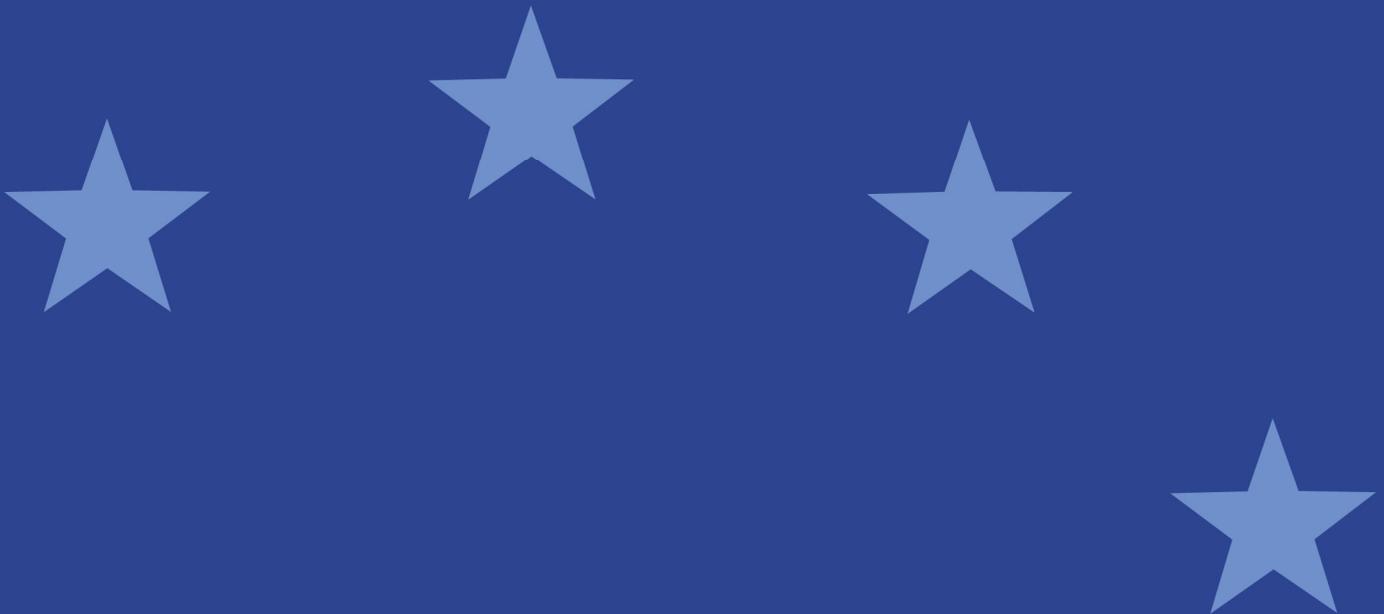




European Securities and  
Markets Authority

## **Reply form for the Consultation Paper on the Guidelines on specific notions under MiFID II re- lated to the management body of market opera- tors and data reporting services providers**



## Responding to this paper

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

### **Instructions**

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

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

Responses are most helpful:

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

### **Naming protocol**

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

ESMA\_MiFID\_GMB\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_MiFID\_GMB\_ESMA\_REPLYFORM or

ESMA\_MiFID\_GMB\_ESMA\_ANNEX1

### **Deadline**

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

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



### ***Publication of responses***

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

### ***Data protection***

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



## Introduction

**Please make your introductory comments below, if any:**

< ESMA\_COMMENT\_MIFID\_MBG\_0 >

Deutsche Börse Group (“DBG”) appreciates the opportunity to respond to ESMA’s Consultation Paper on the Draft Guidelines on specific notions under MiFID II related to the management body of market operators and data reporting services providers (hereinafter also referred to as “ESMA Guidelines”).

As the rules set out in MiFID II are similar to those for credit institutions and investment firms in CRD IV, we kindly ask ESMA to closely align with EBA on setting up the respective guidelines. Moreover, we would rather favour to have a common guideline for both purposes in one single document issued by both ESMA and EBA in order to avoid deviations in language which are not meant as being a difference in content.

DBG in general agrees to the proposals made by ESMA. However, we have some comments in detail where we have different views or see the need for further clarification.

Unless it is expressly mentioned in this statement, DBG agrees to the proposed ESMA Guidelines.

We would like to raise ESMA’s attention to the following issues in particular:

1. Distinction between management (executive) board and supervisory board

The management body is defined in Article 4(1)(36) MiFID II. In case that the national law, for instance in Germany, assigns the managerial and supervisory functions of the management body to different bodies, the Member State shall identify the body responsible in accordance with its national law, unless otherwise specified by the Directive. Even if the draft ESMA Guidelines distinguish between the management body in its executive and its supervisory function in some points, the necessary distinction is not implemented in all required areas. This is also true to some extent for the distinction of duties and the requirements for non-executive and executive directors in a one-tier Board structure.

The differences are in particular of relevance when considering the rules under Article 45(2)(a) MiFID II and determining the number of directorships being held and being allowed to be held. Furthermore, there is also a different level of application of the rules depending on the status of a member of the management body. As such, there may also not just exist one management “body” but two distinct boards which form the management body. The rules need to be sufficiently flexible to consider the differences in Corporate Governance set up according to national legal requirements.

For further details, we like to refer to the dedicated answers to the ESMA questions below.

2. Applicability of rules on prospective and / or current members of the management body

In some paragraphs ESMA is rightly addressing to “members or prospective members” while at other places only “prospective members” are addressed. While there may be good reason to focus on prospective members only in some areas, we are of the opinion that at some places the limitation to prospective members is too restrictive. As such, we kindly ask ESMA to double check the use of “prospective members” only. In addition, we are giving hints in our replies to the various questions below where we feel that “prospective members” only is too limited.

3. Differentiation between the requirements imposed on the management body of market operators and the management body of DRSPs (section 3.2 of the ESMA Consultation Paper)

Paragraph 15 of the ESMA Consultation paper is unclear to us. It refers to “three provisions referenced above”. However, this reference is not understandable. It may well be, that the two items in paragraph 13 and the one in paragraph 14 are meant. In this case, paragraph 17 would not make sense. As such, we kindly ask to clarify the content of paragraph 15 going forward. In any case, we strongly support the application of the proportionality principle and we disagree with the usage of the limitations as set out in Article 45(2)(a) of MiFID II to DRSPs. |

< ESMA\_COMMENT\_MIFID\_MBG\_0>

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

<ESMA\_QUESTION\_MBG\_1>

DBG in general agrees to ESMA's view regarding sufficient time commitment. However, DBG sees in particular the need to adjust the proposal in paragraphs 28, 29 and 33 (mainly as a consequence of different corporate governance structures and different rules for members of the management body in the executive and supervisory function respectively) and need to add guidance related to mandates on behalf of the company (see below).

DBG is missing a clear guidance on how to deal with **mandates on behalf of the company** but in a different company. It is common that members of the Executive Management (here: members of the Executive Board or executive members of the Board of Directors) are also members of the Board of Directors (i.e. supervisory board or non-executive members of the Board of Directors) of other companies in the interest of the own company. This may be related to group companies (i.e. subsidiaries or sister companies) or key clients or service providers (e.g. SWIFT) or otherwise strategic partners etc. In a similar manner, members of the management body in its supervisory function may be engaged on behalf of the company in the supervisory function of other companies as well. Moreover, members of the Executive Management may also hold additional mandates in the Executive Management of other companies on behalf of their company (i.e. in subsidiaries or sister companies or even at the parent company).

In our understanding, those hours which need to be allocated to the mandates per se should nevertheless be counted also towards the position within the company itself. As such, these hours would be "double counted" and the total amount of hours allocated to the different entities would be more than total hours worked.

ESMA should clarify the treatment of the item considering our proposal above.

**Paragraph 28** stipulates that a market operator/DRSP should have a written policy detailing the functions and responsibilities of the management body thereby, setting out ex ante a comprehensive job description and the anticipated time commitment required for each position.

They requirements set out are not appropriate with regards to non-executive members of the management body and explicitly this is true in a two-tier structure; e.g. under the two-tier board structure as provided by the German Stock Corporation law, only a detailed distinction between certain board members is appropriate with regard to the management (executive) board. The supervisory board basically supervises and monitors the management (executive) board as a whole without having a specialisation between the different members of the supervisory board. Thus DBG asks to specify the requirement of a comprehensive job description only to the members of the management body in its executive function, i.e. in a two-tier structure for the members of the management (executive) board only. (The argument in principle also holds for one-tier boards as non-executive board members usually do not have dedicated tasks other than being members of certain committees).

The time commitment for executive members of the management board can be estimated and should be the basis for the respective contractual arrangements. However, depending on actual candidates the schedule of responsibilities may be adjusted and also time commitments may be subject to corrections. Variations over time will make changes necessary and as such the requirement for "ex ante" descriptions need to be accompanied by requirements to update the documents from time to time when this becomes necessary.

In the same light, we also disagree to the guidelines given in **paragraph 29**.

In general, executive members of the management board get paid for the work and they are either “employed” full time or on a part time basis. Their commitment is therefore in general fixed contractually. We do not see any need to go beyond this. Furthermore, the treatment of mandates on behalf of the company needs to be clarified for the intended purpose of the paragraph.

For non-executive members of the management board it is difficult to agree upfront on a dedicated time commitment. Depending on business activities and extraordinary events, the number of meetings or their duration may increase and additional work may have to be performed during the year. On the other hand, meetings are to be set up bringing together a variety of persons which do not exclusively work for the company. As such, time conflicts cannot be excluded and not participating in a meeting can have several causes (such as illness or conflicting arrangements).

We therefore disagree to the proposal in its entirety. In case a similar rule nevertheless should be put into the guideline, we propose to have a dedicated rule for executive and non-executive members of the management body as follows:

Executive members of the management body should have a contractually fixed working commitment on a full or part time basis deemed adequate for the position taken in the context of the dedicated company which should take into account the necessity to be available for unexpected events and should include time spent for mandates being taken on behalf of the company.

Non-Executive members of the management body should be required to confirm in writing sufficient resources to (a) attend in principle all regular meetings of the board and any committee they are a member of including sufficient time to prepare for meetings, to follow up the general business developments and necessary ad-hoc decisions as well as commit for resources to attend to the extent possible additional meetings in case becoming necessary. For practical reasons, there should be no concrete time commitment.

Finally, also the rules in **paragraph 33** do not seem to fit the purpose.

Firstly, the context of the proposal is unclear and unspecific. It is unclear, for what purpose the paragraph is added:

- Ex post review on time commitment shown in a past period (where is this requirement coming from?)
- Basis to estimate necessary time commitment going forward?
- Performance review?

Without a clear reasoning for the determination the paragraph should be removed. Potentially it should be put to the beginning of the guideline after defining who should set indications for expected time commitments. (E.g. “28a The nomination committee (where established) and / or the management body in its supervisory function should estimate the necessary time commitment for the members of the management body in its executive function.”)

However, we clearly disagree to take the attendance to the management body’s meetings as an indication of time commitment at all.

- The management body in its supervisory function meets a few times a year and there may be good reasons for one member not to attend one or some of the meetings (illness, conflicting appointments, see above). This is in particular true for extraordinary meetings. As long as the member prepares well for the decisions to be taken and informs himself on the ongoing topics and any issue that may arise, the mere attendance to (all) meetings does not seem to be an appropriate measure.
- The management body in its executive function is not only meeting frequently but also performing work for the company on an ongoing basis. Even if some meetings are missed (this may be for business reasons), that does not have any impact on the time spend for the company.

As such, the indication of time commitment based on meeting attendance needs to be removed completely.

<ESMA\_QUESTION\_MBG\_1>

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

<ESMA\_QUESTION\_MBG\_2>

DBG is of the view that the proposed guideline does not give any guidance on what could be an adequate indication for significance in terms of "size, internal organisation and the nature, scale and complexity of its activities". While we have some understanding on this terminology for credit institutions (under CRD IV) and investment firms (under MiFID II), we fail to understand the background for market operators from scratch. However, as this is part of the level 1 text, we expect ESMA to give clear guidelines on what could be indicators for the fulfilment of "significance". Large market operators may also have a substantial amount of participations especially with regards to other FMIs (e.g. in our case CCPs and CSDs). However, this in our view is not a criterion to be used to determine significance in the relevant sense. As market operators not being at the same time credit institutions do neither grant loans or take deposits in the sense of CRD IV, also the size of related (not existing) balance sheet positions cannot be taken into account. We therefore fail to find any reasonable indicator to conclude that a market operator would qualify as being significant compared to others.

However, ESMA may want to consider the following indicators:

- Operations of more than 5 regulated markets
- Authorised in addition as a CCP, credit institution or insurance company (any business which according to MiFID II can be operated by a market operator without requiring additional authorisation should not be taken as such an indicator)
- More than 5,000 employees
- More than 500 direct subsidiaries

Without a clear guidance on what may trigger classification as being "significant" the discussion on the consequences and the way how the number of directorships is calculated does not make sense.

Having said this, DBG does not agree with the proposed calculation of directorships in the ESMA Guidelines on a number of issues.

The wording of Article 45(2)(a) third paragraph MiFID II is not precise in the way how directorships within a group **and** related to undertakings where the market operator holds a qualifying holding are to be tackled. The text could be read as either summing up both into one single directorship or summing up directorships

in each of the categories. However, as the directorship at the market operator is also to be taken into account, the answer to the treatment to be chosen seems to be straight forward:

The directorship at the market operator would be a directorship within the group as well as a directorship to be combined with the undertaking in which the market operator holds a qualifying holding. Consequently, the directorship would be in both categories. However, it remains only one directorship. As the text of Article 45(2)(a) third paragraph MiFID II lays out the rule to consider the directorships in question as being one single directorship, the intention of the rule can only be interpreted to sum up directorships with the same group together with directorships held at undertakings where the market operator holds a qualifying holding. As such, **paragraph 37** in our view should be formulated as follows and paragraph 38 should be removed. In this regards it should be clearly stated that when grouping the mandates, the mandate for the market operator is to be included.

**“37. All directorships held within one group and all directorships in undertakings where the market operator holds a qualifying holding count as one a single directorship including ~~That single directorship should be added to the directorship held in the market operator itself.~~”**

The content of **paragraph 39** is unclear to us especially as the last part does not clearly address, which “undertakings” are meant. This seems to be potentially partially a wording issue? (“held in the undertakings as defined in sentence 1”?). However, as there may be directorships held in undertakings where the market operator holds a qualifying holding (paragraph 37), within the group (paragraph 38) and where another subsidiary or the parent company hold a qualifying holding, there may be more than 2 directorships. In case several subsidiaries hold qualifying holdings in different undertakings, the number is going up further. As such, we support the approach of ESMA to also include directorships in undertakings where any (other) company of the group (parent company including any subsidiary) holds a qualifying holding into the “grouping” rule of Article 45(2)(a) third paragraph MiFID II. However, in line with our argument above, this should be summed up to the same single directorship and not form a second directorship. As such, paragraph 39 should be rephrased as follows:

**“39. When other undertaking within the same group hold qualifying holdings in other undertakings, the directorships held in those undertakings should be included within the single directorship of group companies.”**

<ESMA\_QUESTION\_MBG\_2>

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

<ESMA\_QUESTION\_MBG\_3>

DBG refers to the need to specify the indication for “significance” as stated in our response to Question 2. |

<ESMA\_QUESTION\_MBG\_3>

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

<ESMA\_QUESTION\_MBG\_4>

DBG agrees with the ESMA proposal. However, **paragraph 44** is directed to the management body in its entirety. In practise, there is a different set of competencies needed between the management body in its executive and its non-executive (supervisory) function. This is even more important under a two-tier struc-



ture. It needs to be clear which of the minimum fields of expertise are expected in which part of the management body (or bodies) and if the extent of knowledge in those fields are to be considered should be different.

Paragraph 46 last sentence is only referring to “prospective” members. However, when (re-)allocating tasks within the management body, this is also true for existing members of the management body. |  
<ESMA\_QUESTION\_MBG\_4>

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

<ESMA\_QUESTION\_MBG\_5>

DBG supports the elements as proposed by ESMA fully. However, we disagree to the unlimited perspective of the elements listed in paragraph 50 lit a) to g). Even in criminal law most of the offence become time-barred at some point in time. As such, ESMA needs to consider to limit the items for a dedicated period of time, e.g. within the last 5 years. |

<ESMA\_QUESTION\_MBG\_5>

**Q6: Is there any other parameter that should be considered in these guidelines with respect to the honesty and integrity required to the members of the management body of market operators/DRSPs?**

<ESMA\_QUESTION\_MBG\_6>

[TYPE YOUR TEXT HERE ]

<ESMA\_QUESTION\_MBG\_6>

**Q7: Should market operators/DRSPs check the accuracy of the data provided by a member/prospective member of the management body? If yes, how should this be done?**

<ESMA\_QUESTION\_MBG\_7>

[TYPE YOUR TEXT HERE ]

<ESMA\_QUESTION\_MBG\_7>

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

<ESMA\_QUESTION\_MBG\_8>

[TYPE YOUR TEXT HERE ]

<ESMA\_QUESTION\_MBG\_8>

**Q9: In particular, do you agree with requiring a member or prospective member to identify whether it is or has been a shareholder whose participation reached or exceeded 5% of voting rights of a market operator/DRSP or an officer of, or otherwise associated directly with, a shareholder whose participation reaches or exceeds 5% of voting rights of a market operator/DRSP?**

<ESMA\_QUESTION\_MBG\_9>

[TYPE YOUR TEXT HERE ]

<ESMA\_QUESTION\_MBG\_9>



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

<ESMA\_QUESTION\_MBG\_10>  
[TYPE YOUR TEXT HERE ]  
<ESMA\_QUESTION\_MBG\_10>

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

<ESMA\_QUESTION\_MBG\_11>  
[TYPE YOUR TEXT HERE ]  
<ESMA\_QUESTION\_MBG\_11>

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

<ESMA\_QUESTION\_MBG\_12>  
[DBG points out that the ESMA Guidelines is referring to some documents which may in the ongoing process of finalising the guideline not be requested. As such, ESMA should carefully check especially the list in **paragraph 86** prior to the finalisation of the guideline if all documents listed are still requested. DBG in particular challenges the need for item b (confirmation in writing by the nominee of his/her capacity to meet the requirements of the position) where we already fail to find the source for this requirement. Even the confirmation requested in paragraph 29 of the ESMA guidelines (which we oppose to) does not match the requirement. ]  
<ESMA\_QUESTION\_MBG\_12>

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

<ESMA\_QUESTION\_MBG\_13>  
[The proposed guideline in Annex V does not have any structure to which one could reference in case need be. DBG therefore recommends to number the various chapters from chapter 1 (Sufficient time commitment: general) to Chapter 8 (Record-keeping) and also use numbered paragraphs. ]  
<ESMA\_QUESTION\_MBG\_13>

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

<ESMA\_QUESTION\_MBG\_14>  
[TYPE YOUR TEXT HERE ]  
<ESMA\_QUESTION\_MBG\_14>