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INTESA SANPAOLO - CONSULTATION RESPONSE - DRAFT EBA GUIDELINES ON SOUND REMUNERATION POLICIES UNDER DIRECTIVE 2013/36/EU (EBA/CP/2020/24)

29/01/2021

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

Paragraph 12 (Date of application)

We ask the EBA to keep in mind, when defining the date of application, that many institutions will start the process for the adoption of the 2021 remuneration policy and the related incentive plans – and in some cases will approve the policy and the plans - before the final Guidelines are published and before 26 June 2021 (the date of application that is currently set in the draft Guidelines). The EBA should also bear in mind that some Member States have not adopted the legislation implementing CRD V yet and may not adopt it in time for it to be reflected in the 2021 remuneration policy. Considering the above, we ask that the date of application be set at 1 January 2022.

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

Paragraph 93

We understand that Article 94(3) of Directive 2013/36/EU limits the possibility to benefit from the exemption from the application of the requirements under points (l), (m) and second paragraph of point (o) to institutions that do not qualify as "large institutions" under point 146 of Article 4(1) of Regulation (EU) 575/2013 (provided their total assets are under the threshold defined at national level), and we also understand that the definition of "large institution" under said Article is not in the scope of this consultation. However, we think it is important to point out – also in view of the possible future revision of the regulation – that limiting the exemption to institutions that do not qualify as large institutions will have significant implications for those banks that on an individual basis would not qualify as large institutions but that belong to banking groups and on a consolidated basis qualify as large institutions.

Indeed, banks that on an individual basis would not qualify as large institutions but that are part of banking groups that on a consolidated basis have assets with a total value exceeding EUR 30 billion (for the purposes of this comment we will refer to these as "large banking groups"), due to their consolidated situation, will not be able to benefit from the exemption under Article 94(3) of Directive 2013/36/EU. We believe that, especially in light of the proportionality principle, the exemption should also be applied – albeit partially (as further specified) – to such institutions.

In this regard, it is relevant to consider that, pursuant to the applicable regulation, in banking groups, risk takers must be identified both at an individual level and at group (consolidated) level. We believe that, in light of the proportionality principle, banks that on an individual basis would not qualify as large institutions but that are part of large banking groups:

- should be able to apply the exemption under Article 94(3) of Directive 2013/36/EU to the risk takers identified only at an individual level in such banks;
- should meet the requirements under points (l), (m) and second paragraph of point (o), with reference to the remuneration of the members of their staff that are identified also as risk takers at group level.

The partial extension of the exemptions under Article 94(3) of Directive 2013/36/EU to banks that on an individual basis would not qualify as large institutions but that are part of large banking groups and, specifically, to risk takers identified only at an individual level in such banks would:

- ensure a fair and proportionate regulatory treatment of institutions of equal dimension that operate in the same market;
- ensure compliance with the proportionality principle, in a way that takes into account the dimension of institutions both on an individual and on a consolidated basis, as:
    - while in institutions that are not large institutions and that are not part of large banking groups all risk takers would be able to benefit from the exemptions;
    - in banks that on an individual basis would not qualify as large institutions but that are part of large banking groups, group-level risk takers would not benefit from the exemption;
- ensure a consistent application of the remuneration regulation, duly taking into account the fact that being part of a large banking group implies that risk takers identified at an individual level in banks that are not large institutions belonging to such banking group (i.e. the only risk takers that could benefit from the exemption) have less operational autonomy and that risk-taking on the part of such staff has proportionately less impact: indeed, if the exemption were not extended to such staff members:
    - a more favourable regulation would end up being applied to staff who has comparatively greater operational autonomy and whose decisions lead to taking greater risks (i.e. risk takers of banks that do not qualify as large institutions and that are not part of large banking groups); and
    - a significantly more onerous regime would end up being applied to staff with limited levels of autonomy and whose decisions have more limited impact (risk takers identified at an individual level in banks that are not large institutions belonging to a large banking group)
- allow large banking groups to take into due account also the size of each bank that is part of the group in the definition of their group remuneration policies, by providing less tight rules for the smaller banks of the group, in application of the principle of proportionality.

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

Paragraph 142

We ask that the part of Par. 142 that provides "*or under simultaneous events or justifications*" be repealed.

On this regard it should be noted that the definition of "retention bonus" under the Guidelines is broad and may include, in addition to the typical case of a retention bonus established in an individual agreement as the remuneration due to the employee for the obligation not to terminate the employment for a set period of time (or until a certain event), also other types of retention bonuses. In particular, the definition of "retention bonus" in the Guidelines, also includes bonuses that:

- are provided in collective agreements (e.g. share ownerwhip plans) – in some cases collectively bargained with trade unions – addressed to categories of personnel (or to all the personnel) and that only pursue retention and motivational purposes (and are not specifically intended to incentivise individual performance), and
- must be paid, after the expiry of a set period of time, only under the condition that the employment relationship is still in place, without any performance condition.

Collective retention plans such as the one described above exist and have been implemented for several years in the banking sector. With reference to such collective retention plans, there could

be legitimate and justified reasons to pay a staff member that participates in such plan also an additional "typical" retention bonus under an individual agreement providing an obligation for such staff member not to terminate the employment agreement before a certain period of time expires. In light of these types of situation, we ask that the part of Par. 142 that provides "*or under simultaneous events or justifications*" be repealed.

It should be noted that, even if such part of the provision is repealed, the provisions on circumvention (par. 10.2) would prevent any abuse. Additionally, multiple retention bonuses would need to comply with the limit on the ratio between variable and fixed remuneration.

Paragraph 146

In light of the fact that the definition of "retention bonus" in the EBA Guidelines is broad and may also include retention bonuses such as those awarded under collective retention plans like the one described above in the comment on Par. 142 (which, as mentioned, have been implemented for several years in the banking sector), we believe the EBA should not require that retention bonuses provide individual performance conditions.

Indeed, the EBA should consider that collective retention plans, despite not including individual performance conditions, pursue the legitimate objective of motivating the staff and rewarding company loyalty and, indirectly, support the achievement of long-term business objectives. If the requirement of individual performance conditions were implemented, it would not be possible to adopt collective retention plans as the one described above, thus further stiffening remuneration tools in the banking sector.

Additionally, individual performance conditions are already required and provided in incentive plans. Requiring them also for retention bonuses would, in many cases, mean providing the same performance conditions for different types of bonuses.

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

Paragraph 165

The proposed changes to sub-paragraph (e), combined with the provisions under par. 170(b)(i), would limit the possibility to use the predefined generic formula only when a judicial claim has been filed or is about to be filed, significantly reducing its effectiveness as a way to avoid judicial disputes. We propose to change the sub-paragraph as follows: "*e. the institution and a staff member agree on a settlement in case* ***of a potential*** *or an actual labour dispute that could potentially* ***bring an action in front of a court****, to avoid a decision on a settlement by the courts.*"

Indeed, the early termination of an employment agreement represents a particularly critical moment in which there is a high risk of litigation. During this stage of the employment relotionship, settlements represent a key tool to manage – not only judicial claims but also – extra-judicial claims by the employee that may lead to judicial proceedings (with considerable additional costs for the employer). In light of the importance of settlements also to tackle potential labour disputes, we ask that par. 165 (e) be changed as indicated above, in order for it to include a reference to "potential" labour disputes and to refer to a possible "action" before a court, rather than to a "court ruling".

Paragraph 171

We believe that par. 171 should not be adopted. Asking institutions to carry out a prior procedure in front of the competent authority before the award is made presents several critical aspects:

- it would significantly lengthen the time needed for the management of the termination of the employment agreement (i.e. the terms of the settlement would not be definitive until the competent authority gives confirmation, and, if it were to deny confirmation, this could require to start a new negotiation, significantly increasing the risk of litigation). On this regard, the EBA should also consider that, under certain jurisdictions, severance packages for senior management of the institutions (i.e. the risk takers who are most likely to receive

"material" severance payments) must be approved by the board of directors and therefore already undergo a thorough approval procedure within the institution: adding the proposed procedure in front of the competent authority would therefore result in further complexity and duration of the process;

- if the competent authority were to deny confirmation, it could lead to proceedings against the competent authority, as the institution might challenge its decision, which would further lengthen the time needed to manage the termination;
- it would limit institutions' ability and right to freely elaborate compensation packages in compliance with legal provisions, opening severance packages to severe scrutiny by competent authorities, with a negative impact on their ability to attract talent and present competitive remuneration packages vis-à-vis other non EU institutions or other companies;
- it appears to go beyond the provisions of the CRD which only requires severance payments made to risk takers to "*reflect performance achieved over time*" and "*not reward failure or misconduct*".
- there is no clear definition of "material" payment, which creates uncertainty as to when the procedure needs to take place. Additionally, under par. 159 of the draft Guidelines (which corresponds to par. 149 of the Guidelines that are currently in force), institutions are already required to fix a maximum limit to the amount of severance payments. In certain jurisidictions, in particular, institutions must express such limit both in terms of maximum ratio vis-à-vis the fixed remuneration and as a precise maximum amount that may be paid, and the limit must be approved by the shareholders. Introducing the concept of "material" severance payment would overlap with the existing requirement to set maximum limits. Indeed, the definition of such limits is the result of a prior evalutation of what is considered a proportionate and legitimate amount of severance payment. If the agreed severance amount complies with the limits fixed by the institution, then it should be irrelevant whether such amount is *per se* "material" because in the context of such institution, insofar as it respects the fixed limits, such amount is considered proportionate and legitimate.

Paragraph 258

We ask that the requirement to "*defer a significant higher portion than 50% of the variable remuneration paid in instruments*" for members of the management body and senior management be applied only to significant institutions or, alternatively, that it be applied to members of the management body and senior management in "*institutions that do not benefit from the waiver within Article 94(3) of Directive 2013/36/EU*" only in case of particularly high amounts of variable remuneration.

Indeed, the proposed amendment is not provided in Directive 2013/36/EU which only provides that "*For members of the management body and senior management of institutions that are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities, the deferral period should not be less than five years*", without mentioning the portion of variable remuneration paid in instruments.

It should be also noted that the application of tighter rules on the deferral of variable remuneration for members of the management body and senior management is limited, by Directive 2013/36/EU, only to institutions that are "*significant*". Therefore, the application of the requirement under paragraph 258 concerning the portion of deferred variable remuneration paid in instruments – in consistency with the approach of Directive 2013/36/EU – should be only limited to "*significant*" institutions. If the EBA deems it necessary to extend such requirement to all "*institutions that do not benefit from the waiver within Article 94(3) of Directive 2013/36/EU*", then its application should at least be limited to the case of particularly high amounts of variable remuneration.