

NON-PAPER

Corporate Governance - Requirements for management bodies.

1. General remarks

The requirements for management bodies in investment firms, market operators and data reporting service providers are included, respectively, in Articles 9, 48 and 65 of MiFID II.

The CRD IV is to be the reference text for the MiFID requirements in this area. However, only the Council compromise text has been able to take into account the final version of the CRD IV. Indeed, when the Commission proposals were adopted the CRD was still under negotiation and also the text approved by the EP was based on a former version of the CRD IV (the ECON report on CRD IV). Therefore, since the beginning, both the Commission and the EP texts were already susceptible to change after finalisation of the CRD IV.

This non-paper focuses on the recent Council text and its differences with the final CRD IV, except when provisions in the EP or in the Commission proposal are specifically relevant.

As general points:

- the EP text defines non-executive directors (Article 9 -1 MiFID). Such a definition is not present in the CRD IV (nor in the Council text)¹
- only the EP text requires Member States to ensure that members of the management boards in the different entities breaching the MiFID/R provisions may be personally subject to criminal and civil proceedings (without prejudice to national legal systems).

2. Investment firms (Article 9 MiFID II)

Provisions on management bodies in the CRD IV already apply to banks and investment firms (which are both included in the definition of “institutions”). CRD IV however does not cover the authorisation process of investment firms and this is the context in which requirements on management bodies for investment firms are regulated under MiFID.

The Council text is not aligned with the CRD IV in the following main areas:

- 1) Allowed combination of directorships (5 versus 4 non-executive directorships allowed under the CRD IV) and related power for competent authorities to allow one more non-executive directorship (this option is not foreseen by Council),
- 2) Task of nomination committees (where established) to decide on a target for the representation of the underrepresented gender in the management body (not present in Council MiFID text),

¹ The CRD IV only specifies in Recital 57 the role of non-executive directors. On a minor aspect on definitions, the Council text does not include the definition of “management body in its supervisory function” in MiFID but defines the “supervisory function” in MiFIR.

- 3) Task of nomination committees (where established) to avoid decision-making process to be dominated by any one individual or small groups of individuals (not present in Council MiFID text),
- 4) Role of ESMA/EBA (CRD IV requires EBA to adopt guidelines in this area in order to harmonise the approach of supervisors. The EP compromise, in line with the Commission proposal and the former text of the CRD, empowers ESMA to adopt regulatory technical standards while the Council text deletes completely any reference to the ESMA role).

3. Market operators (Article 48 MiFID II)

The Council text takes into account the final text of the CRD IV with the following main differences:

- no role is attributed to ESMA. While the original Commission proposal and the EP text require ESMA to develop draft regulatory technical standards, the CRD IV requires EBA to adopt guidelines in this area;
- combination of five non-executive directorships or one executive and three non-executive directorships is allowed, that is one additional non-executive directorship compared with CRD IV. On the other hand the CRD IV allows NCA to authorise one additional non-executive directorship;
- the CRD IV requires the establishment of a nomination committee subject to a proportionality test. This test is not foreseen in the Council text which seems to require the establishment of a nomination committee in any circumstance.
- the following differences concern the tasks of the nomination committees. In particular:
 - o periodic assessments required to the committees should take place at least annually under CRD IV while such a timeframe is not mentioned in the Council text,
 - o the Council text does not require the nomination Committee to decide on a target for the representation of the underrepresented gender and to prepare a policy on how to increase it;
 - o the Council text does not focus on the need that the management body's decision making process is not dominated by any one individual or small group of individuals in a detrimental way.

4. Data reporting services providers (Article 65 MiFID II)

The EP and the Council texts are broadly aligned with the Commission proposals except for the following main aspects:

- the EP emphasizes the need to avoid conflicts of interest between members of the management body and users of the APAs, CTPs or ARMs;

- the Council deletes the request for ESMA to develop guidelines for the assessment of the suitability of the members of the management body.