DEUTSCHE BÖRSE GROUP

Deutsche Börse Group Response

to EBA/CP/2020/24

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

published for consultation on 29 October 2020

Eschborn, 29 January 2021

A. Introduction

Deutsche Börse Group ("DBG") welcomes the opportunity to comment on EBA's consultation paper "Draft Guidelines on sound remuneration policies under Directive 2013/36/EU" – EBA/CP/2020/24 - issued on 29 October 2020 (in the following referred to as "Draft Guidelines").

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active with regulated Financial Market Infrastructure providers.

Within DBG, among other and according to applicable national law, the following four legal entities are in scope of the specific requirements on remuneration stipulated in the European Capital Requirements Directive ("CRD") respectively the European Capital Requirements Regulation ("CRR"): Eurex Clearing AG ("ECAG"), located in Germany, classified as credit institution and one of the leading European Central Counterparties ("CCP"), Clearstream Holding AG ("CH"), located in Germany and acting as pure financial holding company for the credit institutions and the (I)CSDs [1] Clearstream Banking AG ("CBF"), located in Germany, as well as Clearstream Banking S.A. ("CBL"), located in Luxembourg. Clearstream Group with CH as superordinate company is supervised on a consolidated level as a financial holding group.

However, all group entities in scope of CRD/CRR are offering limited banking activities ancillary to their function as Financial Market Infrastructure ("FMI"). In order to operate as a FMI and in line with the dedicated regulatory framework (e.g. EMIR or CSDR) as well as generally recognised business practices, the business model of DBG entities is risk averse, does not include a trading book / proprietary trading, allows loan business in general only in connection with settlement, clearing and custody activities for very short periods and on a collateralised basis. The business risk is in turn not driven by the volatile balance sheet volumes being mainly comprised of cash collateral and cash deposits to fulfil payment obligation within a recognised securities settlement system but from operational risk which is governed by highly automated processes and proper risk policies given single individuals only limited – if at all – room to take risk.

Part B of the document at hand outlines our responses to selected questions raised in the consultative document.

B. Responses to the question for consultation

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

According to Article 12 of the Draft Guidelines, the revised requirements shall become effective as of 26 June 2021. To avoid the application of two different sets of regulatory requirements (the currently applicable EBA/GL/2015/22 and the Draft Guidelines) and considering management as well as operational challenges, we would highly appreciate if EBA could introduce transitional rules similar to Article 11 of the Consultation Paper on Draft Guidelines on sound remuneration policies under Directive (EU) 2019 (EBA/CP/2020/26) stating that the remuneration policies should be in line with the Draft Guidelines as of the performance year 2022.

[1] (International) Central Securities Depository.

Question 7: Are the provisions on performance criteria sufficiently clear, which other performance indicators, e.g. regarding the performance of business units or portfolios, are used to determine the variable remuneration of identified staff?

While we consider the performance criteria as sufficiently clear, we would like to raise concerns related to the underlying identification of risk takers as outlined in Section 5 as well as the application of malus and clawback rules as outlines in Section 15.7 of the Draft Guidelines.

- Section 5: The identification process

Based on a self-assessment, credit institutions have the responsibility to identify those employees whose professional activities have a material impact on the institution's risk profile ("Risk Takers"). Article 101 of the Draft Guidelines requires institutions to periodically update the self-assessment during the year at least with regard to the qualitative criteria under Article 92(3) of Directive 2013/36/EU and the related RTS (EBA/RTS/2020/05). Article 89 of the currently applicable Guidelines (EBA/GL/2015/22) is more specific in that matter outlining that the intra-year update of the self-assessment shall ensure that "staff who fall or are likely to fall under the criteria in Article 3 for a period of at least three months in the financial year" are identified as Risk Taker. Consequently, the whole bonus awarded for the financial year, in which the employee held a qualitative Risk Taker function for a minimum of three months, is subject to the strict Risk Taker requirements as applicable (e.g. target measurement, deferral scheme, malus/clawback). Vice versa, if an employee currently holds a Risk Taker function for less than three months in the financial year, we understand that the Risk Taker requirements offer the possibility to apply the Risk Taker requirements as applicable (e.g. target measurement, deferral scheme, malus/clawback) on a pro rata basis. As the sentence with the three-months-rule has been deleted entirely in the Draft Guidelines, the identification rule would become more stringent meaning that all employees who fall under a qualitative criterion for at least one day in the financial year have to be identified and treated as Risk Takers with their entire bonus award. In particular in case an employee takes over a Risk Taker function very late in the financial year, his/her entire bonus awarded for the financial year would be subject to the Risk Taker requirements. This would cause challenges (e.g. adaption of individual targets), which seem inappropriate from an administrative perspective as well as would not reflect the individual sphere of influence throughout the year. Therefore, and similar to the currently applicable Guidelines, we would recommend specifying a time period such as the three-months-rule.

- Section 15.7: Malus and clawback

Unchanged to the currently applicable Guidelines (EBA/GL/2015/22), Risk Takers are subject to ex-post risk adjustment mechanisms such as malus and clawback (rf. Article 94(1) CRD IV in conjunction with Article 287 of the Draft Guidelines). Article 293 of the Draft Guidelines further specifies the application of these ex-post risk adjustment mechanisms: in case the respective criteria are fulfilled, malus could only be applied in case the bonus award is subject to deferral (i.e. above the absolute or relative exemption limits according to Article 94(1) CRD IV), while clawback could be applied in any case independent from the size of the actual bonus award. Compared to the currently applicable Guidelines, this specification for clawback tightens the application rules in a way which seems inappropriate taking into account a local labour market, administrative and individual perspective. In many jurisdictions, such as Germany, clawback provisions, in particular for employees below the management body, are uncommon and are a unique labour law element for the financial industry. Therefore, the tightening of the clawback rules could negatively impact the attractivity of the financial industry for highly qualified and extensively demanded functions (e.g. in IT) as qualified individuals may restrain from taking over a dedicated function in credit institutions. In addition, when the current EBA Guidelines (EBA/GL/2015/22) became effective as of 2017, the amendment of existing Risk Taker employment contracts to implement the clawback provision was very challenging even though the principle

of proportionality was applicable as clawback could only be applied if the bonus award is subject to deferral. The tightening of the application rules on clawback would eventually mean that all existing Risk Taker employment contracts need to be amended again. Considering the above mentioned, it would be highly appreciated if the application rules for clawback will be amended to provide local regulators the flexibility to reflect the principle of proportionality similar to the currently available Guidelines.

***

We are at your disposal to discuss the issues raised and proposals made if deemed useful.