Comments

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

Register of Interest Representatives
Identification number in the register: 52646912360-95

Our ref
Ref. DK: ESFS-EBA-GL
Ref. DSGV: 7206/14

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Berlin, January 27, 2021

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

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Questions from the public consultation

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

First of all, from a layout perspective we welcome the fact that the concept of proportionality is expressly mentioned at various points (cf. paras. 27, 85.c., 86, 87. b.). Also, the draft takes into account that a national legislator can raise the €5 billion threshold. (e.g., paras. 87, 93; cf. Art. 94 (4) CRD V).

The Executive Summary (section 1, page 8) states that the guidelines contain clarifications on severance pay, retention bonuses and discretionary pension benefits designed to avoid that such payments be used to circumvent the requirements of the bonus cap. There are, however, no indications that in recent years, i.e., particularly after the national implementation of the EBA/GL/2015/22, circumvention transactions that exploited existing regulations on a significant scale or with significant effect were identified. In view of this, there is no need to make any changes to the regulations at present. This applies all the more as the guidelines serve the purpose of reflecting the changed regulations from the revision of the CRD. The CRD itself, however, does not provide for any changes to these points at all. The intended interventions in the current remuneration system that has been practised in the banks for years and would again have to be subject to revision thus lack any legal basis.

Also in the Executive Summary, the requirements for a gender-neutral remuneration policy are explained (para. 23, page 13). At this point, it should already be clearly communicated that collectively agreed remuneration policies are in principle regarded as nondiscriminatory, since they are negotiated on an equal basis and also do not provide for a distinction by sex for no reason.

It is, moreover, unclear what acts of discrimination are referred to with the wording "any form of discrimination, based on gender *or otherwise* [...]". The benchmark for amending the guidelines is the revised version of the CRD. Within the framework of the CRD, however - as well as in Art. 157 TFEU – reference is made exclusively to the discrimination characteristic of sex. There is no need to have any further regulations regarding remuneration policy, nor is there any mandate here for the EBA.

In so far as para. 25 (page 13) calls for further efforts by employers to prevent discrimination in working conditions, it should also be mentioned that a great deal of effort has been made in this area for some time. For example, there are widespread women's promotion programmes to increase the number of female managers. This is accompanied by a wide range of measures to reconcile work and family life (e.g., part-time jobs, flexibility in working hours and targeted training opportunities). There are also collective bargaining agreements in the industry to promote company initiatives to more closely involve and retain qualified women in management positions. As a result of these efforts, it has also been possible in recent years to significantly increase the proportion of female managers. In addition, the larger German institutions already have national legal requirements to set their own targets for the proportion of women on supervisory boards, executive boards (of directors) and on the first and possibly second management levels and to disclose the degree to which this has been achieved in each case. With regard to the requirement of gender-neutral remuneration too, there are national laws which give employees in larger institutions an individual right to obtain information from the employer about the various methods to determine remuneration (criteria and methods of determining remuneration; disclosure of the comparison pay level for a peer group of the opposite sex).

All things considered, it is worrying that employers in the financial services industry, although they are already the most heavily regulated with regard to their variable compensation options anyway, are grad-

ually being subjected to ever more and further reaching requirements. This applies in any case when reasonable cross-industry approaches are regulatorily tightened and over-complicated in the banking sector, or even implemented exclusively for the banking sector. In this respect, the duplication of remuneration regulations already in force elsewhere (discrimination, etc.) must be avoided in banking supervision regulations. This also applies to the obligation to analyse the "gender pay gap" (para. 63, p. 38). There is no apparent reason why in addition to the burdensome bank-specific remuneration regulation bank employers should be encumbered with onerous special regulations, including in these areas that affect the entire economy.

In view of the scarce resources in the skilled-labour market now and in the future, the industry may and cannot continue to be burdened with ever more specific regulatory obligations. After all, if the financial services sector does away with variable remuneration in order to keep regulatory costs under control and at the same time omits compensating for this on the fixed remuneration side, it has to endure disadvantages when competing with companies in other sectors, because they continue to pay their top performers entirely unregulated on the basis of variable remuneration. However, if the financial services sector does yield to higher fixed remuneration in order to keep the regulatory burden within bounds and remain competitive in the personnel market, it will lose out as regards human resources, while in the personnel market competing companies in other sectors can flexibly meet the expectations of top performers.

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

It is unclear on what basis as part of the implementation of the gender-neutral remuneration regulations further requirements will be imposed on remuneration policy. Insofar as para. 16 (page 28) requires that remuneration policy include ESG risk factors too, such an addition is not required within the framework of the EBA Guidelines. Without the underlying definitions, these requirements are also unworkable. It was not until November 2020 that a separate EBA consultation was launched to, among other things, coordinate a definition of ESG risks. As the EBA's assessment in accordance with Article 98(8) CRD has not yet been completed, the inclusion of ESG risks should be dropped here.

In paras. 23 and 25 (pp. 29, 30) it is unclear what is meant by "*pay per **unit of measurement** or time*". We request elaboration of this wording.

The obligation in para. 26 (page 30) to document job descriptions and evaluation with regard to their equality is in this generality too far-reaching and deviates from the approach of the national legislators not to question remuneration policies arrived at through collective bargaining. The obligation means a disproportionate analysis and documentation effort which in the institutions that apply collective-bargaining-based remuneration policies is in any case not necessary. At this point, there should at least be provisions to exempt from the requirement institutions that are collective-bargaining association members and apply such agreements.

The expectation to implement the aspects mentioned in para. 27 (page 30) should be clarified. Is it assumed that institutions have / must introduce new **job grading systems** for this purpose?

The aspects mentioned to determine the “value of work” are in their current wording in parts not yet understandable (e.g., para. 27. a. “*the place of employment and <u>its costs of living</u>*”; *para. 27. h. “appropriate benefits, including the payment of additional household and child <u>allowances</u> to staff with spouses and dependent children”)*. We request that the wording here be revised / the objective of para. 27 be much more clearly expressed.

Para. 27. e. (page 30) makes the fact whether an employment contract is of temporary or indefinite duration the criterion in assessing the equality of a job. The duration of a contract, however, cannot give any insight into whether an activity is comparable with another. The criterion should therefore be deleted.

Furthermore, the requirements of the review process and documentation are being tightened (para. 63, p. 38). This is to be viewed critically, particularly because of the effort and expense this involves. For institutions remunerating on a collective bargaining basis these requirements could be dropped or reduced to a minimum without the supervisory/regulatory bodies being any the less wise. This applies also to the requirements included in the draft on general remuneration measurement and its documentation (see above, cf. para. 27, p. 30).

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

Para. 76 (page 40) leaves it unclear which “specific renumeration requirements” of subsidiaries should be taken into account.

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

It is unclear why the full amount of variable remuneration whose payment is linked to a multiyear performance period is not taken into account until the last year of the performance period (para. 94. c. page 45). This would inevitably result in a distorted picture of the relationship between fixed and variable remuneration. It would be more appropriate to spread it over the whole performance period as is done with the retention bonus (para. 147. a. page 57).

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

– No comments –

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

With regard to the new comments on severance payments in Section 9, reference is made to our comments on question 1. At the moment, there is no reason and also no legal basis to make further changes to the existing severance regulations at this stage.

The regulations on severance pay (para. 164 ff., page 60) do not distinguish sufficiently between

- Pension benefits
- Transition allowances
- Severance pay.

There is no reason to treat contractual pension commitments in certain cases where fixed-term service contracts are generally not renewed as variable remuneration. This treatment would also raise complicated follow-up questions, e.g., with regard to the calculation of the ratio of fixed to variable remuneration. The pivotal factor is that such commitments be linked to termination of the employment relationship. In contrast to severance payments, such commitments are normally agreed at the beginning of the employment relationship and offer the beneficiary protection of legitimate expectations with regard to his/her pension. Such commitments should therefore be treated neither as variable remuneration nor severance pay. This applies also to transition allowances, which are likewise agreed at the beginning of the contract and in certain cases are intended to allow a "cooling-off".

Institutions should be free to agree such contractual elements without being subject to the specific rules on variable remuneration or severance payments.

With reference to para. 171, furthermore, it does not appear justified to have to additionally inform the supervisory authority about severance payments calculated in line with para. 170 (b)(i) (p. 61) in accordance with an appropriate pre-defined formula. If the severance payment is in line with the appropriate formula that the institution has previously set itself in its remuneration policies, there is, regardless of the amount of the severance payment, no reason to impose further bureaucracy. Rather, it must then be assumed that the severance payment was derived according to appropriate benchmarks; otherwise, the formula to be demonstrated by the bank would also just be reduced to a mere formality.

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