
Consultation Response

EBA Consultation Paper on Draft Guidelines on the Benchmarking of Diversity Practices Including Diversity Policies and General Pay Gap Under Directive 2013/36/EU and Under Directive (EU) 2019/2034

21 July 2023

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the EBA **CONSULTATION PAPER ON DRAFT GUIDELINES ON THE BENCHMARKING OF DIVERSITY PRACTICES INCLUDING DIVERSITY POLICIES AND GENERAL PAY GAP UNDER DIRECTIVE 2013/36/EU AND UNDER DIRECTIVE (EU) 2019/2034** (“the Consultation”). AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Questions

Q1: Is the section on subject matter, scope, definitions, addressees, and implementation appropriate and sufficiently clear?

AFME welcomes the opportunity to provide comments on the EBA’s consultation paper. We would also like to use this opportunity to express our continued support for improved diversity and inclusion in the financial services sector and welcome the EBA’s continued focus on promoting a diverse and inclusive industry.

Diversity & inclusion is a key consideration for Financial Services. Building a culture which supports and celebrates diversity is important to driving business outcomes, including better client servicing, enhanced employee engagement, strengthened community relations, and increased organisational capability.

In relation to the scope of application, we are working on the assumption that only entities that are directly supervised by the ECB should be included within the benchmarking exercise and would appreciate the EBA’s confirmation of this point. Whereas CRD¹ refers to entities falling within the scope of the prudential perimeter of a top mother company, we request clarity that such entities are outside the scope of this reporting.

On the definitions generally, we encourage the EBA to ensure that there is harmonisation not only with existing Capital Requirements legislation, but also with the new Pay Transparency Directive which is shortly expected to be published in the EU Official Journal. For instance, we note that the Guidelines refer in several places to “Executive Directors” and “Non-Executive Directors”, whereas it would be clearer to use the existing terms relating to the management body in its supervisory and management functions.

We are also strongly concerned by the concept of “*geographical provenance*”. The nature of the concept is subjective, for example in relation to “*cultural immersion*”. It is not clear whether this could cover, for instance, a period in which the individual was responsible for a certain region and travelled there frequently without living there on a permanent basis. In addition, there is a reference to “*ethnic diversity*” in Annex X, which is

¹ EU Capital Requirements Directive

not commonly used, or even a legal term in some Member States. For example, in France, recording an individual's ethnic background is not permitted. Furthermore, concerns have been raised about possible conflict with the General Data Protection Regulation (GDPR), in which data on ethnicity is one of the special categories listed under Article 9, the collection and processing of which is subject to additional restrictions. Therefore, our members would not routinely collect such information on individuals. We strongly suggest this data point is changed to 'nationality', which is known by firms and legally defined.

Finally, it is unclear whether multiple countries/regions could be listed under this category, or only a 'primary' one.

Q2: Is the section 1 on the sample of institutions and investment firms appropriate and sufficiently clear?

In relation to the reference to reporting "*at the individual level*" in paragraph 13, we request additional clarity as to what this means.

Based on our reading of the Consultation, we understand that firms would be informed if they were selected to form part of the data sample. We would appreciate confirmation that firms would be notified of their continued inclusion in the sample in each subsequent year, as well as for a minimum notice period for affected firms of, for example, six months before the deadline for each data submission (paragraph 16 "*Competent authorities should inform institutions and investment firms that form part of the sample in good time of the data collection*").

Q3: Are the section 2 on the procedural requirements appropriate and sufficiently clear?

AFME has no comments in response to this question.

Q4: Are the general specifications for the data collection appropriate and sufficiently clear?

We note that several of the data points requested as part of this exercise are already provided to supervisors in the form of, for example, financial returns or Fit and Proper applications (for which we note harmonisation between national approaches is currently underway). As a point of principle, we believe that firms should not be required to duplicate the reporting of information to multiple supervisors in multiple formats. Instead, we request that supervisors share relevant information that has already been submitted to them and that these Guidelines should be limited to new data points only.

Q5: Are the specifications on the collection of data of members of the management body (read together with the definitions) appropriate and sufficiently clear?

Paragraph 28 of the Consultations refers to "*employee representatives that are members of the management body*". However, no definition is supplied for this term and we see that it is understood differently across the industry. For example, we would appreciate clarity as to whether it is intended to refer only to union or workers council representatives.

Paragraph 29 of the Consultation states that "*Members of the management body should be allocated to their legal gender. Genders that differ from the male or female gender form a third category of genders, referred to as non-binary*". However, "legal gender" is not a well-defined, or even generally understood, concept. Firms do not routinely collect data on individuals' gender and may be unwilling, or even unable, to do so. We note, for example, that in Germany, gender is no longer included in an individual's ID card.

If a requirement to record an individual's gender (or even legal sex) is to be maintained, we request that analysis of any barriers within individual Member States be undertaken and that the response options are suitably drafted. Again, we note that in Germany, a court case in 2021 (Ref: 24 U 19/21) found that it was unlawful to require an individual to identify themselves in a way that is not in accordance with their gender identity. Since "non-binary" has a well understood and specific meaning, it is not appropriate to use this term to capture all individuals who do not express as either male or female. Furthermore, the EBA Final report on Guidelines on the benchmarking exercises on remuneration practices, the gender pay gap and approved higher ratios under Directive 2013/36/EU states in paragraph 58b that "*Staff members of a gender different from the male or female gender should be allocated to the gender they identify with or, if this is unknown or if it is different from the male or female gender, these staff members should be allocated to the male or female gender that in total has the lower number of staff members*". We suggest that the approach should be harmonised with this existing EBA position.

If the requirement is maintained, and in Member States where it would be permitted, there would also be a cost implication for firms in setting up such data collection and reporting.

Finally, we ask for consideration of how firms should proceed if an individual is unwilling to provide information on, for example, their gender. Such a situation would render the data incomplete and not fully representative.

Q6: Is the section on the instructions for the calculation of the gender pay gap appropriate and sufficiently clear?

In relation to paragraph 32, we note that the language moves from "*gross total annual remuneration*" to "*taxed monetary equivalent*" in point (a). If the latter is intended to refer to the "*gross*" monetary equivalent, we suggest that it should say this for clarity. If not, we would request an explanation of the difference.

We request clarity as to whether point (a) include travel expenses and other benefits in kind.

We also suggest that a reference to incentive compensation, including the approach to stocks, shares etc. should be included for clarity.

In relation to paragraphs 34 and 35, there is a possibility that, for employee representatives, the daily participation fee will have to be compared with total gross annual remuneration in the calculations. We do not consider these to be comparable data points and request clarity from the EBA as to how to proceed in this situation.

Q7: Is the section on data quality appropriate and sufficiently clear?

AFME has no comments in response to this question.

Q8: Are the Annexes on the data collection appropriate and sufficiently clear?

In relation to several of the Annexes, we refer to our comments above in relation to the definition of "*employee representatives*" (Q5) and the inclusion of requests for several data points that have already been provided to a firm's supervisory authorities (Q4).

Annex I: We refer to our comment under Q1 in relation to the scope of entities to be identified by their legal Entity Identifier.

Annex III, IV V and VI: We are concerned that aspects of these reports could lead to the identification of individuals within the reports. For Annexes III and IV, the reporting of the gender of an individual Chairperson would be unlawful in some Member States. For Annexes V and VI, it would be better for the report to focus on the composition of the management body after all appointments have been made to avoid the issue.

Annex VII: We refer to our comments under Q1 in relation to the use of the term “*geographical provenance*”.

Annex X: Overall, we note that some firms may not have a single diversity policy, but this may be addressed via a range of policies (e.g. populations-specific policies such as for senior management, region-specific policies or policies on related subjects such as culture) and other corporate statements (e.g. values). There should be space to express this beyond a binary question of whether the firm has a “diversity policy”. We also believe that the focus on targets is no longer suitably reflective of the way in which our members are approaching diversity requirements, as many have moved away to include other measures. Furthermore, a binary question on whether a target has been achieved or not leaves no room for contextual explanation.

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