

Draft guidelines on sound remuneration policies under Directive 2013/36/EU (CP15/03)

A submission by the British Property Federation

Introduction

The British Property Federation (BPF) is the voice of property in the UK, representing businesses owning, managing and investing in property. This includes a broad range of businesses comprising commercial property developers and owners, financial institutions, corporate and local private landlords and those professions that support the industry.

We welcome the opportunity to comment on the European Banking Authority's (EBA's) draft guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU (CRD4). Our comments are limited to the application of the proportionality principle to the requirements of Articles 92(2) and 94(1) of CRD4.

Concerns on interpretation of proportionality

Article 92(2) of CRD4 provides that “...institutions [must] comply with the following principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities”.

We accept that this provision can be interpreted in more than one way, and that one reading might be that institutions must comply with **each of** the principles that are subsequently enumerated. The manner of such compliance may take into account the characteristics of particular institutions and ‘flexed’ in a proportionate way, but all of the principles must be complied with in some way. Indeed, this appears to be the view taken by the EBA.

However, we feel strongly that this provision cannot be interpreted on its own and must take into account both relevant recitals and its legislative history. Recital 66 of CRD4 could not be clearer on the intended targets of Article 92(2) and 94(1): “*The provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities. **In particular it would not be proportionate to require certain types of investment firms to comply with all of those principles***” (our emphasis).

If the European co-legislators had intended for all of the requirements of Articles 92(2) and 94(1) to apply to all CRD4 institutions, why would Recital 66 be worded in such an unequivocal manner?

It is also telling that the wording of Article 92(2) and Recital 66 were not substantially amended from the text in CRD3. The provisions relating to proportionality were lifted from the CRD3 measures and if it was ever the intention of the Parliament, Council or Commission to change the interpretation of

the CRD3 measures (given also that the CEBS Guidance was in force and publicly available during the trialogue process), there was sufficient opportunity for the legislature to have changed the operative provisions in CRD4. That they did not indicates that the interpretation of proportionality was correctly settled under CRD3 and the CEBS Guidance.

Conclusion

The EBA's interpretation (based on preliminary legal analysis) of Articles 92(2) and 94(1) of CRD4 is in our view contrary to the intention of the legislation.

We have grave concerns that if the guidelines on sound remuneration policies are developed in accordance with this interpretation it will result in elements of CRD4 applying to firms that were never intended to be caught within the scope of those provisions. Not only is this likely to result in unnecessary cost and restructuring; a dangerous precedent is potentially set regarding the interpretation of proportionality in European regulation.

In particular, the remuneration policies of many real estate investment firms are already strongly linked to overall business performance. Investment decisions are generally made by investment committees and not by individuals. As such there is very limited scope indeed for employees to take significant risks with a view to gaining a direct personal benefit. It would be highly perverse to fully apply the requirements set out in Articles 92(2) and 94(1) to investment firms where the risks those requirements are trying to address do not actually exist.

We remain at your disposal should you wish to discuss the above in further detail.

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