



European Securities and
Markets Authority

Guidelines

**on the management body of market operators and data reporting
services providers**



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1 Scope

Who?

1. These guidelines apply to national competent authorities, market operators and data reporting services providers.

What?

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

When?

3. These guidelines apply from 3 January 2018.

¹ Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).

² 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).

2 Definitions

4. Unless otherwise specified, terms used in MiFID II have the same meaning in these guidelines.

3 Purpose

5. The purpose of these guidelines is to develop common standards to be taken into consideration by market operators and DRSPs when appointing new and assessing current members of the management body and to provide guidance on how information should be recorded by market operators and DRSPs in order to make it available to the competent authorities for the exercise of their supervisory duties.

4 Compliance and reporting obligations

4.1 Status of the guidelines

6. This document contains guidelines issued under Article 45(9) and Article 63(2) of MiFID II and guidelines issued under Article 16 of ESMA Regulation. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
7. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

4.2 Reporting requirements

8. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA in all EU official languages to smk@esma.europa.eu. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available on the ESMA website.
9. Market operators and data reporting services providers are not required to report whether they comply with these guidelines.

5 Guidelines on management bodies pursuant to Article 45(9) and Article 65(3) of MiFID II

5.1 Sufficient time commitment: general

10. Market operators and DRSPs should have a written policy detailing the functions and responsibilities of the management body and setting out ex ante a comprehensive job description and the anticipated time commitment required for each position. The anticipated time commitment should be adapted to the functions and responsibilities taking into account in particular whether it refers to an executive or a non-executive position.
11. When a person is selected to become a member of the management body, the anticipated time commitment for the position should be recorded in writing, and the market operator or the DRSP should require the prospective member to confirm in writing that he or she can devote that amount of time to the role, including the possibility to devote additional

time when the market operator or the DRSP is undergoing a period of particularly increased activity. The effective appointment for the position should not take place without such a written confirmation by the prospective member.

12. Where a person is 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.
13. Prospective members should provide the market operator or the DRSP with information regarding:
 - a. directorships held in other financial and non-financial companies, including when acting on behalf of a legal person or as an alternate appointed by a member of the management body to attend meetings;
 - b. directorships held in organisations which do not pursue predominantly commercial objectives;
 - c. other functions and professional activities within and outside the financial sector relevant in terms of time commitment; and,
 - d. the nature of his/her responsibilities under any of the previous points.
14. Members of the management body of market operators or DRSPs should notify the market operator or DRSP of any material change in the information provided in accordance with the previous paragraph.
15. The records foreseen in Section 5.8 of these Guidelines should be updated whenever a member notifies the market operator or DRSP of a change in his/her external professional functions and/or whenever such a change comes to the attention of the market operator or DRSP. Following this, the market operator or DRSP should reassess the member's ability in respect of the required time-commitment.
16. The nomination committee (where established) or the management body in its supervisory function should take into account the cumulative time commitment shown by the members of the management body, using the attendance to the management body's meetings as one of the indicators of time commitment.

5.2 Sufficient time commitment: calculation of the number of directorships

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

18. Where multiple directorships count as a single directorship under the third paragraph of Article 45(2)(a) of MiFID II (directorships held within the same group or undertakings where the market operator holds a qualifying holding), that single directorship should count as a single executive directorship when it includes at least one executive directorship. Otherwise, it should count as a single non-executive directorship.
19. All directorships held in undertakings where the market operator holds a qualifying holding count as a single directorship. That single directorship should be added to the directorship held in the market operator.
20. All directorships held in subsidiaries within the same group and the directorship held in the market operator count as a single directorship.
21. When subsidiaries within the same group hold qualifying holdings in other undertakings, the directorships held in those undertakings should be counted as one separate directorship. As a consequence, the directorships held in the subsidiaries and the directorship held in the market operator should be counted as one directorship and the directorships held in the undertakings as another separate directorship.
22. Directorships held in organisations which do not pursue predominantly commercial objectives should not be counted when calculating the number of directorships. However, such activities should be taken into account when assessing the time commitment of the concerned member.
23. Organisations which do not pursue predominantly commercial objectives include:
 - a. charities;
 - b. other non-for-profit organisations; and,
 - c. undertakings set up for the sole purpose of managing the private economic interests of the member of the management body provided that they do not require day-to-day management.

5.3 Knowledge, skills and experience

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

- a. each of the material activities of the market operator/DRSP;
 - b. financial accounting and reporting;
 - c. strategic planning;
 - d. risk management;
 - e. compliance and internal audit;
 - f. information technology and security;
 - g. local, regional and global markets where applicable;
 - h. the regulatory environment; and,
 - i. the management of (inter)national groups and risks related to group structures where applicable.
25. At an individual level, prospective members of the management body should have an up-to-date understanding of the activities of the market operator or DRSP and related risks, the market operator's or DRSP's governance arrangements, the prospective position and responsibilities and, where applicable, the group's structure at a level commensurate with their responsibilities. This includes an appropriate understanding of those areas for which an individual member is not directly responsible but is collectively accountable together with the other members of the management body.
26. As regards the education, consideration should 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, market operators and DRSPs should take into consideration both the theoretical knowledge and skills attained through education and training as well as the practical experience gained in previous occupations by the prospective member.
27. As regards the practical experience, consideration should be given to the practical and professional experience gained from a managerial position over a sufficiently long period. Short term or temporary positions can be considered in the assessment but are usually not sufficient to support adequate expertise.

5.4 Honesty and integrity

28. When assessing the honesty and integrity of a prospective member of their management body, market operators and DRSPs should request and check the accuracy of the documents set out in Article 4 of the Commission Delegated Regulation (EU) 2017/571 of 2 June 2016 on authorisation, organisational requirements and the publication of transactions for DRSPs³ and should in particular take into consideration whether the prospective member has been:

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

29. Members of the management body should immediately report to the market operator or DRSP any of the circumstances mentioned above for a reassessment of their suitability.

³ 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 (OJ L 87; 31.3.2017; p. 126).

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

5.5 Independence of mind

31. Members or prospective members of a market operator/DRSP's management body should identify and report to the management body any circumstances which may give rise to conflicts of interest that may impede their ability to perform their duties independently and objectively and subject them to undue influence due to:
 - a. personal, professional or economic relationships with other persons (such as shareholders of the market operator or DRSP concerned or of a competing market operator or DRSP);
 - b. past or present positions held;
 - c. personal, professional or economic relationships with other members of the management body or senior management (or with other entities within the group);
 - d. other economic interests (e.g. loans to the member's or prospective member's company); or
 - e. other interests, including family interest, that may create actual conflicts of interest.
32. The identification of circumstances which may give rise to conflicts of interests described in the previous paragraph should at least cover whether the member or prospective member:
 - a. is or has been a shareholder whose participation reaches or exceeds 5% of voting rights of a market operator or DRSP or an officer of, or otherwise associated directly with, a shareholder whose participation reaches or exceeds 5% of voting rights of a market operator or DRSP;
 - b. is employed, or has previously been employed in the previous 18 months in an executive capacity by a market operator/DRSP or another entity of a market operator/DRSP's group;

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

- d. a member's duty to promptly disclose any matter that may result, or has already resulted, in a conflict of interest, having particular regard to the circumstances described above;
 - e. a member's duty to abstain from voting on any matter where the member may have a conflict of interest or where the member's objectivity or ability to properly fulfil duties to the market operator/DRSP may be otherwise compromised;
 - f. adequate procedures for transactions with related parties so that they 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.
36. The management body should ensure that public disclosure is made of the market operator's and DRSP's policies on conflicts of interest. National competent authorities shall be notified about any material conflicts of interest identified and the mitigating measures taken by the management body.

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

37. Individual members of the management body of market operators should be and remain suitable, including through training, for their position. Market operators should establish a policy for the induction of the members of their management body. Market operators should facilitate the maintenance of members' understanding of the market operator's activities, structure, business model, risk profile, regulatory environment and governance arrangements and members' role in them. Market operators should also provide for relevant general and, as appropriate, individually tailored training programmes to ensure that all members are kept up to date. Training policy should also promote the awareness regarding diversity in the management body.
38. The training policy should be adopted by the management body in its supervisory function. The management body should involve the nomination committee if such is established.
39. The training policy should set out:
- a. the induction and training objectives for the management body separately for the management function and the supervisory function and, where appropriate, specific positions according to their specific responsibilities and involvement in committees;

- b. the responsibilities for the development of a detailed training programme;
 - 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.
40. The policy and training programs should be kept up to date, and consider changes in governance, strategy, products covered and other relevant processes, as well as changes in applicable legislation and market developments.
41. Market operators should use evaluation processes to review the effectiveness of the training provided.

5.7 Diversity

42. Market operators should, in accordance with the nature, scale and complexity of their activity, put in place a recruitment and diversity policy to ensure that a broad set of qualities and competences are considered when recruiting members of the management body. To that end, it should set concrete objectives in terms of diversity.
43. Market operators should set a target for the representation of the underrepresented gender.
44. The recruitment and diversity policy should at least refer to educational and professional background, gender, age and geographical provenance with the aim to achieve a variety of views and experiences. Without prejudice to national law, the diversity policy should provide a reference to the geographical provenance in case the market operator operates in more than one jurisdiction.
45. Without prejudice to national law, the recruitment and diversity policy may provide for employee representation within the management body in order to add a different perspective and genuine knowledge and experience of the activities undertaken by the market operator.
46. The market operators' selection procedures should ensure that the candidates shortlisted for becoming members of their management bodies cover at least one of the areas of diversity described above which is not currently present on the management body. Market operators should not recruit members of the management body with the sole purpose of increasing diversity to the detriment of the functioning and suitability of the management body collectively, or at the expense of the suitability of individual members of the management body.

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

5.8 Record-keeping

48. Without prejudice to the applicable data protection legislation, market operators and DRSPs should record and maintain for at least five years in a durable medium and make available on request of the national competent authority at least the following:
- a. the written policy detailing the functions and responsibilities of the management function;
 - b. confirmation in writing by the prospective member of his/her capacity to meet the requirements of the position;
 - c. information provided by the member or prospective member of the management body regarding other directorships, functions or professional activities that might impact his/her capacity to devote sufficient time to the management body;
 - d. information provided by member or prospective member of the management body regarding his/hers knowledge, skills and experience;
 - e. assessment regarding the collective knowledge, skills and experience of the management body;
 - f. records provided or obtained in relation to the assessment of the honesty and integrity of the member or prospective member of the management body;
 - g. records provided or obtained in relation to the assessment of the independence of mind of the member or prospective member of the management body;
 - h. written conflicts of interest policy and relevant compliance process for implementing the policy;
 - i. public disclosure and/or information to supervisors of policies on conflicts of interest and material conflicts of interest;
 - j. market operators' policy on induction and training of members of the management body;
 - k. recruitment and diversity policy; and,

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