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VH/MK

EACB comments on EBA Consultation Paper on

Draft Guidelines on sound remuneration policies under Directive 2013/36/EU

(EBA/CP/2020/24
29 October 2020)

General comments

The EACB welcomes the opportunity to comment on the EBA consultation on the revision of the Guidelines on sound remuneration policies under Directive 2013/36/EU.

With these guidelines the EBA wants to ensure that banks dispose of remuneration systems which exclude an unjustified differentiation of salaries and that banks dispose of a proper documentation in order to explain at any time why the salaries of any two persons in a group are either equal and or different. We consider it essential that the revised GL do not create too heavy and burdensome administrative requirements for banks, resulting in a disproportionate bureaucratism.

We have serious concern whether the EBA has legislation-based power on the basis of the CRD to give further guidance and regulations on independent members in the remuneration committee (please see our additional comments on para 55 below).

Questions for public consultation

Question 1: Are the amendments to the subject matter, scope and definitions appropriate and sufficiently clear?

- **Avoid sector specific regulation**

Employers in the financial services industry, although already most heavily regulated in terms of their variable remuneration options, will be subjected to more and more requirements. We observe that indeed a number of requirements/expectations which are applicable across all sectors are reinforced and extended by supervisory law in the banking sector or are even implemented exclusively for the banking sector. Therefore, this gold-plating of generally applicable remuneration regulations (such as relating to discrimination, etc.) in the banking supervisory regulations should be avoided. We doubt that it will be helpful for the cause itself to increasingly develop “financial-sector-specific” regulation.

In view of the currently scarce resources in the qualified labor market as currently observed, the EBA should be careful not to burden banks with sector-specific regulatory obligations which increase bureaucracy and increase inflexibility. This could result in disadvantages in competition with companies in other industries which continue to remunerate their employees in a less regulated manner.

- **Proportionality**

We welcome that the concept of proportionality is expressly mentioned in various places of the revised GL (see para 85 point (c), 86, 87 point (a) and (b)). The draft also takes into account that the national legislation can introduce the € 5 billion threshold (e.g., para. 87, 93; cf. Art. 94 (4) CRD V).

- **Lack of legal basis for clarifications on severance payments, retention bonuses and discretionary pension benefits**

The Executive Summary (page 8) states that the guidelines contain clarifications on severance payments, retention bonuses and discretionary pension benefits which are intended to avoid that such payments are used to circumvent the requirement of the bonus-cap. However, there are no indications in recent years, in particular following the national implementation of the EBA GL in 2015, of contracts circumventing the existing rules to a significant extent. At this point in time and against this background, there is in fact no reason to revise the GLs with this respect. Moreover, the amended CRD does not seem to provide for any legal basis to these points. The proposed interventions in the existing remuneration systems, which have been practiced in the banks for years and which would now have to be subject to new adjustments lack a legal basis.

- **Date of application,** 26 June 2021 (para. 12)

The date of application is very ambitious and as admitted by the EBA during the public hearing might turn even challenging for banks. Therefore, we believe that it should be postponed at least by 6 months following the translation of the GL to all languages. Additional time for banks is particularly justified in the context of the COVID-19 crisis where credit institutions are fully mobilized to support the economy and their clients. Imposing additional constraints and requirements to review bank's procedures and systems because of the guidelines should be avoided.

Question 2: Are the amendments regarding gender neutral remuneration policies sufficiently clear?

- **Gender-neutral remuneration policy**

The statement under para 23 (page 15) "*Any form of discrimination, based on gender or <u>otherwise</u> cannot be tolerated.*" is misleading.

While "discrimination" is often used with a negative connotation implying and unjustified differentiation between groups (gender, origin, etc.), the basic meaning of discrimination simply implies "make a difference". While we definitely agree that there should be no difference made regarding gender, employers may make a difference "otherwise", e.g. regarding experience, etc., see also para 27. Art. 157 TFEU, like the CRD only refers to discrimination based on gender. The final version of the GL should avoid any language that could cause misunderstandings.

As a general comment, we note some inconsistency in the rationale of the guidelines aimed at underrepresented gender. We think that this may be seen sometimes as in fact contradicting (to some extent) the idea of gender-neutrality (para. 22 and 23, p.15). Such inconsistencies should be eliminated.

Moreover, regarding the remuneration policy, there is no reason or mandate for the EBA for any further restrictions regarding „differentiations “.

While further efforts on the part of employers to prevent discrimination in the conditions of employment are called for in para. 24 (page 13), it should also be mentioned that great efforts have been made in this area for a long time already. In many countries, there are widespread programs to promote women in order to increase the number of female managers. This is flanked by a broad spectrum of measures to reconcile work and family (e.g. part-time offers, flexible working hours and targeted further training offers). There are also collective agreements in the sector to promote company initiatives to attract and retain qualified women in managerial positions. As a result of these efforts, it has also been possible in recent years to significantly increase the proportion of female managers. We therefore believe that such broad generalizations regarding “more efforts” is not really in the middle of realities and far from helpful.

Furthermore, Article 74 CRD V requires a "gender neutral" remuneration policy, which is defined as remuneration principles based on "equal pay". In this context, it is unclear why EBA refers to career development and succession plans, access to training and ability to apply for internal vacancies, as those are not remuneration-related and therefore not part of such remuneration policy.

- **Lack of reference/ clarification regarding the relationship of the GL with other relevant national measures**

In some Member States national legal requirements already exist for the larger institutions/ companies to set their own target values for the proportion of women on supervisory boards, executive boards and on the first and, if applicable, second management level. Companies are also required to publish the respective degree of achievement of these targets. Also, with regard to the requirement of gender-neutral remuneration, there are national provisions in place in some Members States (e.g. Germany) that provide employees in larger institutions/ companies with an individual right to demand information about the remuneration (criteria and method of remuneration; naming the comparative pay of a comparison group of the opposite sex). The Guidelines should clarify that such national measures and their application is relevant for the compliance with these GLs.

- **Para. 24 (page 35):**
  ”24. *Institutions should be able to demonstrate that the remuneration policy is gender neutral.”*

Today’s remuneration policies are established under generally applicable laws and based on collective labor agreements which are negotiated on an equal footing. Thus, they do not contain any non-justified gender distinction. As the EBA takes a similar position towards common labor agreements (see para. 23 on page. 13), no particular requirements for demonstration beyond the agreements should be necessary in this respect. We would suggest that the EBA clarifies in the GL that existing forms of documentation currently used by banks in relation to remuneration (such as for example common labor agreements) shall be seen as suitable to demonstrate that *the remuneration policy is gender neutral*.

- **ESG risk factors (para. 16)**

Para. 16 (page 28) requires the remuneration policy to be consistent with the ESG risk factors. The requirement to take into account ESG risk factors in remuneration policies should be aligned with the integration of ESG risks in the governance and risk framework and especially with the products of the EBA in the context of its mandate according to Article 98(8) CRD, while this has not yet been completed.

Moreover, due to the interconnectedness of these GL with the principles of risk management, we would expect that the integration of ESG risk factors into risk management will automatically generate the consistency required.

- **Para 23 and 25 (pages 29, 30)**

Concerning the wording "*the pay per unit of measurement or time rate should be gender neutral*": we understand that this wording refers to Article 157 TFEU and that in the case of bank employees refers to the elements mentioned in para 25 and that in the case of collective labour agreements would refer to the parameters determined in that context.

- **Para 26 (page 30)**

  "*26.In order to monitor that gender neutral remuneration policies are applied, institutions should document job descriptions for all their staff members and determine which positions are considered as equal or of equal value per unit of measurement or time rate, taking into account at least the type of activities, tasks and responsibilities assigned to the position or staff member*."

The obligation contained in para. 26 (page 30) to document job descriptions and assess their comparability could be extremely extensive. The GL should clarify that the allocation of positions to brackets according to common labour agreements next to the job description is sufficient for documentation purposes in this respect. This becomes particularly apparent, for example, with regard to the aforementioned individual right to information about the remuneration of a comparison group under German law. German law stipulates that the information has to be gathered from a comparison group of the opposite sex. In this context, the German legislator explicitly states that the relevant comparison group is comprised only of staff members of the opposite sex who are in the same payment bracket under the collective labor agreement as the person demanding the information. This is based on the findings that job descriptions/tasks that are classified into the same payment bracket are considered equal.

Therefore, we would consider any detailed approach redundant where remuneration is based on collective labor agreements. The remuneration brackets are fixed, and it can easily be established how many men and women are in what remuneration bracket and how the distribution of brackets is in certain units. Thus, we suggest exempting employees paid on the basis of collective labor agreements from further documentation requirements.

- **Para. 27 (page 30)**

The expectations regarding the implementation of the aspects mentioned in para. 27 (page 30) should be clarified and the *rationale* behind this guidance further emphasized. We understand that differentiations (discriminations) are allowed along these elements.

The understanding and relevance of some aspects that may be considered when determining the "value of work" are not sufficiently clear e.g. point (a) "*the place of employment and its costs of living*"; point (h) *appropriate benefits, including the payment of additional household and child allowances to staff with spouses and dependent children*". In fact, child benefits, for example, or the adjustment of salaries to the place of employment are very often not related to the value of work, but often granted schematically and completely independent of the valuation of the individual value of work.

We would ask the EBA to revise these formulations or to emphasize the purpose of para. 27 more clearly.

- **Shareholders involvement : Para. 46 (page 39) :**

Credit institutions which are subject to the information and reporting regime of the Shareholder´s rights directive relating to approval of remuneration policy and remuneration report should be excluded from the reporting requirements provided for in para. 46 to avoid conflict of rules and enhance clarity.

- **Composition of the remuneration committee (Section 2.4.1, para. 55)**

According to para. 55, in G-SIIs und O-SIIs the remuneration committee should include a majority of members who are independent and be chaired by an independent member[1].

Such recommendations that the remuneration committee in G-SIIs and n O-SIIs should consist of the majority of independent members while in other significant institutions determined by competent authorities or national law, these committees should have sufficient number of independent members and requiring independent chairs are considerably stricter than in the current Guidelines. We doubt that Article 95(1) CRD in conjunction with Article 75(2) CRD provide a legal basis for a such a composition requirement regarding the remuneration committee in systemically relevant institutions.

In addition, a reference of EBA in the Guidelines to the legal basis of Article 74 CRD according to which institutions shall have robust governance arrangements cannot justify every single exceedance of a legally limited mandate.

Hence, we seriously doubt whether the EBA has level 1 legislation-based power to give further guidance and regulations on independent members in the remuneration committee. Since the CRD does not contain a requirement on independent members of the committees, the EBA would go beyond its mandate when establishing such a provision in the final Guidelines.

Moreover, according to Article 16(1) EBA Regulation, EBA shall issue guidelines "with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law". Experience has shown that the Member States have implemented the requirements regarding independence in completely different ways, it is not very useful to require a majority of independent members for the remuneration committee. This is because these requirements will at best lead to further legal fragmentation instead of harmonization as Article 16(1) EBA Regulation is aiming at.

In conclusion, apart from the lack of a legal basis in CRD for imposing the proposed provisions for the composition of the remuneration committee there is also absolutely no evidence-based need to change the legal status quo.

- **Review of the remuneration policy (para. 63)**

> *"63. The review should include an analysis if the remuneration policy is gender neutral. (…) gender pay gap and its development should be monitored. (…) Where material differences*

[1] On this matter we interpret the broad reference to '**Independence** as set out in the EBA guidelines on internal governance and see also the joint EBA-ESMA guidelines on the assessment of the suitability of members of the management body and key function holders' as set out in **Footnote 19** of the EBA draft in the sense that they have to be **independent of mind and formally independent**.

between the average pay between male and female staff or male and female members of the management body exist, institutions should document the main reasons, take appropriate actions where relevant or should be able to demonstrate that the difference does not result from a remuneration policy that is not gender neutral and that the institution provides for equal opportunities for all genders."

The requirements for the review process and the documentation are tightened. This is to be viewed critically mainly because of the effort which this would involve on the side of institutions.

As already mentioned under para. 26, where and to the extent that remuneration is negotiated through collective bargaining, these requirements could be waived, or they could be reduced to a minimum without jeopardizing the supervisory objective.

Question 3: Are the guidelines on the application of the requirements in a group context sufficiently clear?

- **Para. 76 (page 40)**

It is unclear what "*Specific remuneration requirements of subsidiaries*" have to be taken into account. We would expect the EBA to specify this formulation. Certainly, aspects as mentioned in para 26 would have to be considered.

In particular the guidelines must reflect that when subsidiaries are located in other countries than the central body realities may completely different: Apart from adjustments to the cost of living, schooling cost, etc. further differentiation due to „hardship" , for double households, etc (for seconded staff) must be possible.

Last not least: differing tax and social systems between country of the central body and the subsidiary may require a completely different remuneration package with benefits that can hardly be compared.

Question 4: Are the guidelines regarding the application of waivers within section 4 sufficiently clear?

- **Para. 94 Waivers of variable remuneration pay-out process**
  - **Para 94 point (**c): For variable remuneration relating to multi-year performance or periods a pro-rata allocation should be possible.
  - **Para. 94 point (d):** We suggest adding clarification that severance payments, which are not subject to the bonus cap and the deferral and payment in instruments requirement according to para. 170 of the EBA are not taken into consideration.

- **Para. 96 (typo)**

We would like to note that para. 96 of the revised GL, refers to section 5 of the guidelines instead of section 4:

"96.Where national law empowers competent authorities to set the thresholds under Articles 94(3) and 94(4) of Directive 2013/36/EU for individual institutions, competent authorities should, when lowering or increasing the thresholds under Article 94(3) and (4) of Directive 2013/36/EU taking into account the institutions' nature, scope and complexity of its activities, its internal organisation

or, if applicable, the characteristics of the group to which it belongs, and also take into account the proportionality criteria set out within section ~~5~~4 of these guidelines."

- **Para. 94 point (c) (page 45)**

It is not clear why, in the case of variable remuneration that depends on a multi-year accrual periods, the total amount of the variable compensation is only recognized in full in the last year of the performance period. This would inevitably result in a distorted picture of the ratio between the variable and the fixed remuneration. It would be more appropriate to split it for each year over the entire performance period, as is also done with the retention bonus (para. 147, page 57).

Question 5: Is the section 8.4 on retention bonuses sufficiently clear?

- **Para 145 Retention Bonus (no pro-rata payment):**

"*145. Institutions should set the retention period as the point in time of the event or as the period between the start date and the end date of the event when the retention condition should be met. The retention bonuses should be awarded after the retention period ends. No pro rata awards should be made during the retention period."*

Retention Bonuses are primarily used in cases where institutions are in difficult situations due to circumstances like tough market conditions or in cases of wind-down. In such cases it is especially important that key staff is kept motivated to help navigate the institution through tough times or to properly complete the wind-down process. Paying a retention bonus in full only after the retention period is concluded does not achieve that goal in our opinion. While we agree that a retention bonus should not be paid "up-front" we suggest a split where part of the retention bonus is paid to the eligible employees during the retention period while a significant amount will only be paid after the retention period is over (if all other conditions for allocating and paying the retention bonus are fulfilled), e.g. in a 2-year retention program: 30% of the retention bonus will be paid after the first year, 70% will be paid after the second year.

Question 6: Is the amended section 9 on severance payments sufficiently clear?

- **Severance payments (Para. 164 and ss)**

"164. Additional payments in the context of the regular end of a contractual period or of the appointment as member of the management body, e.g. awarded discretionary pension benefit, should not be treated as severance payments, but as normal variable remuneration that is for identified staff subject to all specific requirements for variable remuneration."

As a general comment, with regard to the Section 9 on severance payments of the revised GL, please refer to our answer under question 1. We see no legal basis to propose changes to the existing guidelines on severance payments.

In addition:

- **Para. 164 ss. page 60**

The guidelines on severance pay (para. 164 ss. page 60) do not make a sufficient distinction between:

- Pension benefits
- Transition allowances and

- Severance payments.

We see no reason to treat awarded discretionary pension benefits for certain cases in which fixed-term employment contracts are not regularly extended (in the context of the regular end of a contractual period or of the appointment as member of the management body) as normal variable remuneration. It is crucial to see that such commitments are related to the termination of the employment relationship. Such benefits should therefore not be treated as variable compensation or severance pay. The treatment under para. 164 GL would give rise to complicated follow-up questions, e.g. with regard to the calculation of the ratio between the variable and the fixed remuneration. Moreover, in contrast to severance payments, such pension benefits are usually agreed at the beginning of the employment relationship and offer the beneficiary the protection of confidence with regard the retirement benefits.

These reservations also apply to transitional payments, which usually are also agreed upon at the conclusion of the contract and are intended to enable a "cooling-off" in certain cases (para. 165 point (b)).

Institutions should be free to agree such parts of the contract without being subject to the special rules for variable remuneration or severance payments.

- **Para. 170 (b)(i) (page 61)**

Furthermore, it does not seem justified to additionally require the institutions to provide competent authorities with information demonstrating that severance payments were calculated through an appropriate predefined generic formula set within the remuneration policy and ask their approval. If the severance payment corresponds to the appropriate formula that the institution has previously set itself in its remuneration principles, there is no reason to initiate further bureaucratic effort, regardless of the amount of the severance payment. Rather, it should be assumed that the severance payment was derived according to appropriate standards; otherwise, the formula to be presented by the bank would be without relevance.

In case the above-mentioned requirement will be maintained, it should be in any case clarified that no ex-ante information of the competent authorities is required, but that the institution must at any time be in a position to demonstrate on request the appropriateness of the payment.

Other sections:

- **Para. 260 Deferral period:**
  "260. Institutions should define what level of variable remuneration constitutes a particularly high amount, taking into account the average remuneration paid within the institution, the ratio of the variable to fixed remuneration of that staff member, the EBA remuneration benchmarking report and, where available, national and other remuneration benchmarking results and the thresholds set by competent authorities. When implementing the guidelines, competent authorities should set an absolute or relative threshold, considering the above criteria. Remuneration at or above that threshold should always be considered as being of a particular high amount."

The EBA GL require Institutions to define what level of variable remuneration constitutes a particularly high amount In this context the ratio of fixed and variable remuneration should be considered and when implementing the guidelines, competent authorities should set an absolute or relative threshold. We suggest reconsidering the wording relating to the *relative threshold*, as it implies that small amounts of

variable remuneration could be subject to stricter rules (deferral of 60%), which seems excessive and punitive. Further, if such a relative threshold applied, employees with lower total variable remuneration (exceeding the relative threshold, but not the absolute amount), could be subject to stricter rules than employees with higher total variable remuneration (but lower relative ratio of fixed to variable). Such results should be avoided and the final text should find a solution to this problem.