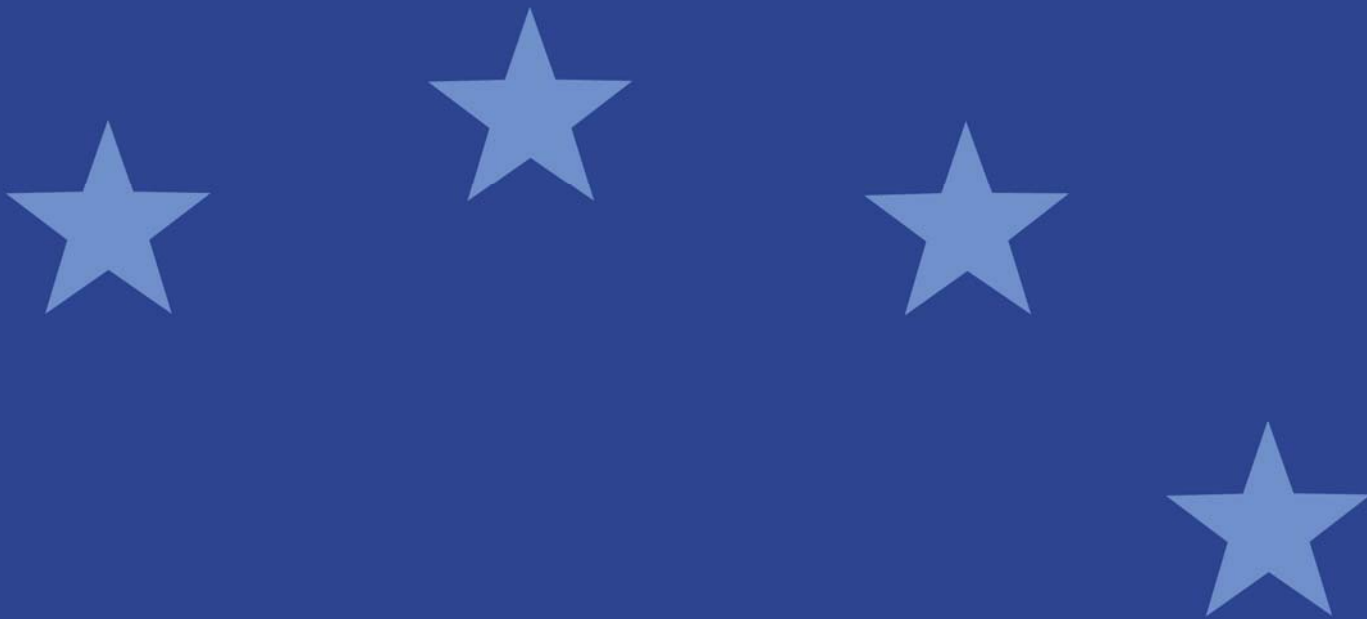




European Securities and
Markets Authority

Consultation Paper

Draft regulatory technical standards on the management body of DRSPs



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

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

ESMA will consider all comments received up to four weeks following the publication of this paper.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions 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 publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

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

Who should read this paper?

This paper may be specifically of interest to national competent authorities, data reporting services providers (as defined in Article 4(1)(63) of Directive 2014/65/EU), firms considering

becoming a data reporting services provider, and other financial groups with a controlling participation in a data reporting services provider.

Acronyms used

APA	Approved Publication Arrangement
ARM	Approved Reporting Mechanism
CTP	Consolidated Tape Provider
DRSPs	Data Reporting Services Providers
MiFID II	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/EU (OJ L 173, 12.6.2014, p. 349)
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84)
NCA	National Competent Authority
RTS	Regulatory Technical Standards

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1 Executive Summary

Reasons for publication

Article 27f(5) MiFIR (see Annex II to this consultation paper for the full text of this Article) provides that ESMA shall develop draft regulatory technical standards (RTS) for the assessment of the suitability of the members of the management body of DRSPs, 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. This consultation paper represents the first stage in the development of the draft RTS and sets out proposals for their content on which ESMA is seeking the views of external stakeholders.

Contents

Section 2 contains information on the regulatory background of these draft RTS as well as clarification regarding the entities subject to them,

Section 3 to 9 describe by topic the proposed draft RTS starting with an explanation on the existing MiFIR mandate for these RTS, as well as the content of the text of the Guidelines on the management body of market operators and DRSPs, which contain additional clarification on the MiFID II mandate for those Guidelines. These are followed by the proposed requirements to be introduced with these RTS and any references to why those have been chosen.

More specifically:

Section 3 explains the detailed obligations for DRSPs to guarantee the honesty and good repute and integrity of the members of their management body.

Section 4 details the way DRSPs shall ensure that the management body dedicates enough time for their activities, with specific limits to their number of simultaneous mandates and detailed information regarding the structure of the organisation.

Section 5 specifies what information DRSPs should provide to ESMA or the NCA where relevant to guarantee the individual and collective knowledge, skills and experience of their management bodies.

Section 6 explains the proposed requirements for DRSPs to ensure the independence of the members of the management body, including detailed systems to avoid and address possible conflicts of interests.

Section 7 proposes a system of training and induction for members of the management body of DRSPs that would help them ensure that the members of their management bodies remain suitable at all times.

Section 8 explains the way these draft RTS propose to include the important concept of diversity into the management body of DRSPs.

Section 9 details the way DRSPs should store information submitted to ESMA or the NCA where relevant in order to ensure that access to it is guaranteed at all times for the purposes of analysing the suitability of the management body.

Next Steps

Responses to this consultation paper will help ESMA in finalising the draft RTS to be submitted to the European Commission for endorsement.

2 Background and entities subject to these RTS

2.1 Background

1. Articles 45 and 63 of MiFID II set out 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.
2. In order to clarify the suitability criteria introduced in MiFID II and to ensure the harmonised application of Union law across Member States, ESMA received in 2016 a mandate to issue Guidelines under Article 45(9) and 63(2) of MiFID II. Article 63(2) of MiFID II required, more specifically, ESMA to develop guidelines for the assessment of the suitability of the members of the management body of DRSPs. Article 63(1) of MiFID II referenced 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. On 28 September 2017, ESMA adopted the Guidelines on the management body of market operators and data reporting services providers (“Guidelines on the management body”).
4. On 18 December 2019, the European Parliament and the Council adopted Regulation (EU) 2019/2175², which reviews the powers, governance and funding of the European Supervisory Authorities (ESAs) thus, among others, amending MiFIR. With regards to the changes foreseen for MiFIR by Regulation (EU) 2019/21751 (also referred to as the “ESAs Review Regulation”), is granting ESMA additional supervisory power with regard to DRSPs. In particular, these changes consist in the transfer of authorisation and supervision of DRSPs from NCAs to ESMA, other than with respect to ARMs or APAs that benefit from a derogation under MiFIR. Accordingly, provisions pertaining to the requirements for DRSPs and

¹ ESMA70-154-271. Guidelines based on Article 45(9) for market operators and Article 63(2) for DRSPs of the Directive 2014/65/EU (MiFID II) clarify the requirements applicable to members of the management bodies of market operators or DRSPs. Guidelines based on Article 16 of Regulation (EU) No 1095/2010 (‘ESMA Regulation’) clarify how information is to be recorded by market operators or DRSPs in order to make it available to the competent authorities for the exercise of their supervisory duties.

² Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

the competences of NCAs with respect to DRSPs set out in MiFID II (i.e. those in Title V of MiFID II, including Article 63 thereof, upon which the Guidelines for the management body of DRSPs are based) are deleted from MiFID II³ and introduced in MiFIR (notably, in Title IVa thereof).

5. Article 27f(5) of MiFIR⁴ mandates ESMA to develop draft regulatory technical standards (RTS) for the assessment of the suitability of the members of the management body of DRSPs, 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 DRSP.
6. Requirements such as sufficient knowledge, skills and experience or the commitment of sufficient time, are laid down in Article 27f of MiFIR and are identical to those in Article 63(2) of MiFID II upon which the Guidelines on the management body are based.
7. Following the endorsement of the proposed RTS, ESMA will consider whether and how the Guidelines on the management body of market operators and DRSPs are to be amended. They could be updated to reflect their new scope as well as any changes that might be deemed necessary.

2.2 Entities subject to these RTS

8. These RTS will apply to DRSPs as defined in points (34) to (36) of Article 2 (1) of MiFIR.
9. The provisions of these RTS will apply to all DRSPs, irrespectively of whether supervised by ESMA or National Competent Authorities (NCAs), while taking into account the principle of proportionality in order to clearly reflect how requirements may take into account the size, complexity and interconnectedness of each entity. This allows ESMA to limit the burden on smaller DRSPs while guaranteeing that all entities continue to fulfil the criteria to determine the suitability of their management body contained in the draft RTS.
10. The third subparagraph of Article 27f (1) of MiFIR 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 deemed to satisfy the relevant requirements.

³ By virtue of the provisions of Directive (EU) 2019/2177 of the European Parliament and of the Council of 18 December 2019 amending Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Directive 2014/65/EU on markets in financial instruments and Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing.

⁴ Unless specified, references to MiFIR provisions in the text are to be considered as to MiFIR as amended by the ESAs Review Regulation.

11. However, there is no similar provision for investment firms seeking authorisation to operate a DRSP. Therefore, investment firms willing to operate a DRSP will be subject to both these RTS as well as the existing joint ESMA/EBA Guidelines for the management body of investment firms⁵. While developing these draft RTS, ESMA made sure that there are no contradictory requirements between them and the ESMA/EBA Guidelines.

3 Good repute, honesty and integrity

12. In accordance with Article 27f (1) of MiFIR, “*the management body of a data reporting services provider shall at all times be of sufficiently good repute*”. The same article also clarifies that “*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*” (emphasis added). ESMA understands that these two sets of concepts partially overlap.
13. These concepts are partially covered by **Section 5.4 on Honesty and integrity** on the Guidelines on the management body. Paragraphs 28 to 30 of the Guidelines on the management body deal with the way a DRSP should guarantee the prospective members’ honesty and integrity. First of all, it establishes a **list of circumstances related to the members’ professional** past that the DRSP should check in the provided documentation; secondly, it invites members to inform the DRSP of any **changes in these circumstances**; and finally it instructs DRSPs to take into account any **convictions** those members may have received in the past.
14. In the proposed draft RTS, ESMA has incorporated all aspects of the existing text of the Guidelines on the management body’s section 5.4 on Honesty and integrity. The existing text provides for a valuable and straightforward way to determine the good repute, honesty and independence of potential or current members of the management body.
15. In order to adapt the text to the requirements of RTS, all the above-mentioned text under Section 5.4 of the Guidelines should be turned into clear obligations for DRSPs to require information from prospective members. The approach to ensure this in these RTS has been to integrate the existing text of the Guidelines and to streamline it into a single self-declaration of good repute including all the elements that the DRSP will need to assess the good repute, honesty and integrity of the prospective member of the management body. This self-declaration alongside the disclosure of all details regarding past criminal convictions related to their profession gives DRSPs clear responsibilities to ensure their prospective members

⁵ Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU.

remain suitable. The text of the Guidelines regarding the criminal record is therefore kept in the proposed RTS and turned into an obligation for the DRSP to require from prospective members alongside the self-declaration of good repute.

16. Besides these changes, ESMA believes that some new additions are necessary to properly fulfil the objective of the mandate of Article 27f of MiFIR.
17. Firstly, ESMA is of the view that the proposed draft RTS should cover the notions of “honesty and integrity” and also tackle the concept of “good repute”. The parameters and requirements in these draft RTS to determine the honesty and integrity of a member or prospective member of a 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 DRSPs⁶.
18. In order to integrate them, it is ESMA’s view that the best way to proceed would be to prescribe a two-step approach to guarantee compliance with the requirements of these RTS:
 - a. First of all, DRSPs should ensure members of the management body provide them with “details regarding any criminal convictions in connection with the provision of financial or data services or in relation to acts of fraud or embezzlement, notably via an official certificate”. This may be provided in the form of any official certificate expedited by Member States which includes an individual’s legal record. The text of the Guidelines made reference to the need for “relevant criminal or administrative records maintained under national law to be taken into account”. The proposed draft RTS would set out a clear requirement for DRSPs by transforming the current text of the Guidelines on the management body into a specific demand for a certificate. This requirement is taken directly from the text of the RTS on the registration of trade repositories (Commission Delegated Regulation (EU) 2019/359)⁷.
 - b. Second, the draft RTS incorporate the existing need for DRSPs to check several aspects of the past activities of potential members of their management body as they currently exist under the Guidelines on the

⁶ Commission Delegated Regulation (EU) 2017/571 of 2 June 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the authorisation, organisational requirements and the publication of transactions for data reporting services providers.

⁷ Commission Delegated Regulation (EU) 2019/359 of 13 December 2018 supplementing Regulation (EU) 2015/2365 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the application for registration and extension of registration as a trade repository.

management body. However, in order to streamline and guarantee clarity for DRSPs to be compliant, the draft RTS propose to oblige DRSPs to ensure that potential members of the management body provide a self-declaration of good repute that includes all of the abovementioned requirements.

19. This approach is also analogous to the one in the RTS on the registration of trade repositories and it guarantees a clear mandate for DRSPs to ensure the good repute, honesty and integrity of the potential members of their management. From ESMA experience in supervising TRs, the persons of the management bodies of TRs experienced no difficulty in complying with this requirement, so we expect that also for DRSP the compliance cost will be minimal.
20. Finally, the text of the draft RTS tries to establish a system for DRSPs to ensure that the good repute, honesty and integrity of the members is reassessed periodically. The mandate stemming from Article 27f of MiFIR states that the members “shall at all times be of sufficiently good repute”. In order to ensure this, these draft RTS include the specific cases under which a DRSP should reassess the compliance with the requirements related to the good repute, honesty and integrity of a member of their management body. In particular, where there are concerns regarding his or her suitability; in the event of a material impact on his or her reputation; as part of the review of the internal governance arrangements by the management body; or in any event that can otherwise materially affect his or her suitability.
21. The listed reasons for re-assessment are taken from the text of the joint EBA-ESMA Guidelines on the suitability of members of the management body and key function holders and aims to establish a comprehensive set of specific circumstances that would prompt such a requirement from DRSPs.
22. The text of the Guidelines on the management body only includes a need for members to notify changes in their circumstances for reassessment. ESMA believes that this should be turned into an obligation for the DRSP. Furthermore, the text should be further developed to include the circumstances that would merit such a re-assessment in order to create a clear supervisory expectation.
23. The text of the Guidelines on the management body already mentioned the need for members to notify the DRSP in the event of any change to the circumstances in order to be subject to a re-assessment. This means that this article would not impose any further burden on DRSPs. On the contrary, it would help clarify under which circumstances they would be required to start such a re-assessment process.

Q1: Do you agree with the proposed approach of integrating the assessment of good repute, honesty and integrity in a single self-declaration of good repute? Should you disagree, please provide reasons, propose an alternative approach and justify it.

Q2: Do you agree with the proposed circumstances under which DRSPs should ensure the re-assessment of the good repute, honesty and integrity of a member of their management body?

4 Sufficient time commitment

24. The mandate stemming from Article 27f (1) of MiFIR regarding sufficient time commitment states: ***“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”*** (emphasis added).
25. In the text of the Guidelines on the management body, the references to sufficient time commitment are divided between **the general ones on Section 5.1** and the ones specific to the **number of directorships held by members of the management body in Section 5.2**.
26. The text of **section 5.1** specifies that the requirement for a member of the management body to confirm that they comply with the limitation of the number of simultaneous directorships held is limited to market operators. Therefore, as per the Guidelines, no such requirements were imposed on DRSPs in general.
27. It is ESMA’s view that the text of the Guidelines provides for a good reference for DRSPs to ensure the sufficient time commitment of the members of their management body and propose to include it while turning it into specific obligations for DRSPs. This means that DRSPs would see no alteration as to their burden to comply with the requirements on sufficient time commitment.
28. With regards to **section 5.2 of the Guidelines** on the management body, it has to be noted that this section stems from the requirement for *“a person (...) selected to become part of the management body of a market operator which is significant in terms of its size, internal organisation and the nature, the scope and the complexity of its activities, this person should confirm in writing that he or she complies with the limitations of the number of directorships set out in Article 45(2)(a) of MiFID II”*. This means that the requirements on “sufficient time commitment” for the management body of DRSPs differ slightly from those required for other market operators. This differentiation, stemming from Article 45(2)(a) of MiFID II provided 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 and 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.
29. For the management body of market operators not deemed significant and of DRSPs, the drafting with respect to the concept of “sufficient time commitment”

remained more general. In particular, those members are not explicitly subject to the limitation of accumulating more than one executive directorship with two non-executive directorships or more than four non-executive directorships.

30. Article 27f of MiFIR also requires that members of the management body of DRSPs commit sufficient time to perform their duties. It specifies in paragraph 5 that the assessment of their suitability should be done *“taking into account different roles and functions carried out by them”*. It is ESMA’s understanding that since paragraph 1 of Article 27f of MiFIR requires for the assessment of the suitability of the members of the management body to guarantee that they dedicate sufficient time and that this should be done taking into account different roles and functions carried out by them, an inclusion on how this sufficient time commitment should be measured is granted.
31. While the specific limits to the number of directorships held by members of the management body in Section 5.2 of the Guidelines on the management body do not make reference to DRSPs, NCAs have nevertheless had 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 have had the liberty to determine the specific limits to be established in terms of the number of simultaneous directorships held by an individual.
32. This means for our proposal that a specific limit on the number of simultaneous directorships for members of the management body of DRSPs could not be directly interpreted from Article 27f of MiFIR in the same way it was interpreted for Article 45 of MiFID II. It is therefore proposed that the specific limits indicated in Section 5.2 of the Guidelines on the management body and the obligations of the nomination committee under them for the management body of significant market operators stemming from Article 45(4) of MiFID II, should not be directly used for DRSPs but rather adapted to ensure their objective. ESMA has the obligation of establishing a specific limitation to ensure that a member of the management body of a DRSP dedicates adequate time to the performance of their oversight role.
33. ESMA believes that the best approach to do so, would be to require DRSPs to establish themselves a limit to the number of simultaneous directorships held by members of their management body. This approach allows DRSPs to take into account their own complexity and scale in order to establish a proportionate limit to the number of directorships held by one member. Furthermore, members should confirm in writing to the DRSP that they comply with this limit.
34. This **proposed limitation to the number of directorships** held by members is not only inspired on the existing text of the Guidelines on the management body of market operators but also from the text of the joint EBA-ESMA Guidelines on the suitability of members of the management body and key function holders.

35. This addition for DRSPs, which uses as a legal basis the mandate of Article 27f of MiFIR as it takes into account “*different roles and functions carried out by them*”, allows alongside the rest of the provisions in these RTS to fully ensure that sufficient time commitment is devoted by members of the management body of DRSPs.
36. It is ESMA’s view that, this approach is strongly rooted in the **principle of proportionality**. By allowing DRSPs to determine their own limit of directorships and making reference to the need for those limits to take into account the complexity and range of activities of the company. This takes into consideration that the limitation of the multiple directorships could have some negative impacts for smaller and less complex DRSPs which may encounter difficulties as a result of a reduction in the pool of available potential candidates for a particular position, and the possible increase in the cost of attracting and compensating members of the management body.
37. More complex DRSPs, however, could deal with the higher compliance costs derived from a reduced choice in potential members of their management body. Furthermore, several DRSPs appertain to larger financial groups, largely facilitating the task for fulfilling such requirements.
38. While acknowledging the synergy effects that could exist between different directorships held by one person, the specific limitations on the number of directorships aims at establishing a benchmark that allows ESMA to guarantee that members of the management body of DRSPs are able to dedicate sufficient time to their duties as required. It is therefore proposed that such benchmarks for time commitment in the form of a limitation to the number of simultaneous directorships held by members of the management body of DRSPs apply to every DRSP while taking into account the principle of proportionality and giving freedom for DRSPs to consider what those benchmarks might be.
39. The rest of the obligations included in the draft text of the RTS are largely inspired by the text of the Guidelines on the management body with the sole addition of a requirement to provide ESMA, or the NCA where relevant, with this information on its member’s positions in the organisation.

Q3: Do you agree that DRSPs should establish themselves the limitation to the number of simultaneous directorships that members of the management body of their DRSP can hold?

5 Knowledge, skills and experience

5.1 Legislative mandate and introduction

40. According to the first subparagraph of Article 27f (1) of MiFIR all the members of the management body of DRSPs must “**at all times possess [...] sufficient knowledge, skills and experience [...] to perform their duties**”. The second subparagraph of this article states that the management body of DRSPs “**shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider**” (emphasis added). Paragraph 3 of Article 27f of MiFIR adds that the “**management body of a data reporting services provider shall define and oversee 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**” (emphasis added).
41. These elements are dealt with in Section 5.3 of the Guidelines on the management body. The text therein provides for the basis upon which to build such requirements in these RTS. ESMA believes therefore, that all paragraphs of said Section should be modified to be included as requirements in the RTS, while addressing some of the shortcomings that will be explained below.
42. The main changes come from the modification of the legal instrument prescribing the respective requirements from Guidelines to RTS. The draft RTS specify three respective requirements: how to assess the individual knowledge of the management body, how to assess the collective knowledge of the management body and when and how the collective knowledge has to be re-assessed.
43. Obviously, as is the case in the Guidelines on the management body, 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.
44. The way ESMA proposes to tackle this issue in the draft RTS is to look at both the collective and individual knowledge, skills and experience of the members of the management body of DRSPs.

5.2 Individual knowledge, skills and experience

45. First, regarding the assessment of the individual knowledge, skills and experience of prospective members, **the Guidelines on the management body mention several ways** this could be done. However, since there is a lack of mention to the

explicit method that DRSPs should use to do this, we propose **new additions** in these RTS regarding **individual knowledge, skills and experience**. ESMA believes that the text of the Guidelines on the management body would not suffice to clarify what DRSPs are supposed to analyse when assessing a potential member's candidacy.

46. In order to address this, ESMA believes that the best way for a DRSP to prove to ESMA or their relevant NCA the suitability of individual members is by providing a statement which explicitly says that the individual has been assessed by the DRSP “as having the requisite experience as enumerated in these technical standards and, if not, details of the training plan imposed, including the content, the provider and the date by which the training plan will be completed.”
47. In order to **clarify how** the DRSP should undertake such a process, the proposed draft RTS oblige a DRSP to require from every potential member “a Curriculum vitae containing details of education and professional experience (including professional experience, academic qualifications and other relevant training), including the name and nature of all organisations for which the individual has worked and the nature and duration of the functions performed, in particular highlighting any activities within the scope of the position sought”. This CV would be later submitted to ESMA alongside the individual analysis. This proposal is taken from the Joint ESMA-EBA Guidelines on the assessment of the suitability of members and key function holders.
48. In practice, DRSPs already require a CV from potential members and do background checks on their education and professional experience and therefore ESMA does not believe that this would impose a new compliance obligation upon the companies. This proposal would however clarify what shape the individual assessment of members should take and what are the specific skills, knowledge and experience that should be taken into account and how, listing those areas that are most important for the business model of DRSPs, and therefore that should be included in the individual knowledge checks done by DRSPs and transmitted to ESMA or the relevant NCA. These areas include key elements of knowledge for a DRSP, namely IT, financial data, compliance and pricing and fee policies.
49. The detailed explanation as for the knowledge, education and practical experience aspects that should be assessed in the members' CV are mostly taken from the text of the Guidelines on the management body and would therefore not impose a new compliance obligation on DRSPs which are already taking these into account when analysing new members of their management body.
50. The provision of a statement guaranteeing an assessment has been done on the individual knowledge of members based on their CV and the listed requirements guarantees the fulfilment of such obligation would not imply a major compliance cost for the DRSP to produce it and it will also allow to better assess the collective knowledge of the management body.

51. Furthermore, ESMA believes that these RTS would benefit from the inclusion of clauses that would clarify the need for DRSPs to guarantee the independence and capacity of members of their management body to supervise and decide on the **operational separation and outsourcing of activities** by the DRSP. Article 27f (3) of MiFIR clearly states that the management body of a DRSP shall define and implement “*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*” (emphasis added).
52. In order to guarantee such effective and prudent management regarding the segregation of duties in the organisation, ESMA believes that DRSPs should have a clear responsibility to request a certificate guaranteeing knowledge and responsibility in the outsourcing of activities and operational separation from the members of their management body. Such a certificate is not mentioned in the Guidelines on the management body, but ESMA believes is needed in these RTS. Such a requirement guarantees the fulfilment of the individual and collective knowledge of the management body without imposing an extra burden on DRSPs, which mostly already undergo such processes.
53. Such a clause is of special importance when it comes to DRSPs as their business is commonly provided by entities which are part of a larger financial group with several such activities. The need for a confirmation of the knowledge and responsibility in such areas is therefore important as is in the case of trade repositories; and the inclusion of these requirements helps harmonise and clarify what is expected as a result of the need for a proper knowledge of the activities of the entity of which it is a natural consequence. The proposed requirements are based on similar ones existing for trade repositories, notably in the RTS for the registration as a trade repository.
54. ESMA believes that including this information regarding the operational separation and outsourcing of activities within the organisation in the assessment done by DRSPs of the individual knowledge of the members of their management body guarantees that special consideration is taken on this issue that is paramount to the operation and functioning of DRSPs. This information would allow ESMA, or the NCA where relevant, to evaluate the suitability of the management body is indeed taking into account such an important aspect of the business.

5.3 Collective knowledge, skills and experience

55. In order to fulfil the mandate from Article 27f of MiFIR to determine the suitability of the management body it is not only important to assess the individual knowledge of the prospective member of the management body but also the collective knowledge of the management body as a whole. ESMA aims to remain flexible by allowing DRSPs to choose their method of assessment of collective knowledge (or

their NCAs), as long as they include the minimum areas of knowledge set out by this text (which already exist in the Guidelines on the management body and provide a comprehensive assessment on the collective knowledge of the body). These are: each of the material activities of the data reporting services provider including outsourced activities; financial accounting and reporting; strategic planning; risk management; compliance and internal audit; information technology and security; local, regional and global markets where applicable; the regulatory environment; and the management of (inter)national groups and risks related to group structures where applicable.

56. ESMA believes these RTS should include these minimum areas of knowledge covered **mentioned in the Guidelines on the management body** while introducing a flexible system that guarantees their analysis by DRSPs and the fulfilment of the criteria in line with supervisory expectations. The proposed text ensures clarity as regards the areas of knowledge the system chosen by DRSPs has to include as a minimum, while at the same time remaining flexible enough for the system to take into account the different sizes and structures of DRSPs.
57. The flexibility can be introduced in **the way of assessing** the collective knowledge, skills and experience. While keeping the text from the Guidelines, ESMA believes that DRSPs would gain more clarity with a flexible system to assess the collective knowledge of the management body. It is ESMA's view that the best way to guarantee the collective assessment by DRSPs while at the same time reducing the burden on these companies would be to require them to provide ESMA, or the NCA where relevant, with a **statement on their analysis of both the collective suitability of the management body as well as of each individual member** regarding their role in the management body as a whole. This statement should also include a plan to address any vulnerabilities detected by the DRSP regarding the collective knowledge.
58. The objective of this statement would be to allow **flexibility for DRSPs** to choose their own system of assessing the collective knowledge of the management body as long as that system covers the specified mandatory areas of knowledge. With this approach ESMA aims at avoiding the burden of a fixed system that might provide maximum convergence, but that could also prove to be too costly for companies using completely different systems for the assessment of the collective knowledge. By allowing DRSPs to choose their own method for the assessment of the collective knowledge of the management body we avoid creating a single system for all that might penalize smaller DRSPs which due to the smaller size of their management body could not perform such an assessment or it might prove useless or inadequate. This flexible system therefore allows ESMA, or NCAs where relevant, to account for **proportionality** when assessing the information provided by DRSPs on the assessment of the collective knowledge of their management body.

5.4 Re-assessment of the collective knowledge, skills and experience

59. Finally, the point on the **re-assessment of the collective knowledge, skills and experience** of the management body. As already explained in Section 3 to guarantee the up-to-date collective knowledge of the management body required by Article 27f, ESMA should specify the circumstances that would trigger a re-assessment, in this case, of the collective knowledge of the DRSP.
60. The text of Article 27f of MiFIR states that this shall be kept “*at all times*”, and therefore the RTS should give clarity as to which instances would grant enough reasons for a re-assessment to be made in order to ensure continuous compliance.
61. The proposed specific situations upon which DRSPs would be required to perform a re-assessment of the collective knowledge of the management body are comprehensive and try to cover all circumstances that may mean a change in membership of the body. They guarantee that the profiles of new members are always chosen with the collective knowledge of the body in mind, thus keeping the requirement fulfilled at all times. They are more specifically: when appointing new members of the management body, including as a result of a direct or indirect acquisition or increase of a qualifying holding in the company ; when re-appointing members of the management body, if the requirements of the position have changed or if the members are appointed to a different position within the management body; when appointed or reappointed members cease to be members of the management body; when there is a material change to the company’s business model, risk appetite or strategy or structure at individual or group level; or in any event that can otherwise materially affect the collective suitability of the management body.
62. The proposed text is taken from the Joint EBA-ESMA Guidelines on the assessment of members of the management body and key function holders. ESMA believes they provide clarity to DRSPs as to their responsibility in guaranteeing the adequate knowledge, skills and experience of their management body, without introducing any new burden to those entities.
63. The abovementioned provisions on all three points, namely, the individual and collective assessment method and the reassessment criteria are based on the text of the ESMA/EBA joint Guidelines on the assessment of the suitability of members and key function holders, as well as when mentioned on the RTS on the authorisation of trade repositories.

Q4: Do you agree with ESMA’s proposal on the obligation for DRSPs to provide a statement guaranteeing their assessment of the individual knowledge, skills and

experience of prospective members based on their analysis of CVs as well as the information therein contained?

Q5: Do you agree with ESMA's proposal regarding the manner of guaranteeing the assessment of the collective knowledge, skills and experience of the management body of DRSPs?

Q6: Do you agree with ESMA's view regarding the inclusion of a reassessment obligation of the adequate knowledge, skills and experience of the management body at a collective level?

6 Independence of mind

64. The requirement to have independence of mind under the second subparagraph of Article 27f (1) of MiFIR establishes that members of the management body of a DRSP “*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.***” (emphasis added). The objective is to guarantee the ability of members of the management body to remain unbiased by other companies or individuals with an interest in their activities.
65. Furthermore, according to Article 27f (3) of MiFIR, the management body of a DRSP shall define and implement “*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***” (emphasis added).
66. The Guidelines on the management body already include a section dealing with the Independence of mind. It is ESMA's view that the **current requirements** set out in Section 5.5 of the Guidelines on the management body of market operators and DRSPs have proven very useful in establishing the fundamentals of how DRSPs should guarantee the independence of mind of members of their management body, which is why this proposal suggests to use the text of the Guidelines on the management body contained in said section while adapting it to explain the obligations that are expected from DRSPs.
67. In order to guarantee this, and in line with the existing text of Section 5.5 of the Guidelines on the management body, ESMA proposes that any member or prospective member of the management body of a DRSP should disclose any links with shareholders whose individual participation reaches or exceeds 5% of voting

rights of the DRSP, taking as a reference the disclosure obligations included in Article 9(1) of the Directive 2004/109/EC (the Transparency Directive)⁸.

68. For firms operating a DRSP the definition of “qualifying holding” contained in Article 4(1)(31) of MiFID II was considered. MiFID II defines 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 [...] 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 which that holding subsists”.
69. This proposal, as contained in the Guidelines on the management body, 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 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.
70. The content of the Guidelines on the management body are already well known to all DRSPs, and so the proposed text of the draft RTS does not represent a complete novelty for any of these entities, which should already have such a policy in place.
71. With regards to **additions to the already existing text**, although the text of the Guidelines on the management body serves well as a basis for these RTS, ESMA believes that some additions are warranted to both grant further clarification on the specific responsibilities for DRSPs to assess the suitability of the members of their management body with regards to independence, as well as to complete some missing elements explained below.

⁸ 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).

72. First of all, ESMA believes that the article containing the minimum requirements that should be included in the **conflict of interest policy** should incorporate two additions which take inspiration from the requirements in the RTS for the registration of trade repositories.
73. The **first** requirement refers to the need to provide a remuneration policy of the members of the management body, and the **second** one refers to the need for the conflict of interest policy to include a point on the acceptance of money bribes and gifts. ESMA believes these changes which are already commonplace in trade repositories and the financial services industry in general do not impose an excessive burden on DRSPs.
74. As regards the abovementioned point on the “*notification of any material conflicts of interest*” that is included in the Guidelines, ESMA believes that this would benefit from the introduction of the need to provide ESMA, or the NCA where relevant, with “*an up-to-date inventory of existing material conflicts of interest in relation to any ancillary or other related services provided by the applicant and a description of how these are being managed*”. This proposal aims to guarantee that members of the management body of DRSPs remain independent “*at all times*” and clarifies how this is to be ensured by DRSPs specifically to achieve the overall suitability of the management body.
75. This **inventory** would be based upon the example of the one trade repositories are already providing to ESMA, specifically under Article 15 of the RTS on the registration of trade repositories⁹, and would guarantee to DRSPs a follow-up on their mandated conflict of interest policy while ensuring that ESMA and their NCA where relevant are aware at all times of any material conflicts of interest and how they are being addressed or are to be addressed soon.
76. This proposal establishes a clear responsibility for DRSPs to keep ESMA, or their NCA where relevant, informed and addresses the need for the independence of the members of their management body to be kept at all times. It has some continuity with the text of the Guidelines on the management body as well, as paragraph 36 indicated that NCAs should “*be notified about any material conflicts of interest identified and the mitigating measures taken by the management body*”. The inclusion of the instrument of an inventory helps clarify what is expected from DRSPs and stems from the different nature of RTS and Guidelines.

⁹ Commission Delegated Regulation (EU) 2019/359 of 13 December 2018 supplementing Regulation (EU) 2015/2365 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the application for registration and extension of registration as a trade repository.

77. The fact that this requirement already exists for trade repositories, alongside the fact that the requirement for a conflict of interest policy already existed in the Guidelines makes ESMA believe that this would not mean a large burden for DRSPs.

Q7: Do you agree with ESMA's inclusion of an up-to-date inventory of existing material conflicts of interest that DRSPs are obliged to provide?

7 Induction and training

78. Article 27f (1) of MiFIR states that the “*management body of a data reporting services provider shall at all times [...] possess sufficient knowledge, skills and experience [...] to perform their duties*” and that “*shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider*”.
79. ESMA notes that although there is no explicit reference under Article 27f of MiFIR with respect to the need for the existence of a training policy for the management body of DRSPs, the requirement of the existence of a training policy for members of the management body of DRSPs could be interpreted from the abovementioned text of Article 27f of MiFIR itself.
80. ESMA understands that in order to possess sufficient knowledge and skills at all times, a training policy is required. However, ESMA considers that the requirement for the existence of an **induction and training policy should be proportionate to the size of the relevant DRSP and its associated management body**. Small firms with a limited number of resources have natural limitations when it comes to developing and implementing an induction and training specific for this line of their business.
81. Section 5.6 of the Guidelines on the management body is dedicated to the guarantee of adequate human and financial resources devoted to the induction and training of members of the management body of market operators. Such section is based upon the level 1 requirement of Article 45 (3) of MiFID II for market operators: “Market operators shall devote adequate human and financial resources to the induction and training of members of the management body” and therefore does not apply to DRSPs.
82. The logic of such exclusion in the Guidelines on the management body, was the assumption that DRSPs due to their usually smaller size, would be overburdened were such a requirement imposed onto them. As mentioned before, the principle

of proportionality and the spirit in which the original text was drawn, does not necessarily correspond to the reality of all DRSPs. Such a requirement should be applicable to DRSPs in line with other requirements and following the principle of proportionality. This would mean that the training policy should be adapted to the size of the management body of each DRSP concerned.

83. ESMA believes that DRSPs shall have a clear indication on what exactly they should do to guarantee the requirement of Article 27f of MiFIR for the management body to have appropriate knowledge, skills and experience at all times. To accomplish this goal, it is ESMA's view that the setting up of a proper training and induction policy which contains clear indications on what is expected from them to be provided, is the best solution.
84. Therefore, ESMA suggests using the current text of the Guidelines as a basis for the requirements set out in these draft RTS. They have proven to be useful in the context of market operators and should be adapted to transform them into clear requirements for DRSPs. While the **importance of a training policy to ensure the proper knowledge, skills and experience of the management body** is clear, special attention has been taken in this proposal to take into account the size and complexity of the entities. Due to the different size and complexity of the management body of different DRSPs, the needs and objectives of the induction and training policy might not be the same for all entities.
85. ESMA believes that the best way to address this in a manner that is both objective and proportional is to **apply such requirements to all DRSPs while specifying that the training and induction policy of each DRSP should be proportionate** to the size of the management body of the entity in question. Since the objective of a training policy is to ensure that the management body retains at all times sufficient collective knowledge, skills and experience, such a clause would guarantee that smaller DRSPs would keep respecting such a mandate while limiting the logistic and economic impact for them.
86. To achieve a proportional training and induction policy, ESMA proposes to require to all DRSPs to **take into account when designing their mandatory training and induction policy**, their own size and complexity, factors that greatly affect their capacity to have such a policy in place. This approach would guarantee that smaller DRSPs, would not see a significant burden upon them, while all DRSPs would be able to guarantee the individual and collective knowledge of their management body. Larger, more complex DRSPs, which are often already part of a larger financial group would also see that taking into account proportionality does not imply an excessive burden on their companies. ESMA would consequently take into account proportionality, as well as the content of the policies themselves, when evaluating the training and induction policy submitted by a DRSP.

87. Finally, it is paramount to note as well that the existence of an induction and training policy relates to the already mentioned point on the collective knowledge of the management body. DRSPs would under these RTS be mandated to provide a statement with their assessment of the collective knowledge as well as any potential deficiencies in it and how to address them. A proper induction and training policy stems as mentioned from this need and would therefore be a natural consequence of this requirement for DRSPs to address any shortcomings regarding the collective knowledge of their management body.

Q8: Do you agree that the above requirements regarding induction and training of members of the management body for DRSPs are an appropriate and proportional manner to guarantee the continuous knowledge, skills and experience of the management body as a whole? Please elaborate on the reasons for your response.

8 Diversity

88. The concept of diversity included in Section 5.7 of the Guidelines on the management body and stemming from Article 45(5) of MiFID II is instrumental to the achievement of a broader set of qualities and competences in the management of DRSPs. ESMA notes however, that **Article 63 of MiFID II did not explicitly refer to the concept of diversity** with respect to the management body of DRSPs, which is why the Guidelines on the management body did not include DRSPs in Section 5.7 on Diversity. Paragraph 47 of the Guidelines on the management body includes a mere invitation for DRSPs to apply this if they so wish.

89. As mentioned before regarding the section on induction and training, it is ESMA's view, that this reflects the fact that at the moment it was believed 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 concept can be seen in the Guidelines on the management body where there is an explicit mention to the fact that such a policy in the case of market operators should take into account the "nature, scale and complexity of their activities". Further proof of this objective is the fact that in paragraph 47 the invitation for DRSPs to apply such a policy, makes reference to the same concept: "the nature, scale and complexity of their activities".

90. The Guidelines on the management body in their section on Diversity talk about the content that a recruitment and diversity policy should have in the context of the management body of market operators. As mentioned before, the lack of explicit reference to this concept in Article 27f of MiFIR, means that the mandate to develop these draft RTS does not covers the possibility of mandating DRSPs to have a specific policy in place that would be needed to assess the suitability of their management body. For that reason, ESMA does not propose to include in these

RTS a specific provision on the need for a diversity policy to be put into place by DRSPs.

91. Nevertheless, given the importance of diversity, ESMA believes that the best way to include the concept in these RTS is to make a reference to the importance of diversity in the achievement of an appropriate collective knowledge, skills and experience of the management body. This is why we propose to include it as part of the requirements set for the assessment of the collective knowledge of the management body. DRSPs will be mandated to take into account *“the educational, professional background, gender, age and geographical provenance with the aim of achieving a variety of views and experiences”* when they assess the collective knowledge of their management body. This should ensure that the importance of diversity is considered in the management body of DRSPs without overburdening DRSPs with the creation of a fully-fledged diversity policy.
92. This reference should be interpreted with the importance of proportionality, as firms whose management body is more limited in size will have natural limitations as to the diversity of their management body. Furthermore, provisions related to diversity should not restrict the obligation for each member of the management body of a DRSP to have the expertise required for the fulfilment of the duties assigned to the role.
93. In summary, the lack of explicit reference to the need for DRSPs to develop a diversity policy, does not provide for the inclusion of such a requirement for the management body of DRSPs in the draft RTS as those that are described in the text of the Guidelines on the management body in the case of market operators. This reflects the difference of mandate that exists between Article 45 and Article 63 of MiFID II, and that is reflected in the Section on Diversity of the Guidelines on the management body. However, ESMA believes that the concept of diversity should be a factor that is taken into account when analyzing the collective suitability of the management body for a DRSP. Therefore, when performing the assessment of the collective knowledge, skills and experience of each of the members and how they fit into the collective knowledge of the management body the background, culture, origins, etc. contribute to the comprehensiveness of the collective views and should therefore be taken into account when performing that assessment.

Q9: Do you agree with ESMA’s view that diversity constitutes a necessary factor to achieve the collective knowledge of the management body of DRSPs that ESMA needs to assess?

9 Record-keeping

94. The text of the Guidelines on the management body regarding the Section on Record-keeping is based on Article 16 of Regulation No 1095/2010 (ESMA

Regulation), which establishes the obligation of ESMA to “*issue guidelines [...] addressed to competent authorities or financial market participants*” in order to ensure “*the common, uniform and consistent application of Union law*”. This means that the development of the Section on Record-keeping in the Guidelines on the management body was not based like the rest of the text on the specific mandate of Articles 45 and 63 of MiFID II.

95. The Section of the Guidelines on the management body in its paragraph 48 describes a common timeframe of five years with respect to the record-keeping obligations for orders and transactions of investment firms and trading venues. There were no general overarching provisions in the respective sectoral legislation with respect to the obligations of market operators and DRSPs. However, during the drafting of the abovementioned Guidelines, it was ESMA’s view 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 implementing acts (for instance, Articles 2(2), 7(6), 11(1) and 18(5) of RTS 7 (Commission Delegated Regulation (EU) 2017/584)¹⁰; 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 Directive¹¹).

96. Article 27f of MiFIR states in its paragraph 1 that “***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***” (emphasis added); and in its paragraph 2 that “*DRSPs shall notify to ESMA or a national competent authority where relevant 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*” (emphasis added); and finally in its paragraph 4 that “*ESMA or a national competent authority where relevant shall refuse authorisation [...] 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*”.

97. From those legislative provisions, ESMA understands that the information mentioned in paragraph 48 of the Guidelines on the management body, which is

¹⁰ Commission Delegated Regulation (EU) 2017/584 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying organisational requirements of trading venues.

¹¹ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

all of the information discussed in these draft RTS, represents the fundamental element for the analysis of the suitability of the management body of DRSPs. It would therefore be the duty of DRSPs to guarantee that this information is stored in a durable medium and that it is made available to ESMA or to the relevant NCA so they are able to perform this assessment.

98. ESMA believes that for this to be ensured, and for the assessment of the continuity of said suitability to be guaranteed, there is a need to remind of the importance of a formal system to be in place where such information is stored in every element that is to be provided to ESMA or the NCA where relevant. The objective is clear: whenever an assessment or reassessment is required, historic information on how the suitability may have evolved in the (recent) past is necessary to have clarity. Furthermore, any dispute or claim that may arise against the information provided by any member of the management body to the DRSP needs to be corroborated against the original information provided when they took over the function.
99. On this basis, it would be necessary for this information to be stored, without entering into an obligation to develop a record-keeping policy. Any records on their past activities, behaviours or connections to other companies in the market may become relevant when a conflict of interest arises that could not be taken into account before. And of course, the different policies established by the DRSPs are necessary to analyse their adaptation to new needs or changes in the market.
100. Nevertheless, due the lack of a specific mandate in Article 27f, the text of the Guidelines on the management body that is contained in the Section on Record-keeping cannot be included in the same manner in these draft RTS. First of all, with regards to the timing of such information to be stored, while the Guidelines on the management body tried to recommend a minimum duration of five years for the storage of this information, the requirements in these draft RTS favour no reference to a specific minimum time as the information is needed in the context of analysing the continuous suitability of members of the management body.
101. The non-inclusion of a time limit would guarantee that the information has to be available for ESMA or the NCAs whenever it may be needed to perform an analysis on the suitability of the management body. Evidently this does not mean that the information may be needed indefinitely but the lack of an explicit mention of this in Article 27f does not allow us to make a reference to a minimum of five years which is contained in the text of the Guidelines. It is therefore why we propose not to include any specific time limit on the time this information must be stored and available.

102. There is a clear precedent for such an approach in the RTS for the registration of trade repositories. In the same way, no specific time is referenced with regards to the record-keeping policy and the data therein contained but rather a mere clarification that a system needs to be in place and the data available to supervisory authorities. It is ESMA's view that this approach represents the best possible one to take into account for these proposed RTS as well.

103. In order to ensure the storage of all information related to the suitability of members of the management body ESMA proposes therefore, to include a requirement of the need for the information to be available to ESMA at all times in each article that deals with information to be provided to ESMA or the relevant NCA. This will ensure clarity for DRSPs as for the need to hold on to such information. ESMA's approach would guarantee continuous accessibility to such information without imposing the development of a record-keeping policy to DRSPs, a point not specifically mentioned in Article 27f of MiFIR.

Q10: Do you agree that DRSPs should ensure continuous availability to the information needed for the assessment of the suitability of their management body by keeping it in a durable medium and making it available to ESMA or the NCA where relevant?

10 Annexes

10.1 Annex I

Summary of questions

Q1: Do you agree with the proposed approach of integrating the assessment of good repute, honesty and integrity in a single self-declaration of good repute? Should you disagree, please provide reasons, propose an alternative approach and justify it.

Q2: Do you agree with the proposed circumstances under which DRSPs should ensure the re-assessment of the good repute, honesty and integrity of a member of their management body?

Q3: Do you agree that DRSPs should establish themselves the limitation to the number of simultaneous directorships that members of the management body of their DRSP can hold?

Q4: Do you agree with ESMA's proposal on the obligation for DRSPs to provide a statement guaranteeing their assessment of the individual knowledge, skills and experience of prospective members based on their analysis of CVs as well as the information therein contained?

Q5: Do you agree with ESMA's proposal regarding the manner of guaranteeing the assessment of the collective knowledge, skills and experience of the management body of DRSPs?

Q6: Do you agree with ESMA's view regarding the inclusion of a reassessment obligation of the adequate knowledge, skills and experience of the management body at a collective level?

Q7: Do you agree with ESMA's inclusion of an up-to-date inventory of existing material conflicts of interest that DRSPs are obliged to provide?

Q8: Do you agree that the above requirements regarding induction and training of members of the management body for DRSPs are an appropriate and proportional manner to guarantee the continuous knowledge, skills and experience of the management body as a whole? Please elaborate on the reasons for your response.

Q9: Do you agree with ESMA's view that diversity constitutes a necessary factor to achieve the collective knowledge of the management body of DRSPs that ESMA needs to assess?

Q10: Do you agree that DRSPs should ensure continuous availability to the information needed for the assessment of the suitability of their management body by keeping it in a durable medium and making it available to ESMA or the NCA where relevant?

10.2 Annex II

Legislative mandate to develop technical standards

Article 27f of MiFIR

Requirements for the management body of a data reporting services provider

1. 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 pursuant to Article 27c 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. Data reporting services provider shall notify to ESMA or a national competent authority where relevant 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.

3. The management body of a data reporting services provider shall define and oversee 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.

4. ESMA or a national competent authority where relevant 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.

5. ESMA shall develop draft regulatory technical standards by 1 January 2021 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.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

10.3 Annex III

Cost-benefit analysis

Article 10 of Regulation (EU) No 1095/2010¹² requires ESMA, to analyse the potential costs and benefits relating to the proposed RTS unless such analyses are highly disproportionate in relation to the scope and impact of the draft RTS concerned or in relation to the particular urgency of the matter.

Article 27f(1) of MiFIR establishes requirements with respect to the management body of DRSPs, stating that the management body “*shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties*”. And that “*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*”.

Article 27f (5) of MiFIR determines that ESMA shall develop regulatory technical standards for the assessment of the suitability of the members of the management body of DRSPs.

Description

Benefits: The RTS is aimed at transforming and updating the Guidelines on the management body. In that sense, they should create clear obligations for DRSPs, as well as members and potential members of the management body of DRSPs about the requirements that should be met according to Article 27f of MiFIR.

Compliance costs

- One-off
- Ongoing

Most of the concepts that these RTS aim at including are already in existence under the Guidelines on the management body, and the vast majority of national regulatory frameworks.

¹² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).] (ESMA Regulation).

Therefore, the vast majority of the provisions provided for in these RTS are in line with the Guidelines on the management body, national regulations and supervisory practice throughout the EU.

The novelties for DRSPs in these RTS are the notions of “diversity” and the “devotion of resources for the induction and training of the members of the management body”, as well as the calculation on the number of directorships. However, it must be noted that in respect of the principle of proportionality, the notion of the calculation of the number of directorships will be introduced only to a small subset of DRSPs, which following the objective criteria established for their direct supervision by ESMA, have proven to be more complex entities that are part of a financial group with a significant impact in the internal market.

In the case of the criteria of “diversity” and the “devotion of resources for the induction and training of the members of the management body”, it must be added that in the Guidelines on the management body there is already a specific mention to the fact that these provisions should apply to larger, more complex entities. In the case of diversity, there is even an explicit mention to DRSPs as they are assumed to be smaller. These two explicit mentions to size, show that the purpose of excluding DRSPs, and in the case of “diversity” explicitly due to the potentially smaller size of their management body, is based exclusively on their expected size.

ESMA sees therefore no reason to exclude from these requirements DRSPs that have been proven, via the derogation criteria, to be large enough to be supervised by ESMA.

10.4 Annex IV

Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) .../...

of [...]

supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council with regards to regulatory technical standards for the assessment of the suitability of the members of the management body of data reporting services providers

(text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ⁽¹³⁾, and in particular the second subparagraph of Article 27f(5) thereof,

¹³ OJ L 173 12.6.2014, p. 84

Whereas:

- (1) Rules should be laid down for the assessment of the suitability of the members of the management body of data reporting services providers.
- (2) ...
- (3) ...
- (4) ...
- (5) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (6) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁴

HAS ADOPTED THIS REGULATION:

¹⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

*Article 1***Sufficiently good repute**

1. A data reporting services provider shall provide to ESMA or the national competent authority, where relevant, and require from each member of its management body to provide:
 - a. details regarding any criminal convictions in connection with the provision of financial or data services or in relation to acts of fraud or embezzlement, notably via an official certificate;
 - b. a self-declaration of good repute where each prospective member declares whether he or she:
 - i. 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;
 - ii. 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;
 - iii. 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;
 - iv. has been refused the right to carry on activities which require registration or authorisation by a regulatory authority;
 - v. 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;
 - vi. 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

- vii. 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.
2. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available to ESMA, or the national competent authority where relevant, the information referred to in this Article upon request.

Article 2

Reassessment of suitability

1. A data reporting services provider shall ensure that the members of the management body immediately report to the data reporting services provider any change in the information provided in accordance with point b of Article 1(1) for a reassessment of their suitability.
2. A data reporting services provider shall reassess the suitability of each of the members of the management body in any of the following cases:
 - a. where there are concerns regarding his or her suitability;
 - b. in the event of a material impact on his or her reputation;
 - c. as part of the review of the internal governance arrangements by the management body;
 - d. in any event that can otherwise materially affect his or her suitability.
3. A data reporting services provider shall provide ESMA or the national competent authority, where relevant, with all information mentioned in this article for a reassessment of the suitability of the members of its management body.

Article 3

Functions and responsibilities

1. A data reporting services provider shall have a written policy that contains the following items:
 - a. details of the functions and responsibilities of the management body;
 - b. a comprehensive job description for each position in the management body; and
 - c. the anticipated time commitment required for each position in the management body. The anticipated time commitment shall be adapted to the functions and responsibilities of the position taking into account in particular whether it refers to an executive or a non-executive position.
2. A data reporting services provider shall ensure that when a person is selected to become a member of its management body, the anticipated time commitment for the position is recorded in writing.
3. A data reporting services provider shall require the prospective member to confirm in writing that he or she can devote the anticipated time commitment to the role, including the possibility to devote additional time when the data reporting services provider is undergoing a period of particularly increased activity. The effective appointment to the position shall not take place without such a written confirmation by the prospective member.
3. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available to ESMA, or the national competent authority where relevant, the information referred to in this Article upon request.

Article 4

Number of directorships

1. A data reporting services provider shall establish and provide to ESMA, or the national competent authority where relevant, a maximum number of directorships a member of its management body can hold, in any legal entity, at the same time. To do so, it shall take into account its individual circumstances and the nature, scale and complexity of its activities.

2. A data reporting services provider shall ensure that each member of its management body confirms in writing, that they comply with the limitations on the number of directorships a member of the management body can hold, in any legal entity, at the same time.

Article 5

Information to be provided on time commitments

1. A data reporting services provider shall provide ESMA or the national competent authority, where relevant, and ensure that prospective members of its management body provide the data reporting services provider 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 organizations 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 or her responsibilities with respect to the directorships, functions and professional activities under points (a) to (c).
2. A data reporting services provider shall ensure that the members of its management body notify the data reporting services provider of any material change in the information provided in accordance with paragraph 1.
3. A data reporting services provider shall reassess the ability of a member of its management body in respect of the required time-commitment when the member notifies the data reporting services provider of any changes in his or her external professional functions or whenever the data reporting services provider becomes otherwise aware of such a change.
4. A data reporting services provider shall update and communicate to ESMA, or the national competent authority where relevant, if the information on any of the three first paragraphs of this Article changes.

Article 6

Attendance

The nomination committee or the management body in its supervisory function shall take into account the cumulative time commitment shown by the members of the management body, using at least the attendance to the management body's meetings as one of the indicators of time commitment.

Article 7

Individual knowledge, skills and experience

1. A data reporting services provider shall provide ESMA, or the national competent authority where relevant, with a statement from the data reporting services provider, which includes the curriculum vitae of the individual, on whether or not the individual has been assessed as having the requisite experience as enumerated in this Article and, if not, details of the training plan imposed, including the content, the provider and the date by which the training plan will be completed. This statement shall include detailed information on the knowledge and experience in IT management, compliance, financial data and pricing and fee policies.
2. A data reporting services provider shall assess the requisite experience and knowledge by ensuring that all prospective members of its management body provide the data reporting services provider with a curriculum vitae containing in particular:
 - a. details of education and professional experience (including professional experience, academic qualifications and other relevant training);
 - b. the name and nature of all organisations for which the individual has worked and the nature and duration of the functions performed in those organisations, in particular highlighting any activities within the scope of the position sought in the data reporting services provider.
3. As regards the education, consideration shall be given to the level and profile of the education and whether it relates to financial services or activities or any other relevant area of knowledge described above (financial accounting and reporting, strategic planning and so forth). For this purpose, a data reporting

services provider shall 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 of the management body.

4. As regards the practical experience, consideration shall be given to the practical and professional experience gained from a managerial position over a sufficiently long period. Short term or temporary positions shall be considered in the assessment but are usually not sufficient to support adequate expertise.
5. A data reporting services providers shall ensure that each prospective member of the management body has an up to date understanding of the activities of the data reporting services provider and related risks, its governance arrangements, the prospective position and responsibilities and, where applicable, the group's structure at a level commensurate with their responsibilities. This shall include an appropriate understanding of the areas for which a member of the management body is not directly responsible but is collectively accountable together with the other members of the management body.
6. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available to ESMA, or the national competent authority where relevant, upon request the information referred to in this Article and all information contained in the abovementioned statements.

Article 8

Operational separation and outsourcing

The statement mentioned in Article 7.1 shall include a confirmation that each member of the management body of the data reporting services provider has been assessed as having the expertise and knowledge to supervise, monitor and decide on the operational separation in terms of resources, systems and procedures, between the data reporting services provider and other business lines, irrespective of whether that separate business line is run by the data reporting services provider, a company belonging to its holding company, or any other company within which it has an agreement.

Article 9

Collective knowledge, skills and experience

1. A data reporting services provider shall ensure that its 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 that such activities entail according to the scale of the management body.
2. When assessing the collective suitability of its management body, a data reporting services provider shall take into account the educational and professional background, gender, age and geographical provenance of the members with the aim of achieving a variety of views and experiences and consider at least the following areas of knowledge and fields of expertise:
 - a. each of the material activities of the data reporting services provider, including outsourced activities;
 - 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.
3. A data reporting services provider shall assess or re-assess the collective suitability of its management body when material changes to the composition of the management body occur, in particular in any of the following cases:
 - a. when appointing new members of the management body, including as a result of a direct or indirect acquisition or increase of a qualifying holding in the company;
 - b. when re-appointing members of the management body, if the requirements of the position have changed or if the members are appointed to a different position within the management body;

- c. when appointed or reappointed members cease to be members of the management body.
 - d. when there is a material change to the company's business model, risk appetite or strategy or structure at individual or group level;
 - e. in any event that can otherwise materially affect the collective suitability of the management body.
4. Where re-assessments of the collective suitability are performed, a data reporting services shall focus the assessment on the relevant changes in the institution's business activities, strategies and risk profile and in the distribution of duties within the management body and their effect on the required collective knowledge, skills and experience of the management body.
5. A data reporting services provider shall provide ESMA, or the national competent authority where relevant, with a statement regarding its overall assessment or reassessment of the collective suitability of its management body as a whole, including a statement on how the individual is to be situated in the overall suitability of the management body (i.e. following any method chosen by the institution or required by the relevant competent authority that includes at least the requirements mentioned in the first paragraph of this article). This should include the identification of any gaps or weaknesses and the measures imposed to address these.
6. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available to ESMA, or the national competent authority where relevant, the information referred to in this Article upon request.

Article 10

Conflict of interest policy

1. The management body of a data reporting services provider shall have a written conflicts of interest policy and an objective compliance process for implementing

the policy. The policy shall include, with respect to each member of the management body, at least:

- a. the duty to avoid to the extent possible activities that could create conflicts of interest;
 - b. examples of where conflicts of interests can arise when serving as member of the management body;
 - c. a rigorous review and approval process to follow before the engagement 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. the 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. the duty to abstain from voting on any matter where the member of the management body may have a conflict of interest or where his or her objectivity or ability to properly fulfil the duties may be otherwise compromised;
 - f. adequate procedures for transactions with related parties so that they are 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.
 - h. a description of the remuneration policy for the members of the management body and senior management;
 - i. the rules regarding the acceptance of money, gifts or favours by members of the management body of the data reporting services provider.
2. A data reporting services provider shall ensure that public disclosure is made of its policies on conflicts of interest. ESMA, or the national competent authority where relevant, shall be notified about any material conflicts of interest identified and the mitigating measures taken by the management body.
 3. Prior to the appointment, a data reporting services provider shall assess any circumstance which may give rise to a conflict of interest or actual conflicts of interest, having regard to the conflicts of interest policy referred to in paragraph 1 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 conflict of interest shall be disclosed and the mitigating measures

shall be approved by the management body and notified to ESMA, or the national competent authority where relevant.

4. A data reporting services provider shall provide ESMA, or the national competent authority where relevant, with an up-to-date inventory of existing material conflicts of interest in relation to any ancillary or other related services provided by the data reporting services provider and a description of how these are being managed.
5. When a data reporting services provider is part of a group the inventory shall include any material conflicts of interest arising from other undertakings within the group and how these conflicts are being managed.

Article 11

Notification of conflicts of interest

1. A data reporting services provider shall ensure that members or prospective members of its management body identify and report to the management body any potential conflicts of interest that may impede their ability to perform their duties independently and objectively and subject them to undue influence, including:
 - a. any personal, professional or economic relationships with other persons (including shareholders of the data reporting services provider concerned or of a competing data reporting services provider);
 - b. any past or present positions held;
 - c. personal, professional or economic relationships with other members of the management body or senior management or where the data reporting services provider is part of a group, with other entities within the group;
 - d. other economic interests, including loans to the member's or prospective member's company; or
 - e. other interests, including family interest, that may create actual conflicts of interest.
2. A data reporting services provider shall ensure that the identification of circumstances which may give rise to conflicts of interests described in the

previous paragraph shall 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 data reporting services provider or an officer of, or otherwise associated directly with, a shareholder whose participation reaches or exceeds 5% of voting rights of a data reporting services provider;
 - b. is employed, or has previously been employed in the previous 18 months in an executive capacity by a data reporting services provider or another entity in the group of a data reporting services provider;
 - c. is or has been, within 18 months, a principal of a material professional adviser or a material consultant to a data reporting services provider or another entity in the group of a data reporting services provider or an employee materially associated with the service provided;
 - d. 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 a market which is part of the group of the data reporting services provider;
 - e. is or has been a material supplier or customer of a data reporting services provider or another entity of the group of the data reporting services provider or an officer of or otherwise associated directly or indirectly with a material supplier or customer; and
 - f. has or used to have any other material contractual relationship with a data reporting services provider or another entity in the group of the data reporting services provider other than as a member of the management body.
3. The references in the preceding paragraph to “a data reporting services provider” encompasses both the data reporting services provider to the management body of which the person is a member or prospective member as well as another data reporting services provider.
4. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available on request of ESMA, or the national competent authority where relevant, the information referred to in this Article.

*Article 12***Requirements on the induction and training policies of data reporting services providers**

1. A data reporting services provider shall provide ESMA, or the national competent authority where relevant, with a written induction and training policy to ensure that each member of its management body is and remains suitable, for their position. The policy shall facilitate the maintenance of members' understanding of the activities, structure, business model, risk profile, regulatory environment and governance arrangements of the data reporting services provider and of the role of the members of its management body in them. A data reporting services provider shall also provide for relevant general and, as appropriate, individually tailored training programs to ensure that all members are kept up to date. The training policy shall also promote the awareness regarding diversity in the management body.
2. The policy mentioned in paragraph 1 shall be proportionate to the size of the entity and shall be adopted by the management body in its supervisory function, involving the nomination committee, where established.
3. The policy shall 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.
4. The policy and training programs shall be kept up to date and shall take into account market developments as well as changes in governance, strategy, products covered, or the applicable legislation.

5. The data reporting services provider shall use evaluation processes to review the effectiveness of the training provided.
6. Without prejudice to the applicable data protection legislation, a data reporting services provider shall record and maintain in a durable medium and make available on request of ESMA, or the national competent authority where relevant, the information referred to in this Article.

Article 13

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [date]

For the Commission

The President

On behalf of the President

[Position]

