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UNI Europa Finance reply to the EBA consultation paper on regulatory technical standards on the content of recovery plans (EBA/CP/2013/01)

General remarks

UNI Europa Finance welcomes the EBA proposed regulatory technical standards for recovery plans and the opportunity to comment on them. The standards enhance comparability amongst institutions and their respective plans. They are complementary to the Commission's framework for the recovery and resolution of credit institutions but deals only with recovery plans and not with resolution of an institution, the latter being in the realm of the new Directive.

UNI Europa Finance is disconcerted to see that the employee dimension is only mentioned once under article 7.1.a. Employees have exclusive knowledge of the daily practices of a company and hence, information from employees can serve as a relevant indicator.

The employee dimension must be taken into account while constructing a recovery plan. The bottom line is that it must be made absolutely clear what a recovery will entail for the employees of the entity or group concerned, and that the plan must provide for a continuously sound and sustainable employment situation. This means that, regardless of the design of the plan there must be no worsening of employee's rights in any aspect due to a company going through a recovery phase.

UNI Europa Finance will only reply to the questions which we deem relevant to comment on.

Specific remarks

Q.02: Do you believe that the draft RTS on recovery plans is comprehensive and contains sufficient and relevant requirements to enable a timely and effective recovery of an institution in the event of financial distress?

UNI Europa Finance generally supports the RTS for recovery plans. However, consequences on employees and employment have not been sufficiently taken into account and the key role employees can play in recovery measures and warning systems is not sufficiently explicit. In addition to the important role a financial institution has in the economy at large, these institutions are also large purveyors of employment and have a social responsibility in this respect. In order to address and include a sound governance structure, decision-making process and a strategic analysis, this dimension needs to be further enforced.

Q.03: Please provide your views on the indicators and escalation process as stipulated in the draft RTS under Articles 2(2)(a) and 5(c), and on the other governance arrangements provided for by Article 5.

UNI Europa Finance would like to see early warning systems and information from the employees mentioned. Finance employees are crucial as a source of information regarding the day-to-day practices in financial undertakings. They are often the first to realise that company practices are unsound – but they seldom have somewhere to turn with their worries. This section should therefore include a mentioning of whistle-blowing procedures, like the wordings under Article 70 in CRD IV. Whistle-blowing can be used for prevention, such as to detect inappropriate or risk sensitive practices and to discover infringement of rules and regulations.

We also believe that the board should be collectively responsible and accountable for risk management programs. In this respect, the civil and criminal liability of directors should be reinforced. We also advocate the importance of having employee representatives on the board level: this can ensure that the board has access to information it would not get otherwise.

More specifically, under article 5.c.1 it needs to be defined when and how employees and their representatives will be consulted and informed. This dimension is needed under 5.c.2 too as one among the descriptive aspects.

Q.05: Please provide your views on the requirements for the description of the institution or group, as stipulated by the strategic analysis in the draft RTS under Article 6(3)

Under article 6.3 regarding the description of the institution and 6.3.c.4 regarding operational interconnectedness a description of the employment situation should be included along with an analysis of the impact of the plan on the employees of the institution.

Q.06: Please provide your views on the requirements for the recovery options, as stipulated by the strategic analysis in the draft RTS under Article 6 (4). Does this requirement comprehensively and adequately capture the different categories of recovery options that could be considered?

Under article 6.5.b., either included in point (i) relating to operations of the institution, or as a separate point, the impact assessment should also include the expected impact on employment in the institution and on external firms (i.e. on sub-contractors, externalised IT, suppliers, etc.) following the proposed recovery arrangements and measures. If the impact on employment is known, preventive measures may be taken in order to preserve employment, such as training or skills development. These measures should be further specified as well. Preventive measures on employment and skills development are already part of employment legislation in some Member States. In practice, it appears however that preventive measures are not sufficiently used: in restructuring processes, firms often rely on dismissals and recruit different staff later on. Such kind of measures may also include contact with government agencies in order to enable external reclassification measures and training for skills outside the finance industry if a permanent reduction in staff level in the sector is to be expected. Banks should take their responsibility for training of employees seriously and thus contribute to preserving employment and to reinforce the employability in case of permanent staff reduction in the firm or/and sector.

Under 6.5.d the assessment should also identify the potential impact of the recovery options in relation to the employee situation, as this influences the recovery capacity.

Q.07: Please provide your views on the requirements for the communication plan, as stipulated in the draft RTS under Article 7.

UNI Europa Finance welcomes the focus of the internal communication and disclosure plan to focus on communication with staff, works councils or other staff representatives. This focus on employees should be used as an example and integrated in the strategic analysis and governance structure as well.

The communication plan should address national, European and/or international information and procedures for employee representatives, including envisaged measures for establishing procedures

to consult with staff during the process, taking into account national systems for dialogue with social partners where applicable.

In practice, European consultation procedures are often neglected and not sufficiently taken into account by global firms. In general terms, information and consultation procedures with employee representatives should, if used correctly, be mutually beneficial: employee representatives will discover the ongoing restructuring and the recovery plan, but they can also reveal specific situations management might otherwise not be aware of, which can help to prevent crises situations.

When it comes to information concerning the employment situation of the firm or group of firms, employees' representatives and trade union representatives must be able to share information between them in order to anticipate important changes in working and employment conditions as well as possible redundancies. While there is no doubt that any misuse of confidential information must not be accepted, it must be ensured that trade union members and trade union officials are allowed to use relevant information in order to fulfil their mandate and defend workers' rights.

The European trade union federations and the ETUC have been very concerned about companies' managements not obliging to European legislation on information and consultation of employees (most importantly EWC Directive 2009/38/EC). Often, even information directly relating to the employment conditions or the financial situation of a company is not given to European Works Councils or SE works councils, with management referring to confidentiality and potential harm for business. In other cases, information is given under the condition that e.g. EWC members must not even pass it on to their trade unions. Under these conditions, information and consultation of employees, guaranteed by European legislation, can not be effectively implemented in practice. EWC members and trade unionists are bound to confidentiality rules as well (see for example EWC Directive 2009/38/EC), so they should be trusted to know their responsibilities of how to handle confidential information.

Q.08: Please provide your views on the requirements for preparatory measures, as stipulated in the draft RTS under Article 8, providing in particular your views on the question of what types of preparatory arrangements or measures could or should be taken into account in the analysis of the recovery plan.

In order to improve the effectiveness of the recovery plan, as described under Article 8.b., management needs to have a full, all-inclusive understanding of the situation. Information should therefore be a constant flow, not only between managers, but also bottom-up, from employees to management. This can be done either in the usual information and consultation process through works council sessions, or through whistle-blowing. Very often, difficult or potentially dangerous situations are identified by staff well before management discovers them. The question of professional alert systems points to the question of professional responsibility. Employees must have the right to raise an alert, and also enjoy anonymity where appropriate and adequate protection when they exercise this right. Better protection for whistleblowers should be insured and structures provided to enable the information flow.

Q.11: Do you agree that, for an institution, the costs of producing a recovery plan are likely to be proportional to the size/complexity of the firm and so of the costs its failure may create? If not, could you explain why?

Not a direct reply to the question however we would like to raise the issue of potential moratoria on payments in relation to an institution's costs in a situation of recovery.

It should not be possible to push the cost burden of recovery onto the employees. The question of employees' prioritised right to salaries and other means of remuneration in cases of failing financial institutions must be addressed and a potential moratorium on payments cannot be used on any employee remuneration, including non-executive variable pay that is collectively negotiated.

When defining criteria for recovery plans, the social partners' right to assume the responsibility of sound and sustainable remuneration principles must be respected as well as the primacy of collective agreements. This, since pay is, according to art. 153.5 in the Treaty on the Functioning of the European Union (TFEU), not for the EU to deal with. This has also been acknowledged in Recital 14 in the directive 2010/76/EU (commonly known as CRD III) on capital requirements for the trading book and for re-securitisations.

Recital 14: *The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular to the provisions of Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the rights, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.*

CRD III acknowledges that the provisions on remuneration are without prejudice to the social partners' right to conclude collective agreements in accordance with national laws and traditions. The provisions in recital 14 are of highest importance to the trade union movement.

About UNI Europa

UNI Europa Finance is the European-level trade union body for the finance sector. It represents 100 unions with 1.5 million workers in the banking and insurance industries. UNI Europa Finance is part of UNI Europa, representing 7 million workers in the services and communication sectors. UNI Europa is member of the ETUC and registered in the European Commission's Transparency Register. It is part of UNI Global Union and recognised by the European Union as a social partner.