a request for non-disclosure has been made and any document or information related thereto will be dealt with by ESMA in compliance with Regulation (EC) 1049/2011<sup>1</sup> and ESMA's internal rules<sup>2</sup>.

### Data protection

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<sup>1</sup> Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43–48

<sup>2</sup> Decision of ESMA's Management Board of 24 May 2011, [ESMA/2011/MB/69](http://www.esma.europa.eu/ESMA/2011/MB/69)

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Data Protection](#).

### **Who should read this paper**

This paper may be specifically of interest to national competent authorities, market operators (as defined in Article 4(1)(18) of Directive 2014/65/EU<sup>3</sup>, investment firms operating or considering to operate a multilateral trading facility as defined in Article 4(1)(22) of Directive 2014/65/EU, firms considering becoming a data reporting services provider (as defined in Article 4(1)(63) of Directive 2014/65/EU), and wholesale and retail investors' groups.

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<sup>3</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EC, OJ L 173, 12.6.2014, p. 349–496

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## Acronyms used

NCA	National Competent Authority
DRSPs	Data Reporting Services Providers
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012
NCA	National Competent Authority
RTS	Regulatory Technical Standard

# 1 Executive Summary

## Reasons for publication

Article 45(2)(a) to (c) of MiFID II requires that all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties, shall commit sufficient time to perform their functions in the market operator, shall act with honesty, integrity and independence of mind. Article 45 also prescribes that market operators shall not only promote diversity, but also devote adequate human and financial resources to the induction and training of the management body.

Article 63 of MiFID II and recital (53) of MiFID II establishes similar requirements with respect to the management body of Data Reporting Services Providers (DRSPs), with the exception of the allocation of resources for the induction and training of the management body and the promotion of diversity.

Article 45(9) of MiFID II mandates ESMA to issue guidelines on the notions of “sufficient time commitment”, “adequate collective knowledge, skills and experience”, “honesty, integrity and independence of mind”, “adequate human and financial resources allocated to the induction and training of members” and “diversity” in the context of the management body of a market operator as specified above.

Article 63(2) of MiFID II determines that ESMA shall develop guidelines for the assessment of the suitability of the members of the management body of DRSPs as described in Article 63(1).

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Section 2 contains information on the regulatory background of these requirements, while Section 3 describes the differences between the mandate for market operators and data reporting services providers. Section 3 further describes the proposed guidelines with additional explanation where necessary.

Section 4 contains the annexes to the Consultation Paper. Annex I sets out a summary of the questions contained in this paper. Annex II contains the MiFID II mandate to issue these guidelines. Annex III outlines a preliminary high level cost-benefit analysis. Annex IV contains a template for a matrix to assess the collective competence of members of the management body. Finally, the proposed guidelines are contained in Annex V.

## Next Steps

ESMA will consider the responses received to this consultation paper with a view to finalising the guidelines and publishing a final report in the first half of 2017.

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## 2 Regulatory background

1. Articles 45 and 63 of MiFID II set requirements for the management body of market operators and DRSPs respectively. Those requirements aim to ensure that the management body and each of its individual members are suitable to ensure sound and prudent management of the firms as well as exercise effective responsibility for the activities undertaken by those firms. In order to clarify the suitability criteria introduced in Level 1 and to ensure the harmonised application of Union Law across Member States, ESMA received a mandate to issue Guidelines under Article 45(9) and 63(2) of MiFID II.
2. Article 45(9) of MiFID II mandates ESMA to issue guidelines on the specific notions of “sufficient time commitment”, “adequate collective knowledge, skills and experience”, “honesty, integrity and independence of mind”, “adequate human and financial resources devoted to the induction and training of members” and “diversity” in the context of the management body of a market operator.
3. Article 63(2) of MiFID II requires, more generally, that ESMA shall develop guidelines for the assessment of the suitability of the members of the management body of DRSPs. Article 63(1) references most of the concepts outlined under Article 45 of MiFID II such as the existence of sufficient knowledge, skills and experience from the members of the management body or the commitment of sufficient time.

## 3 Analysis

### 3.1 Entities subject to these Guidelines

4. These Guidelines apply to market operators, defined by Article 4(1)(18) of MiFID II as ‘the person or persons who manages and/or operates the business of a regulated market and may be the regulated market itself’.
5. As a consequence, investment firms operating a multilateral trading facility (defined in Article 4(1)(19) of MiFID II), an organised trading facility (defined in Article 4(1)(23) of MiFID II) or credit institutions operating a trading venue (as defined in Article 4(1)(24) of MiFID II) would not be subject to these Guidelines.
6. Instead, the Guidelines prescribed by Articles 91 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms<sup>4</sup> and Article 9(1) of MiFID II would be applicable to them.

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<sup>4</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC; *OJ L 176, 27.6.2013, p. 338–436*

7. DRSPs shall be subject to these Guidelines.
8. Article 63(1) third paragraph of MiFID II establishes that in case the members of the management body of a market operator seeking authorisation to operate a DRSP are the same members as the management body of the regulated market, they shall be considered suitable.
9. However, there is no similar provision for investment firms seeking authorisation to operate a DRSP. Therefore, investment firms willing to operate a DRSP would be subject to both sets of Guidelines (these ones and the ones prescribed by Article 9(1) MiFID II).
10. These Guidelines are also addressed to competent authorities as defined in Article 4(1)(26) of MiFID II. Competent authorities should ensure that market operators and DRSPs comply with these Guidelines, in line with Article 45(7) and (8) and Article 63(1) of MiFID II.
11. The initial and ongoing assessment of the suitability of the members of the management body of a market operator or a DRSP is the responsibility of the market operator or DRSP.

### **3.2 Differentiation between the requirements imposed on the management body of market operators and the management body of DRSPs**

12. ESMA has decided to issue one single set of Guidelines for the management bodies of both market operators and DRSPs and to fulfil the mandates received under Articles 45(9) and 63(2) of MiFID II in one document. ESMA notes that the provisions outlined under Articles 45 and 63 are based on similar criteria. In particular, the parameters to be considered in terms of capacity to commit sufficient time to the management of the entity, adequate collective knowledge, skills and experience, honesty, integrity and independence of mind seem to be applicable to both the management body of market operators and the management body of DRSPs. There is therefore merit in aligning to the extent possible the concepts to be developed and to avoid duplication of rules especially considering that there might be cases where the same members will be part of management bodies of both a market operator and a DRSP.
13. ESMA acknowledges that the requirements set out in Level 1 and the mandates it has received are similar for both management bodies but not without some distinctions. In particular, Article 45 is more prescriptive than Article 63 and the mandates are also slightly different. More specifically, the requirements (i) to devote human and financial resources to the induction and training of members of the management body and (ii) to engage a broad set of qualities and competences in the recruitment of members of the management body and to promote diversity within the composition of the management body are only provided in the case of market operators.

14. Similarly, the specific limitations in terms of the number of positions and directorships imposed on the members of the management body of market operators that are significant in terms of size, internal organisation and the nature, scale and complexity of their activities (Article 45(2)(a) of MiFID II) are not expanded to DRSPs.
15. In ESMA's view, regarding the three provisions referenced above, it might be appropriate to expand the scope of application also to DRSPs. However, it is important to take into consideration the differences between the management bodies of market operators and DRSPs in terms of nature, scale and complexity, reflecting in particular on the fact that the latter might be of a very limited size (e.g. just one individual). Where appropriate, the proposed guidelines should be interpreted according to a proportionality principle which renders the provision applicable only under certain conditions.
16. In particular, the Guidelines on sufficient time commitment have to be construed taking into account the specific characteristics of the market operator and DRSP in question. The application of the proportionality principle here might lead National Competent Authorities (NCAs) to impose on DRSPs similar limitations to those set out in Article 45(2)(a) of MiFID II, in situations where their dimension was equivalent to that of a market operator which is significant in terms of its size, internal organisation and the nature, scale and complexity of its activities.
17. Regarding the obligation to devote resources on the induction and training of the management body, Article 63 does not impose such obligation to DRSPs and as a consequence, it should only apply to market operators.
18. The promotion of diversity is not explicitly required by Article 63 but mentioned in recital (53). In that context, ESMA considers that such concept would only be applicable to DRSPs when and to the extent that the nature, scale and complexity of their activities is comparable to those of a market operator. Under any other circumstances, DRSPs can apply the proposed diversity guidelines on a voluntary basis.
19. On a separate line, members of the management body of market operators and DRSPs have to be at all times of good repute (Article 45(1)). MiFID II also mandates them to operate at all times according to the principles of honesty, integrity and independence of mind (Article 45(2)(c) and second paragraph of Article 63(1)). Despite there is no explicit mandate to clarify the term "good repute" under Article 45(9) of MiFID II, ESMA is of the view that the guidelines provided on the notions of "honesty and integrity" also tackle the concept of "good repute".
20. Finally, the requirements specified in these Guidelines are applicable to market operators (the person or persons who manages and/or operates the business of a regulated market and may be the regulated market itself, as defined in Article 4(1)(18) of MiFID II) and DRSPs (an approved publication arrangement, a consolidated tape provider or an approved reporting mechanism, as appears in Article 4(1)(63) of MiFID II) regardless of the fact that they may be subsidiaries of a parent market operator/DRSP in a third country.

### 3.3 Sufficient time commitment: general

21. As a point, it has to be noted that the requirements on “sufficient time commitment” for the management body of market operators and DRSPs differ slightly. Article 45(2)(a) of MiFID II provides for specific requirements applicable to market operators which are significant in terms of their size, internal organisation and the nature, scale and complexity of their business.
22. For the management of market operators not deemed significant according to those criteria and for the management body of DRSPs, the drafting of level 1 with respect to the concept of “sufficient time commitment” remains more general. In particular, the members of the management bodies of DRSPs and market operators not considered significant are not subject to the limitation of accumulating more than one executive directorship with two non-executive directorships or more than four non-executive directorships.
23. For market operators not considered significant, Article 45(2)(a) also specifies that the number of directorships a member of the management body can hold at the same time should take into account individual circumstances and the nature, scale and complexity of the market operator’s activities.
24. Article 63(1) of MiFID II also requires that members of the management body of DRSPs commit sufficient time to perform their duties. Article 63(2) specifies that the different roles and functions carried out by members of the management body of a DRSP be taken into account.
25. Furthermore, Recital (54) makes a generic reference applicable to investment firms, regulated markets and DRSPs to the necessary limitation of the number of directorships that can be assumed by a member of the management body to ensure adequate time is given to the performance of their oversight role.
26. While the limitations imposed by Article 45(2)(a) MiFID II are not directly applicable to DRSPs or market operators not considered significant, NCAs nevertheless have the responsibility to assess the commitments that members or prospective members of the management body of DRSPs and market operators not considered significant may have. On the basis of such analysis, NCAs may determine the specific limits to be established in terms of the number of commitments. For the purposes of these Guidelines, all the references to a “prospective member of the management body” should be interpreted as referring to a successful candidate in the selection process.
27. It is therefore proposed that apart from the specific limits established by Article 45(2)(a) and the obligations of the nomination committee under Article 45(4) MiFID II for the management body of significant market operators, the proposed Guidelines described below should be applicable equally to all market operators and DRSPs.

#### Proposed Guidelines

28. Market operators/DRSPs should have a written policy detailing the functions and responsibilities of the management body thereby, setting out ex ante a comprehensive job description and the anticipated time commitment required for each position.
29. When a person is selected to become part of the management body, the anticipated time commitment for the position should be included in the letter of appointment, and the market operator/DRSP should require the nominee to confirm in writing that he or she can devote that amount of time to the role, including the possibility to devote additional time commitment when the market operator/DRSP is undergoing a period of particularly increased activity. The effective appointment for the position should not take place without confirmation of those details in writing by the prospective member.
30. Prospective members should provide the market operator/DRSP with information regarding:
  - a. directorships held in other financial and non-financial companies, including when acting on behalf of a legal person or as an alternate appointed by a member of the management body to attend meetings;
  - b. directorships held in organisations which do not pursue predominantly commercial objectives;
  - c. other functions and professional activities within and outside the financial sector relevant in terms of time commitment; and
  - d. the nature of his/her responsibilities under any of the previous letters.
31. Members of the management body of market operators/DRSPs should notify the market operator/DRSP of any change in the information provided in accordance with the previous paragraph.
32. Market operators/DRSPs should keep records of the information provided by the prospective members of their management bodies regarding external professional functions exercised by the members of their management body. Such records should be updated whenever a member notifies the market operator/DRSP of a change in his/her external professional functions and/or such changes come to the attention of the market operator/DRSP. Following this, the market operator/DRSP should reassess the member's ability in respect of the required time-commitment constraints of their internal position.
33. The nomination committee (where established) and the management body in its supervisory function should take into account the cumulative time commitment shown by the members of the management body, using the attendance to the management body's meetings as an indication of time commitment.

**Q1: Do you agree with ESMA's view regarding sufficient time commitment?**

### **3.4 Sufficient time commitment: calculation of the number of directorships**

34. The members of the management body of a market operator that is significant in terms of size, internal organisation and the nature, scale and complexity of its activities are not only subject to the obligation to commit sufficient time to perform their functions but also to a limitation in terms of the maximum number of directorships that they can assume simultaneously.

#### **Proposed Guidelines**

35. Where a directorship involves at the same time executive and non-executive responsibilities, the directorship should count as an executive directorship.

36. Where multiple directorships count as a single directorship under Article 45(2)(a) third paragraph of MiFID II (directorships held within the same group or undertakings where the market operator holds a qualifying holding), that single directorship should count as a single executive directorship when it includes at least one executive directorship. Otherwise, it should count as a single non-executive directorship.

37. All directorships held in undertakings where the market operator holds a qualifying holding count as a single directorship. That single directorship should be added to the directorship held in the market operator.

38. All directorships held in subsidiaries within the same group count as a single directorship.

39. When subsidiaries within the same group hold qualifying holdings in other undertakings, the directorships held in those undertakings should be counted as one separate directorship. As a consequence, the directorships held in the same group should be counted as one directorship and the directorships held in the undertakings as another separate directorship.

40. Directorships held in organisations which do not pursue predominantly commercial objectives must not be counted when calculating the number of directorships. However, such activities should be taken into account when assessing the time commitment of the concerned member.

41. Organisations which do not pursue predominantly commercial objectives include:

- a. Charities;
- b. Other non-for-profit organisations; and
- c. Undertakings set up for the sole purpose of managing the private economic interests of the member of the management body provided that they do not require day-to-day management.

**Q2: Do you agree with ESMA's view regarding the calculation of directorships?**

**Q3: Is there any other element in the calculation of the number directorships that should be clarified?**

### **3.5 Knowledge, skills and experience**

42. Article 45(2)(b) of MiFID II establishes that the management body of a market operator possesses adequate collective knowledge, skills and experience to be able to understand the market operator's activities, including the main risks. Article 63(1) of MiFID II requires that all the members of the management body of DRSPs possess "sufficient knowledge, skills and experience (...) to perform their duties". Recital (53) of MiFID II clarifies that market operators and DRSPs should in particular have adequate collective knowledge, skills and experience to be able to understand the firm's activities including the main risks.
43. These concepts should be assessed by having regard to the size of the relevant business and its associated management body. Small firms with a limited number of persons on their management body have natural limitations when it comes to covering all the areas described for the knowledge, skills and experience required at collective level.

#### **Proposed Guidelines**

44. Market operators and DRSPs should ensure that their management body has, collectively, the managerial competence required to perform its role and duties and a sufficient understanding of the firm's activities and the risks such activities entail according to scale of the management body. When assessing the collective suitability of their management body, market operators and DRSPs should consider at least the following areas of knowledge and fields of expertise:
- a. each of the material activities of the market operator/DRSP;
  - b. financial accounting and reporting;
  - c. strategic planning
  - d. risk management;
  - e. compliance and internal audit;
  - f. information technology and security;
  - g. local, regional and global markets where applicable;
  - h. the regulatory environment; and,
  - i. the management of (inter)national groups and risks related to group structures where applicable.

45. In order to facilitate the assessment of and communication about the collective suitability of its management body, a market operator or DRSP may, where considered appropriate, use the templates in the Annex of these Guidelines to build up a suitability matrix. The matrix awards scores to members and prospective members of the management body for different types of knowledge, skills and experience which are supplemented with explanatory notes. On the basis of the scores awarded individual strengths and weaknesses of the management body are identified and compared to each other.
46. At an individual level, members of the management body should have an up-to-date understanding of the activities of the market operator or DRSP and its risks, the market operator or DRSP's governance arrangements, their respective position and responsibilities and where applicable, the group's structure at a level commensurate with their responsibilities. This includes an appropriate understanding of those areas for which an individual member is not directly responsible but is collectively accountable together with the other members of the management body. For this purpose, market operators and DRSPs should take into consideration both the theoretical knowledge and skills attained through education and training as well as the practical experience gained in previous occupations by the prospective member.
47. As regards the education, consideration should be given to the level and profile of the education and whether it relates to financial services or any other relevant area of knowledge.
48. As regards the practical experience, consideration should be given to the practical and professional experience gained from a managerial position over a sufficiently long period. Short term or temporary positions can be considered in the assessment but are usually not sufficient to support adequate expertise.

**Q4: Do you agree with ESMA's view regarding the adequate knowledge, skills and experience at collective and individual levels?**

### **3.6 Honesty and integrity**

49. In accordance with Articles 45(1) and 63(1) of MiFID II, members of the management body of market operators and DRSPs have to be at all times of good repute. MiFID II also mandates them to operate at all times according to the principles of honesty, integrity and independence of mind (Article 45(2)(c) and second paragraph of Article 63(1)). ESMA understands that these two sets of concepts partially overlap. It should be noted that there is no explicit mandate to clarify the term "good repute" under Article 45(9) of MiFID II. ESMA is of the view that the guidelines provided on the notions of "honesty and integrity" also tackle the concept of "good repute". The parameters and requirements listed below to determine the honesty and integrity of a member or prospective member of a market operator/DRSP are in line with those included in Article 4(1)(e) of the RTS on the authorisation, organisational requirements and the publication of transactions for DRSPs.

#### **Proposed Guidelines**

50. When assessing the honesty and integrity of a member or prospective member of their management body, market operators and DRSPs should request the documents set out in Article 4 of the Technical Standards on authorisation, organisational requirements and the publication of transactions for DRSPs and should in particular take into consideration whether the members or prospective member:
- a. has been subject to an adverse decision in any proceedings of a disciplinary nature brought by a regulatory authority or government body or is the subject of any such proceedings which are not concluded;
  - b. has been subject to an adverse judicial finding in civil proceedings before a court in connection with the provision of financial or data services, or for impropriety or fraud in the management of a business;
  - c. has been part of the management body of an undertaking which was subject to an adverse decision or penalty by a regulatory authority or whose registration or authorisation was withdrawn by a regulatory authority;
  - d. has been refused the right to carry on activities which require registration or authorisation by a regulatory authority;
  - e. has been part of the management body of an undertaking which has gone into insolvency or liquidation while the person was employed by the undertaking or within a year of the person ceasing to be employed by the undertaking;
  - f. has been fined, suspended, disqualified, or been subject to any other sanction in relation to fraud, embezzlement or in connection with the provision of financial or data services, by a professional body; or,
  - g. has been disqualified from acting as a director, disqualified from acting in any managerial capacity, dismissed from employment or other appointment in an undertaking as a consequence of misconduct or malpractice.
51. Relevant criminal or administrative records maintained under national law should be taken into account, considering the type of conviction or indictment, the level of appeal, the punishment received, the phase of the judicial process reached and the effect of any rehabilitation measures. The surrounding, including mitigating, official circumstances and the seriousness of any relevant offence or administrative or supervisory action, the time period and the member's conduct since the offence or administrative or supervisory action and the relevance of the offence or administrative or supervisory action to the role should be considered.

**Q5: Do you agree with ESMA's view regarding honesty and integrity?**

**Q6: 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?**

**Q7: 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?**

### **3.7 Independence of mind**

52. Members of the management body of a market operator or DRSP should be able to act with independence of mind when performing their responsibilities, effectively assessing and challenging the activities of other members of the management body and senior management and effectively overseeing and monitoring management decision-making.
53. The identification and management of conflicts of interest for trading venues existed already in Article 39(a) of MiFID I for regulated markets and indirectly for MTFs through Article 13 of MiFID I. The obligation for regulated markets was to have arrangements to identify and manage the potential adverse consequences for the operation of the market or its participants between the interest of the regulated market, its owners or its operator and the sound functioning of the market.
54. This approach to independence of mind for trading venues remains in MiFID II under Article 47(1)(a).
55. The requirement to have independence of mind under Article 45(2)(c) of MiFID II refers to the capacity of the members of the management body of a market operator to perform correctly their duties.
56. In particular, ESMA proposes that any member or prospective member of the management body of a market operator or DRSP should disclose any links with shareholders whose individual participation reaches or exceeds 5% of voting rights of the market operator/DRSP, taking as a reference the disclosure obligations included in Article 9(1) of the Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC<sup>5</sup> (the Transparency Directive).
57. For investment firms operating a DRSP the definition of “qualifying holding” contained in Article 4(1)(31) of MiFID II was considered. MiFID II considers a qualifying holding as any “*direct or indirect holding in an investment firm which represents 10 % or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the investment firm in*

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<sup>5</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; OJ L 390, 31.12.2004, p. 38–57

*which that holding subsists*". However, this concept would not be directly applicable to market operators.

58. The proposal outlined above takes into account two main facts. Firstly, the purpose of the obligation to report links with a significant shareholder allows for the identification of circumstances that would affect the individual acting as a member of the management body of a market operator or a DRSP and not the authorisation of the institution as a whole. Secondly the existence of such a link does not automatically prevent the member or prospective member of the management body from acting. As a consequence, it has been considered that the thresholds to communicate that circumstance should be lower than those established under Article 4(1)(31) of MiFID II.

### **Proposed Guidelines**

59. Members or prospective members of a market operator/DRSP's management body should identify and report to the management body any circumstances which may give rise to conflicts of interest that may impede their ability to perform their duties independently and objectively and subject them to undue influence due to:
- a. personal, professional or economic relationships with other persons (such as shareholders of the market operator or DRSP concerned or of a competing market operator or DRSP);
  - b. past or present positions held;
  - c. personal, professional or economic relationships with other members of the management body or senior management (or with other entities within the group);
  - d. other economic interests (e.g. loans to the member's or prospective member's company); or
  - e. other interests, including family interest, that may create actual conflicts of interest.
60. The identification of circumstances which may give rise to conflicts of interests described in the previous paragraph should at least cover whether the member or prospective member:
- a. is or has been a shareholder whose participation reaches or exceeds 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;
  - b. is employed, or has previously been employed in the previous 18 months in an executive capacity by a market operator/DRSP or another entity of a market operator/DRSP's group;

- c. is or has been, within 18 months, a principal of a material professional adviser or a material consultant to a market operator/DRSP or another entity of a market operator/DRSP's group, or an employee materially associated with the service provided;
  - d. for the management body of market operators, is or has been, within 18 months, a shareholder whose participation reaches or exceeds 5% of voting rights or a member of the management body of a company listed on that market;
  - e. is or has been a material supplier or customer of a market operator/DRSP or another entity of a market operator/DRSP's group, or an officer of or otherwise associated directly or indirectly with a material supplier or customer;
  - f. has or used to have a material contractual relationship with a market operator/DRSP or another entity of a market operator/DRSP's group other than as a member of the management body.
61. The references in the preceding paragraph to "a market operator/DRSP" encompasses both the market operator/DRSP of which the person is a member or prospective member and also a competing market operator/DRSP.
62. The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a nominee from being part of a market operator/DRSP's management body. Prior to the appointment the market operator/DRSP should identify any circumstance which may give rise to a conflict of interest or actual conflicts of interest, notably with the management body's conflicts of interest policy described below, assess them and decide, where appropriate, on mitigating measures. After the appointment, any new circumstances which may give rise to a conflict of interest or new actual conflicts of interest should be disclosed and the mitigating measures should be approved by the management body.
63. The management body of market operators and DRSPs should have a formal written conflicts of interest policy and an objective compliance process for implementing the policy. The policy should include as a minimum:
- a. a member's duty to avoid to the extent possible activities that could create conflicts of interest or the appearance of conflicts of interest;
  - b. examples of where conflicts can arise when serving as a management body member;
  - c. a rigorous review and approval process for members to follow before they engage in certain activities (such as serving on another management body) so as to ensure that such activity will not create a conflict of interest;
  - d. a member's duty to promptly disclose any matter that may result, or has already resulted, in a conflict of interest, having particular regard to the circumstances described above;

- e. a member's responsibility to abstain from voting on any matter where the member may have a conflict of interest or where the member's objectivity or ability to properly fulfil duties to the market operator/DRSP may be otherwise compromised;
  - f. adequate procedures for transactions with related parties so that they be made on an arm's length basis;
  - g. the way in which the management body will deal with any non-compliance with the policy.
64. The management body should ensure that appropriate public disclosure is made, and/or information relating to the market operators' and DRSPs' policies on conflicts of interest and potential conflicts of interest is provided to NCAs.

**Q8: Do you agree with ESMA's view regarding the independence of mind of a member of a management body?**

**Q9: 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?**

### **3.8 Adequate human and financial resources devoted to the induction and training of members of the management body of market operators**

65. Alongside with the requirements for members of the management body of a market operator to possess "sufficient knowledge, skills and experience to perform their duties", Article 45 of MiFID II further provides in its third paragraph that "market operators shall devote adequate human and financial resources to the induction and training of members of the management body" with a mandate for ESMA to further clarify this notion.
66. ESMA notes that there is no equivalent reference under Article 63 with respect to the management body of DRSP. The MiFID II Level 1 text only provides for the first provision which requires members of such a management body to have "sufficient knowledge, skills and experience". Therefore, the proposed Guidelines below should apply to market operators only.

#### **Proposed Guidelines**

67. Individual members of the management body of market operators should be and remain suitable, including through training, for their position. Market operators should establish a policy for the induction of members of the management body. Market operators should facilitate the maintenance of members understanding of the market operator's activities, structure, business model, risk profile, regulatory environment and governance

arrangements and members' role in them. Market operators should also provide for relevant general and, as appropriate, individually tailored training programs to ensure that all members are kept up to date. Training should also promote the awareness regarding diversity in the management body.

68. The policy and training plans should be kept up to date, and should consider governance changes, strategic changes, new products and other relevant change processes, as well as changes in applicable legislation and market developments.
69. The policy should be adopted by the management body in its supervisory function. The management body should involve the nomination committee when established.
70. The policy should set out:
  - a. the induction and training objectives for the management body separately for the management function and the supervisory function and, where appropriate, specific positions according to their specific responsibilities and involvement in committees;
  - b. the responsibilities for the development of a detailed training program;
  - c. the financial and human resources available in order to ensure that induction and training can be provided in line with the policy; and
  - d. a clear process for any member of the management body to request induction or training.
71. Market operators should use evaluation processes to review the effectiveness of the training provided.

**Q10: Do you agree with ESMA's view about induction and training of members of the management body of market operators?**

### **3.9 Diversity**

72. The concept of diversity included in Article 45(5) of MiFID II is instrumental to the achievement of a broader set of qualities and competences in the management of market operators and DRSPs as outlined under Recital 53.
73. It should be noted that the reference to diversity under Recital 53 does not differentiate between the management body of a market operator and the management body of a DRSP. ESMA notes however, that Article 63 of MiFID II does not explicitly refer to the concept of diversity with respect to the management body of DRSPs.
74. In ESMA's view, this reflects the fact that the management body of a DRSP might be of a limited size and might even, in extreme cases, consist only of one single individual

rendering the general concept of diversity inapplicable in practice. This has been reflected in the proposed Guidelines below.

75. Therefore, ESMA considers that the concept of diversity has to be assessed in the context of the size of the relevant business and its associated management body. Small firms with a limited number of persons on their management body have natural limitations when it comes to implementing the concept of diversity in terms of age, gender, geographic provenance and educational and professional background.
76. ESMA considers that such a concept would only be applicable to DRSPs when and to the extent that the nature, scale and complexity of their activities is comparable to those of a market operator.
77. In addition, ESMA is of the view that the proposed Guidelines on diversity should be read in conjunction with the proposed Guidelines regarding the adequate collective knowledge, skills and experience referred to above. In particular, provisions related to diversity should not restrict the obligation for each member of the management body of a market operator/DRSP to have the expertise required for the fulfilment of the duties assigned to the role.

### **Proposed Guidelines**

78. Market operators should put in place a recruitment and diversity policy to ensure that a broad set of qualities and competences are considered when recruiting members of the management body. To that end, it should set clear objectives in terms of diversity.
79. Market operators should set a target for the representation of the underrepresented gender.
80. The recruitment and diversity policy should at least refer to educational and professional background, gender, age and geographical provenance with the aim to achieve a variety of views and experiences and to facilitate independent opinions within the management body.
81. Without prejudice to national law, the diversity policy may provide for employee representation within the management body in order to add a different perspective and genuine knowledge and experience of the internal workings of the market operator.
82. The market operators' selection procedures should ensure that the candidates shortlisted for becoming members of their management bodies cover at least one of the areas of diversity described above which is not currently present on the management body. Where the prospective member does not cover any of the additional areas, the management body should indicate in writing the grounds for not selecting a candidate that meets such diversity requirement.

83. DRSPs may apply the Guidelines above on diversity where the nature, scale and complexity of their activities and the size of their management body are comparable to those of a market operator.

**Q11: Do you agree with ESMA's view regarding diversity?**

### **3.10 Record keeping**

84. Article 25 of MiFIR establishes a common timeframe of five years with respect to the record-keeping obligations for orders and transactions of investment firms and trading venues. MiFID II does not contain a general overarching provision with respect to the obligations of market operators and DRSPs.

85. However, ESMA's view is that market operators and DRSPs should keep records in a durable medium with respect to the issues identified in these Guidelines for at least five years, thereby ensuring consistency with other MiFID II Level 2 provisions (for instance, Articles 2(2), 7(6), 11(1) and 18(5) of the Draft Regulatory Technical Standard on organisational requirements of regulated markets, multilateral trading facilities and organised trading facilities enabling or allowing algorithmic trading through their systems; and Article 76(8)(b) of Commission's Delegated Regulation supplementing MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive).

#### **Proposed Guidelines**

86. Market operators and DRSPs should record and maintain for at least five years in a durable medium available on request of the national competent authority at least the following:

- a. written policy detailing the functions and responsibilities of the management function;
- b. confirmation in writing by the nominee of his/her capacity to meet the requirements of the position;
- c. information provided by the member or potential member of the management body regarding other directorships, functions or professional activities that might impact his/her capacity to devote sufficient time to the management body;
- d. information provided by member or potential member of the management body regarding his/hers knowledge, skills and experience;
- e. assessment regarding the collective knowledge, skills and experience of the management body;
- f. records provided or obtained in relation to the assessment of the honesty and integrity of the member or prospective member of the management body;

- g. records provided or obtained in relation to the assessment of the independence of mind of the member or prospective member of the management body;
- h. written conflicts of interest policy and relevant compliance process for implementing the policy;
- i. public disclosure and/or information to supervisors of policies on conflicts of interest and material conflicts of interest;
- j. market operators' policy on induction and training of members of the management body;
- k. recruitment and diversity policy;
- l. records of the selection procedures linked to the requirements contained in these Guidelines.

**Q12: Do you agree with ESMA's view regarding record-keeping?**

### **3.11 Other related questions**

**Q13: Is there any additional element that should be considered for the purpose of these proposed guidelines that has not been mentioned before?**

**Q14: Please provide any views with respect to the costs and benefits identified in the relevant annex.**

## **4 Annexes**

### **4.1 Annex I: Summary of questions**

**Q1: Do you agree with ESMA's view regarding sufficient time commitment?**

**Q2: Do you agree with ESMA's view regarding the calculation of directorships?**

**Q3: Is there any other element in the calculation of the number directorships that should be clarified?**

**Q4: Do you agree with ESMA's view regarding the adequate knowledge, skills and experience at collective and individual levels?**

**Q5: Do you agree with ESMA's view regarding honesty and integrity?**

**Q6: 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?**

**Q7: 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?**

**Q8: Do you agree with ESMA's view regarding the independence of mind of a member of a management body?**

**Q9: 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?**

**Q10: Do you agree with ESMA's view with induction and training of members of the management body of market operators?**

**Q11: Do you agree with ESMA's view regarding diversity?**

**Q12: Do you agree with ESMA's view regarding record-keeping?**

**Q13: Is there any additional element that should be considered for the purpose of these guidelines that has not been mentioned before?**

**Q14: Please provide any views with respect to the costs and benefits identified in the relevant annex.**

## 4.2 Annex II: MiFID II mandate to issue Guidelines

### Article 45 of MiFID II - Requirements for the management body of a market operator

1. *Member States shall require that all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties. The overall composition of the management body shall reflect an adequately broad range of experience.*

2. *Members of the management body shall, in particular, fulfil the following requirements:*

*(a) All members of the management body shall commit sufficient time to perform their functions in the market operator. The number of directorships a member of the management body can hold, in any legal entity, at the same time shall take into account the individual circumstances and the nature, scale and complexity of the market operator's activities.*

*Unless representing the Member State, members of the management body of market operators that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities shall not at the same time hold positions exceeding more than one of the following combinations:*

- (i) one executive directorship with two non-executive directorships;*
- (ii) four non-executive directorships.*

*Executive or non-executive directorships held within the same group or undertakings where the market operator owns a qualifying holding shall be considered to be one single directorship.*

*Competent authorities may authorise members of the management body to hold one additional non-executive directorship. Competent authorities shall regularly inform ESMA of such authorisations.*

*Directorships in organisations which do not pursue predominantly commercial objectives shall be exempt from the limitation on the number of directorships a member of a management body can hold.*

*(b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the market operator's activities, including the main risks.*

*(c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor decision-making.*

3. *Market operators shall devote adequate human and financial resources to the induction and training of members of the management body.*

4. *Member States shall ensure that market operators which are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities establish a nomination committee composed of members of the management body who do not perform any executive function in the market operator concerned.*

*The nomination committee shall carry out the following actions:*

*(a) identify and recommend, for the approval of the management body or for approval of the general meeting, candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body. Further, the committee shall prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected. Furthermore, the nomination committee shall decide on a target for the representation of the underrepresented gender in the management body and prepare a policy on how to increase the number of the underrepresented gender in the management body in order to meet that target;*

*(b) periodically, and at least annually, assess the structure, size, composition and performance of the management body, and make recommendations to the management body with regard to any changes;*

*(c) periodically, and at least annually, assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report to the management body accordingly;*

*(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.*

*In performing its duties, the nomination committee shall, to the extent possible and on an ongoing basis, take account of the need to ensure that the management body's decision making is not dominated by any one individual or small group of individuals in a manner that is detrimental to the interests of the market operator as a whole.*

*In performing its duties, the nomination committee shall be able to use any forms of resources it deems appropriate, including external advice.*

*Where, under national law, the management body does not have any competence in the process of selection and appointment of any of its members, this paragraph shall not apply.*

5. *Member States or competent authorities shall require market operators and their respective nomination committees to engage a broad set of qualities and competences when recruiting members to the management body and for that purpose to put in place a policy promoting diversity on the management body.*

6. *Member States shall ensure that the management body of a market operator defines and oversees the implementation of the governance arrangements that ensures effective and prudent management of an organisation, including the segregation of duties in the organisation*

*and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market.*

*Member States shall ensure that the management body monitors and periodically assesses the effectiveness of the market operator's governance arrangements and takes appropriate steps to address any deficiencies.*

*Members of the management body shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.*

*7. The competent authority shall refuse authorisation if it is not satisfied that the members of the management body of the market operator are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions, or if there are objective and demonstrable grounds for believing that the management body of the market operator may pose a threat to its effective, sound and prudent management and to the adequate consideration of the integrity of the market.*

*Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with this Directive are deemed to comply with the requirements laid down in paragraph 1.*

*8. Member States shall require the market operator to notify the competent authority of the identity of all members of its management body and of any changes to its membership, along with all information needed to assess whether the market operator complies with paragraphs 1 to 5.*

**9. ESMA shall issue guidelines on the following:**

***(a) the notion of sufficient time commitment of a member of the management body to perform that member's functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the market operator;***

***(b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in point (b) of paragraph 2;***

***(c) the notions of honesty, integrity and independence of mind of a member of the management body as referred to in point (c) of paragraph 2;***

***(d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body as referred to in paragraph 3;***

***(e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 5.***

**ESMA shall issue those guidelines by 3 January 2016.**

## **Article 63 - Requirements for the management body of a data reporting services provider**

1. *Member States shall require that all members of the management body of a data reporting services provider shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties.*

*The management body shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider. Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making where necessary.*

*Where a market operator seeks authorisation to operate an APA, a CTP or an ARM and the members of the management body of the APA, the CTP or the ARM are the same as the members of the management body of the regulated market, those persons are deemed to comply with the requirement laid down in the first subparagraph.*

**2. *ESMA shall, by 3 January 2016, develop guidelines for the assessment of the suitability of the members of the management body described in paragraph 1, taking into account different roles and functions carried out by them and the need to avoid conflicts of interest between members of the management body and users of the APA, CTP or ARM.***

3. *Member States shall require the data reporting services provider to notify the competent authority of all members of its management body and of any changes to its membership, along with all information needed to assess whether the entity complies with paragraph 1.*

4. *Member States shall ensure that the management body of a data reporting services provider defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation including the segregation of duties in the organisation and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market and the interest of its clients.*

5. *The competent authority shall refuse authorisation if it is not satisfied that the person or the persons who shall effectively direct the business of the data reporting services provider are of sufficiently good repute, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the provider pose a threat to its sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market.*

### 4.3 Annex III: High-level cost-benefit analysis

Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed guidelines.

Article 45 of MiFID II requires that all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties, shall commit sufficient time to perform their functions in the market operator, shall act with honesty, integrity and independence of mind, shall devote adequate resources to the induction and training of the management body and promote diversity.

Article 63 of MiFID II and recital (53) of MiFID II establishes similar requirements with respect to the management body of DRSPs, with the exception of the devotion of resources for the induction and training of the management body.

Article 45(9) of MiFID II mandates ESMA to issue guidelines on the notions of “sufficient time commitment”, “adequate collective knowledge, skills and experience”, “honesty, integrity and independence of mind”, “adequate human and financial resources devoted to the induction and training of members” and “diversity” in the context of the management body of a market operator.

Article 63 of MiFID II determines that ESMA shall develop guidelines for the assessment of the suitability of the members of the management body of DRSPs.

	Description
<i>Benefits</i>	The Guidelines are aimed at providing clarity on a number of concepts that appear in MiFID II. In that sense, they should provide clarity to national competent authorities, members and potential members of the management body of market operators and DRSPs about the requirements that should be met according to Articles 45 and 63 of MiFID II.
<i>Compliance costs</i> <ul style="list-style-type: none"> <li>- <i>One-off</i></li> <li>- <i>Ongoing</i></li> </ul>	Most of the concepts that these Guidelines aim at clarifying were already in existence under MiFID I and the vast majority of national regulatory frameworks. Therefore, the clarification provided in the Guidelines of the notions of concepts such as “sufficient time commitment”, “collective knowledge, skills and experience” and “honesty, integrity and independence of mind” is in line with the

	<p>current national regulations and supervisory practice throughout the EU.</p> <p>MiFID II introduces two new elements that were not in the pre-existing framework (the notions of “diversity” and the “devotion of resources for the induction and training of the members of the management body”) and therefore we consider the eventual costs in which national competent authorities, market operators and DRSPs driven by Level 1.</p> <p>However, a survey undertaken by ESMA on the content of these guidelines demonstrated that a number of EU countries had already introduced the assessment of diversity and the induction of training of members of the management body of market operators (see for instance, the Spanish Unified Governance Code; the Italian Corporate Governance Code and the Dutch Corporate Governance Code).</p>
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#### **4.4 Annex IV: Template for a matrix to assess the collective competence of members of the management body**

The suitability matrix is a tool for a market operator/DRSP to evaluate periodically or annually the collective suitability of the members of the management body. By assessing the knowledge, skills and experience of the individual members of the management body, strengths and weaknesses in the management body can be identified and hence the collective knowledge, skills and experience can be assessed. The outcome of the suitability matrix identifies training needs and should be used to determine the profile of a new candidate.

This matrix is designed to provide a collective assessment of the knowledge, skills and experience of the management body as a whole. A low score attributed to certain items under analysis does not necessarily impact the individual assessment of a member. Indeed, it is expected that in a collegiate body there are candidates with different characteristics, including different levels of knowledge, and different professional experiences.

The matrix could also be used, together with the other section of these guidelines, as a tool for the supervision of the collective suitability of the management body.

The matrix should thus be aligned with the specific characteristics of the market operator/DRSP regarding the business model and strategy and activities; risk appetite, risk strategy and actual risk profile; and outsourcing arrangements. Moreover, national regulations can require additional knowledge, skills or expertise not yet covered in the matrix. Therefore market operator/DRSPs should determine whether it is necessary to add criteria before using the template provided.

##### **Explanation of scores in matrix**

The matrix will result in scores that could be an indication of the collective suitability of the management body. The underlying motivation for the individual scores can also be important, especially when used for supervisory assessment. For example, there may be a specific reason to have certain people on the management body because of knowledge needed for specific activities. The explanation of the scores in the matrix can also be annexed separately.

##### **Different structures**

Each area of knowledge or expertise has to be covered by member(s) of the management body. The market operator/DRSP should determine how the overview of the collective suitability is best achieved.

General Information on <name market operator/DRSP>

Management body in its <management / supervisory> function

Part of group?	If yes, provide name and describe the position of the market operator/DRSP within the group (holding, parent, subsidiary)
Structure	<one-tier, two-tier, or other>

**A. Governance**

*This section maps how the responsibilities are divided within the management body in its management function or in its supervisory function. This section can be tailored to the responsibilities within the organisation.*

Please fill in a score for each member as follows: L (Low) = is at a minimum aware of the subject M (Medium) = has good understanding of the subject but is not expert H (High) = can make a balanced independent judgement on the subject (expert)	Name											
Is capable of assessing the setup and functioning of the administrative organisation (AO) and internal control (IC).												
Is capable of setting up the compliance function and/or assessing its setup, 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 understanding and implementing the remuneration policy (either to the members of the management body in its management function or market operator/DRSP-wide) and using incentives to influence behaviours.												
Is capable of understanding and implementing the policy on outsourcing.												
Is capable of assessing whether the careful treatment of clients has been safeguarded.												
Is capable of implementing a succession planning.												
Is capable of assessing the setup and functioning of Human Resources.												

Other relevant responsibilities and roles can be included below (e.g. the setup and functioning of sales and services or of the IT).													
*													

<b>B. Competence of risk management, compliance and audit</b>												
<i>This section maps the knowledge of members of the management body with regard to strategy, risk management, compliance and internal audit.</i>												
Please fill in a score for each member as follows: L (Low) = is at a minimum aware of the subject M (Medium) = has good understanding of the subject but is not expert H (High) = can make a balanced independent judgement on the subject (expert)	Name											
Has knowledge of and experience with setting and implementing the market operator/DRSPs strategy and risk appetite.												
Has insight in the market operator/DRSPs strategy and business models.												
Is capable of understanding the policy on risk management and corresponding procedures and measures and of raising critical questions about this topic.												
Has insight into the most relevant risks facing the company, spread out over time and across the market operator/DRSP.												
Has knowledge of and experience with relevant laws and regulations.												
Is capable of setting up or overseeing the audit plan and of raising critical questions about it.												

**C. Managerial competence**

*This section maps the managerial knowledge, expertise and skills of the members of the management body.*

Please fill in a score for each member as follows: L (Low) = is at a minimum aware of the subject M (Medium) = has good understanding of the subject but is not expert H (High) = can make a balanced independent judgement on the subject (expert)	Name											
Has knowledge of and experience with managing processes and tasks and providing direction and guidance to others.												
Is consistent in word and deed and acts in accordance with the own stated values and beliefs (tone at the top).												
Has knowledge of and experience with oversight (either over the members of the management body in its management function or the day-to-day management).												
Has knowledge in the areas of social, ethical and professional standards.												
Has experience with complying with and upholding applicable laws and regulations, governance and conduct codes, and internal rules and regulations.												
Has knowledge of and experience with engaging external experts for the proper execution of his/her task.												
Has experience with communicating the strategy, policies and objectives within the market operator/DRSP or group in a clear and transparent way.												
Has experience with external communication and knows when stakeholders (such as supervisory authorities, shareholders, clients and external auditors) have to be informed.												

Other relevant knowledge and areas of experience which is required by national law or regulation or is required in view of the nature and activities of the market operator/DRSP.												
*												

<b>D. Products, services and markets within the market operator/DRSPs scope of activities</b>												
<i>This section maps the knowledge of the members of the management body with regard to the main activities of the market operator/DRSP.</i>												
Please fill in a score for each member as follows: L (Low) = is at a minimum aware of the subject M (Medium) = has good understanding of the subject but is not expert H (High) = can make a balanced independent judgement on the subject (expert)	Name											
Has knowledge of and experience with the market(s) in which the company operates and the relevant developments in that market/these markets.												
Has knowledge of and experience with the company's financial aspects of products and services.												
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 identifying the long-term interests of the company in assessing products, services and markets in which the company operates and to act accordingly.												
Has knowledge of other relevant business areas and/or activities of the market operator/DRSP, consisting of:												
To be completed and, if relevant, to be assigned a score												

*													
<b>E. Sectoral and Financial Competence</b>													
<i>This section maps the knowledge and expertise of the members of the management body of the main sectors in which the market operator/DRSP operates.</i>													
Please fill in a score for each member as follows: L (Low) = is at a minimum aware of the subject M (Medium) = has good understanding of the subject but is not expert H (High) = can make a balanced independent judgement on the subject (expert)	Name												
Has knowledge of and experience with financial markets.													
Has knowledge of and experience with finance.													
Has knowledge of and experience with accounting.													
Has knowledge of and experience with the operation of trading venues.													
Has knowledge of and experience with data services.													
Has knowledge of other relevant business areas and/or activities of the market operator/DRSP, consisting of (e.g. clearing and settlement, asset management, securities administration):													
*													

**F. Balanced and consistent decision-making.**

This section assesses the collective decision making skills of the members of the management body.

Please fill in a score for each member as follows:  L (Low) = is at a minimum aware of the subject  M (Medium) = has good understanding of the subject but is	Name											
Knows how the internal decision-making process is organised.												
Knows when to ask for information (internally or externally) in order to take timely and well-informed decisions.												
Is capable of and has experience with ensuring that sufficient alternatives are being weighed in a decision-making process.												
Acts with independence of mind by providing constructive and robust challenge of proposals and decisions.												
Knows how in a decision-making process the interests of all stakeholders are weighed and has experience with this.												
Has knowledge of and experience with recognizing and raising the issue of conflicts of interests in the decision-making process.												
Is capable of sufficiently assessing whether decisions have been taken in line with the company strategy.												
Knows how decision-making is carefully taken and has experience with this.												
Other relevant knowledge and areas of experience in this field:  <i>To be completed, if and insofar as present</i>												

*													
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<b>G. Overall picture of the collective suitability</b>	
This section assesses the collective suitability of the members of the management body, taking into account the mapping of the knowledge, skills and experience of all members in the context of the overall management body composition.	
<b>What are the strengths of the management function or of the supervisory function?</b>	
<b>What are the weaknesses of the executives / management function or of the non-executives / supervisory function? How will these be managed or mitigated?</b>	
<b>Considerations regarding the overall composition of the management body.</b>  Explain why the market operator/DRSP assumes this composition of the executives / management function and of the non-executives / supervisory functions and why this is composition is considered adequate and effective  - How is the collaboration between members?,	

## 4.5 Annex V: Proposed Guidelines

### Sufficient time commitment: general

Market operators/DRSPs should have a written policy detailing the functions and responsibilities of the management body thereby, setting out ex ante a comprehensive job description and the anticipated time commitment required for each position.

When a person is selected to become part of the management body, the anticipated time commitment for the position should be included in the letter of appointment, and the market operator/DRSP should require the nominee to confirm in writing that he or she can devote that amount of time to the role, including the possibility to devote additional time commitment when the market operator/DRSP is undergoing a period of particularly increased activity. The effective appointment for the position should not take place without confirmation of those details in writing by the prospective member.

Prospective members should provide the market operator/DRSP with information regarding:

- a. directorships held in other financial and non-financial companies, including when acting on behalf of a legal person or as an alternate appointed by a member of the management body to attend meetings;
- b. directorships held in organisations which do not pursue predominantly commercial objectives;
- c. other functions and professional activities within and outside the financial sector relevant in terms of time commitment; and
- d. the nature of his/her responsibilities under any of the previous letters.

Members of the management body of market operators/DRSPs should notify the market operator/DRSP of any change in the information provided in accordance with the previous paragraph.

Market operators/DRSPs should keep records of the information provided by the prospective members of their management bodies regarding external professional functions exercised by the members of their management body. Such records should be updated whenever a member notifies the market operator/DRSP of a change in his/her external professional functions and/or such changes come to the attention of the market operator/DRSP. Following this, the market operator/DRSP should reassess the member's ability in respect of the required time-commitment constraints of their internal position.

The nomination committee (where established) and the management body in its supervisory function should take into account the cumulative time commitment shown by the members of the management body, using the attendance to the management body's meetings as an indication of time commitment.

### **Sufficient time commitment: calculation of the number of directorships**

Where a directorship involves at the same time executive and non-executive responsibilities, the directorship should count as an executive directorship.

Where multiple directorships count as a single directorship under Article 45(2)(a) third paragraph of MiFID II (directorships held within the same group or undertakings where the market operator holds a qualifying holding), that single directorship should count as a single executive directorship when it includes at least one executive directorship. Otherwise, it should count as a single non-executive directorship.

All directorships held in undertakings where the market operator holds a qualifying holding count as a single directorship. That single directorship should be added to the directorship held in the market operator.

All directorships held in subsidiaries within the same group count as a single directorship.

When subsidiaries within the same group hold qualifying holdings in other undertakings, the directorships held in those undertakings should be counted as one separate directorship. As a consequence, the directorships held in the same group should be counted as one directorship and the directorships held in the undertakings as another separate directorship.

Directorships held in organisations which do not pursue predominantly commercial objectives must not be counted when calculating the number of directorships. However, such activities should be taken into account when assessing the time commitment of the concerned member.

Organisations which do not pursue predominantly commercial objectives include:

- a. Charities;
- b. Other non-for-profit organisations; and
- c. Undertakings set up for the sole purpose of managing the private economic interests of the member of the management body provided that they do not require day-to-day management.

### **Knowledge, skills and experience**

Market operators and DRSPs should ensure that their management body has, collectively, the managerial competence required to perform its role and duties and a sufficient understanding of the firm's activities and the risks such activities entail according to scale of the management body. When assessing the collective suitability of their management body, market operators and DRSPs should consider at least the following areas of knowledge and fields of expertise:

- a. each of the material activities of the market operator/DRSP;
- b. financial accounting and reporting;

- c. strategic planning
- d. risk management;
- e. compliance and internal audit;
- f. information technology and security;
- g. local, regional and global markets where applicable;
- h. the regulatory environment; and,
- i. the management of (inter)national groups and risks related to group structures where applicable.

In order to facilitate the assessment of and communication about the collective suitability of its management body, a market operator or DRSP may, where considered appropriate, use the templates in the Annex of these Guidelines to build up a suitability matrix. The matrix awards scores to members and prospective members of the management body for different types of knowledge, skills and experience which are supplemented with explanatory notes. On the basis of the scores awarded individual strengths and weaknesses of the management body are identified and compared to each other.

At an individual level, members of the management body should have an up-to-date understanding of the activities of the market operator or DRSP and its risks, the market operator or DRSP's governance arrangements, their respective position and responsibilities and where applicable, the group's structure at a level commensurate with their responsibilities. This includes an appropriate understanding of those areas for which an individual member is not directly responsible but is collectively accountable together with the other members of the management body. For this purpose, market operators and DRSPs should take into consideration both the theoretical knowledge and skills attained through education and training as well as the practical experience gained in previous occupations by the prospective member:

As regards the education, consideration should be given to the level and profile of the education and whether it relates to financial services or any other relevant area of knowledge.

As regards the practical experience, consideration should be given to the practical and professional experience gained from a managerial position over a sufficiently long period. Short term or temporary positions can be considered in the assessment but are usually not sufficient to support adequate expertise.

### **Honesty and integrity**

When assessing the honesty and integrity of a member or prospective member of their management body, market operators and DRSPs should request the documents set out in Article 4 of the Technical Standards on authorisation, organisational requirements and the

publication of transactions for DRSPs and should in particular take into consideration whether the members or prospective member:

- a. has been subject to an adverse decision in any proceedings of a disciplinary nature brought by a regulatory authority or government body or is the subject of any such proceedings which are not concluded;
- b. has been subject to an adverse judicial finding in civil proceedings before a court in connection with the provision of financial or data services, or for impropriety or fraud in the management of a business;
- c. has been part of the management body of an undertaking which was subject to an adverse decision or penalty by a regulatory authority or whose registration or authorisation was withdrawn by a regulatory authority;
- d. has been refused the right to carry on activities which require registration or authorisation by a regulatory authority;
- e. has been part of the management body of an undertaking which has gone into insolvency or liquidation while the person was employed by the undertaking or within a year of the person ceasing to be employed by the undertaking;
- f. has been fined, suspended, disqualified, or been subject to any other sanction in relation to fraud, embezzlement or in connection with the provision of financial or data services, by a professional body; or,
- g. has been disqualified from acting as a director, disqualified from acting in any managerial capacity, dismissed from employment or other appointment in an undertaking as a consequence of misconduct or malpractice.

Relevant criminal or administrative records maintained under national law should be taken into account, considering the type of conviction or indictment, the level of appeal, the punishment received, the phase of the judicial process reached and the effect of any rehabilitation measures. The surrounding, including mitigating, official circumstances and the seriousness of any relevant offence or administrative or supervisory action, the time period and the member's conduct since the offence or administrative or supervisory action and the relevance of the offence or administrative or supervisory action to the role should be considered.

### **Independence of mind**

Members or prospective members of a market operator/DRSP's management body should identify and report to the management body any circumstances which may give rise to conflicts of interest that may impede their ability to perform their duties independently and objectively and subject them to undue influence due to:

- a. Personal, professional or economic relationships with other persons (such as shareholders of the market operator or DRSP concerned or of a competing market operator or DRSP);
- b. past or present positions held;
- c. personal, professional or economic relationships with other members of the management body or senior management (or with other entities within the group);
- d. other economic interests (e.g. loans to the member's or prospective member's company); or
- e. other interests, including family interest, that may create actual conflicts of interest.

The identification of circumstances which may give rise to conflicts of interests described in the previous paragraph should at least cover whether the member or prospective member:

- a. is or has been a shareholder whose participation reaches or exceeds 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;
- b. is employed, or has previously been employed in the previous 18 months in an executive capacity by a market operator/DRSP or another entity of a market operator/DRSP's group;
- c. is or has been, within 18 months, a principal of a material professional adviser or a material consultant to a market operator/DRSP or another entity of a market operator/DRSP's group, or an employee materially associated with the service provided;
- d. for the management body of market operators, is or has been, within 18 months, a shareholder whose participation reaches or exceeds 5% of voting rights or a member of the management body of a company listed on that market;
- e. is or has been a material supplier or customer of a market operator/DRSP or another entity of a market operator/DRSP's group, or an officer of or otherwise associated directly or indirectly with a material supplier or customer; and
- f. has or used to have a material contractual relationship with a market operator/DRSP or another entity of a market operator/DRSP's group other than as a member of the management body.

The references in the preceding paragraph to "a market operator/DRSP" encompasses both the market operator/DRSP of which the person is a member or prospective member and also a competing market operator/DRSP.

The existence of a circumstance which may give rise to a conflict of interest does not automatically exclude a nominee from being part of a market operator/DRSP's management body. Prior to the appointment the market operator/DRSP should identify any circumstance which may give rise to a conflict of interest or actual conflicts of interest, notably with the management body's conflicts of interest policy described below, assess them and decide, where appropriate, on mitigating measures. After the appointment, any new circumstances which may give rise to a conflict of interest or new actual conflicts of interest should be disclosed and the mitigating measures should be approved by the management body.

The management body of market operators and DRSPs should have a formal written conflicts of interest policy and an objective compliance process for implementing the policy. The policy should include as a minimum:

- a. a member's duty to avoid to the extent possible activities that could create conflicts of interest or the appearance of conflicts of interest;
- b. examples of where conflicts can arise when serving as a management body member;
- c. a rigorous review and approval process for members to follow before they engage in certain activities (such as serving on another management body) so as to ensure that such activity will not create a conflict of interest;
- d. a member's duty to promptly disclose any matter that may result, or has already resulted, in a conflict of interest, having particular regard to the circumstances described above;
- e. a member's responsibility to abstain from voting on any matter where the member may have a conflict of interest or where the member's objectivity or ability to properly fulfil duties to the market operator/DRSP may be otherwise compromised;
- f. adequate procedures for transactions with related parties so that they be made on an arm's length basis; and
- g. the way in which the management body will deal with any non-compliance with the policy.

The management body should ensure that appropriate public disclosure is made, and/or information relating to the market operators' and DRSPs' policies on conflicts of interest and potential conflicts of interest is provided to NCAs.

### **Adequate human and financial resources devoted to the induction and training of members of the management body of market operators**

Individual members of the management body of market operators should be and remain suitable, including through training, for their position. Market operators should establish a policy for the induction of members of the management body. Market operators should facilitate the maintenance of members understanding of the market operator's activities, structure,

business model, risk profile, regulatory environment and governance arrangements and members' role in them. Market operators should also provide for relevant general and, as appropriate, individually tailored training programs to ensure that all members are kept up to date. Training should also promote the awareness regarding diversity in the management body.

The policy and training plans should be kept up to date, and should consider governance changes, strategic changes, new products and other relevant change processes, as well as changes in applicable legislation and market developments.

The policy should be adopted by the management body in its supervisory function. The management body should involve the nomination committee when established.

The policy should set out:

- a. the induction and training objectives for the management body separately for the management function and the supervisory function and, where appropriate, specific positions according to their specific responsibilities and involvement in committees;
- b. the responsibilities for the development of a detailed training program;
- c. the financial and human resources available in order to ensure that induction and training can be provided in line with the policy; and
- d. a clear process for any member of the management body to request induction or training.

Market operators should use evaluation processes to review the effectiveness of the training provided.

## **Diversity**

Market operators should put in place a recruitment and diversity policy to ensure that a broad set of qualities and competences are considered when recruiting members of the management body. To that end, it should set clear objectives in terms of diversity.

Market operators should set a target for the representation of the underrepresented gender.

The recruitment and diversity policy should at least refer to educational and professional background, gender, age and geographical provenance with the aim to achieve a variety of views and experiences and to facilitate independent opinions within the management body.

Without prejudice to national law, the diversity policy may provide for employee representation within the management body in order to add a different perspective and genuine knowledge and experience of the internal workings of the market operator.

The market operators' selection procedures should ensure that the candidates shortlisted for becoming members of their management bodies cover at least one of the areas of diversity described above which is not currently present on the management body. Where the prospective member does not cover any of the additional areas, the management body should indicate in writing the grounds for not selecting a candidate that meets such diversity requirement.

DRSPs may apply the Guidelines above on diversity where the nature, scale and complexity of their activities and the size of their management body are comparable to those of a market operator.

### **Record-keeping**

Market operators and DRSPs should record and maintain for at least five years in a durable medium available on request of the national competent authority at least the following:

- a. written policy detailing the functions and responsibilities of the management function;
- b. confirmation in writing by the nominee of his/her capacity to meet the requirements of the position;
- c. information provided by the member or potential member of the management body regarding other directorships, functions or professional activities that might impact his/her capacity to devote sufficient time to the management body;
- d. information provided by member or potential member of the management body regarding his/hers knowledge, skills and experience;
- e. assessment regarding the collective knowledge, skills and experience of the management body;
- f. records provided or obtained in relation to the assessment of the honesty and integrity of the member or prospective member of the management body;
- g. records provided or obtained in relation to the assessment of the independence of mind of the member or prospective member of the management body;
- h. written conflicts of interest policy and relevant compliance process for implementing the policy;
- i. public disclosure and/or information to supervisors of policies on conflicts of interest and material conflicts of interest;
- j. market operators' policy on induction and training of members of the management body;
- k. recruitment and diversity policy; and

- I. records of the selection procedures linked to the requirements contained in these Guideline.