

EBA CONSULTATION GUIDELINES ON SOUND REMUNERATION POLICIES

AMAFI's answer

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities.

AMAFI welcomes the opportunity to respond to this consultation paper on EBA's Guidelines on sound remuneration policies.

Introductory comments

Before answering the questions raised in the consultation, AMAFI would like to highlight some specific comments with regards to (i) the competitive implications of Brexit and (ii) the necessity to avoid conflicts between obligations stemming from national legislations and the EBA Guidelines.

- (i) For the European Union, Brexit means that it loses its main financial centre. The EU-27 therefore has a sovereignty issue at stake in being able to rebuild within its borders the capacity to ensure the proper financing of its economy and to meet the expectations of its savers. In an environment that is becoming highly competitive with the United Kingdom, it is therefore particularly essential to ensure that European financial players are able to attract the highly qualified staff needed to provide the quality of service that our public institutions, companies and investors expect.

Faced with this challenge, we should not be naïve: remuneration policies will be a central element in this capacity to attract. At a time when various elements suggest that the rules applicable in this area in the United Kingdom are going to diverge fairly rapidly from those implemented in the EU-27, it is absolutely essential that the EBA takes account of this risk, which is one of the necessary conditions for European players to play the role expected of them effectively. The European Authority must therefore not unjustifiably raise the level of constraint on European actors. It must also monitor closely and accurately the measures that may be taken by the British authorities in this area.

- (ii) We also would like to point out it is extremely important these Guidelines do not create conflict of laws with national social and labour legislations. This would indeed lead to a situation where actors scoped in are not able to comply both with the Guidelines and with national legislations that CRD V does not amend. During the transposition of CRD IV, such situation emerged in various member states including in France and Germany with regards to clawback. The content of the Guidelines should therefore not impinge on national legislations as not only does it create legal uncertainties, but it could also potentially delay member states' compliance with the legislation.

Question 1: Are the amendments to the subject matter, scope and definitions appropriate and sufficiently clear?*Paragraph 3*

We would appreciate if the starting date of application of these guidelines could be clarified. We would suggest 1st January 2022 as starting date in order for the industry to have a clear understanding of the respective positions of all EU-27 national competent authorities and to have sufficient time to adapt its remuneration policies and processes to comply with the updated guidelines.

Paragraph 8

We would call on the EBA to clarify point (c). In particular, we would like to understand whether it means that a subsidiary of asset management or investment firm would have to apply gender neutral remuneration policies as per these guidelines while they do not have to comply with other CRD V requirements as specified in Articles 92, 94 and 95?

Paragraph 11

We would like to emphasize that the gender pay gap definition does not take into account the type of work, nor does it include the level of responsibility or the experience etc. As such calculating a gender pay gap does not meet the purpose of gender-neutral remuneration policies.

Additionally, given the term “earnings” is not defined in the Guidelines, we would suggest replacing it by “remuneration”. Also, as “hourly” is not a common practice in the financial/banking industry, we would suggest switching with “full time annual remuneration awarded” in order to be consistent with paragraph 25.

Considering the definition of severance payments, we believe the concept of “early termination of a contract” could be clarified as the guidelines are not entirely clear to that regard. We would suggest the notion of “early” to be interpreted as (i) a contract with a predefined period (e.g. temporary contracts) terminated before its end-date and (ii) indefinite contracts terminated before the risk taker reaches legal retirement.

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

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

On this topic, we consider the EBA guidelines go further than what is explicitly stated in CRD V. They significantly broaden the scope of gender-neutral remuneration policies by including issues related to gender equality policies (e.g. career development, succession plans). Besides, given the scope and primary purpose of CRD V we consider this Guidelines are not necessarily the most appropriate legislative vehicle to tackle in the most efficient way such an important issue.

Paragraph 23

We consider that the reference to “all related employment conditions that have an impact on the pay per unit of measurement or time rate should be gender neutral” goes beyond gender neutral remuneration policies and therefore should be deleted.

Besides, we would also suggest deleting the second sentence of paragraph 23 as not only does it broaden the scope of policies but also because it is not in line with the definition of “gender neutral remuneration policies”.

Paragraph 25

We would suggest using “working time arrangements” as unit of measurement as it is simpler and clearer than “full basis annual remuneration awarded”.

Paragraph 26

Rather than documenting a job description, we would recommend focusing on categories of job positions while respecting the principle of proportionality to avoid heavy constraints as it would not have a detrimental impact on the monitoring.

Paragraph 27

We recommend adding an item on “specific skills or competence of staff”.

Besides, point h) only concerns children excluding other family responsibilities, we would therefore suggest the following wording: “h) appropriate benefits, including the payment of additional voluntary household and other allowances to staff with dependent family members (e.g. children, other closed relatives).

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

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

Paragraph 46

We consider that the second part of the sentence in point c) goes beyond the scope of equal remuneration for equal work as defined in the Directive and we suggest replacing it by “how the remuneration policy is gender neutral”.

Paragraph 55

We consider the term “significant institutions” should be clarified as otherwise it would create uncertainty for the institutions’ remuneration committees. Institutions might potentially have to face conflicting definitions when it comes to taking into account those that are part of national regulations and those competent authorities rely on.

It should also be clarified that EBA does not aim to capture small and non-complex institutions that are part of a group featuring in the list of significant entities directly supervised by the ECB. On the contrary, we consider proportionality should apply to these small and non-complex institutions including when it comes to the composition of their remuneration committees. Otherwise, this would go against the objective behind CRD V remuneration reforms.

Paragraph 63

In order to measure a possible gender pay gap in a meaningful way, a minimum number of persons must constitute the sample on which the calculation is made. Below 1000 members of staff, we consider that the calculated gap will have no probative value.

Besides, we consider the size and activity of each institution should be used to define the differences between average pay.

Paragraph 73

In the last sentence, we consider the term “readily available” as too broad and therefore should not be used. Consolidated institutions cannot be expected to have information about their subsidiaries as if it were their own information. In fact, they are independent legal entities. We would suggest the EBA to recognise that consolidating/sub-consolidating institutions need time to be able to present information a supervisory authority might require.

Paragraph 75

We consider clarifications are needed for Article 65(3)(a) as it does not provide competent authorities the ability to gather information directly from subsidiaries.

The EBA should bear in mind that national competent authorities do not necessarily operate within a legal framework that enables them to request information directly to subsidiaries and especially if they are based in a third country jurisdiction.

Paragraph 76

We call on the EBA to clarify this paragraph as specific remuneration requirements always have to be taken into account and are independent of gender neutrality provisions.

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

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

Paragraph 93

We would like the EBA to clarify whether the threshold defined in point (b) should apply at the level of the institution concerned or to the whole consolidated group.

Paragraph 94

We propose to delete the reference to a specific exchange rate to convert in EUR or to stress that the rate which should be used should be part of the entities remuneration policy before each yearly exercise is launched. By doing so it would avoid creating confusion for subsidiaries using the exchange rate established by each entity when reporting the remuneration information of their executives. Besides, we understand the existing system with exchange rates has worked well so far and we do not think it is worth establishing a specific exchange rate in these guidelines.

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

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

Paragraph 142

It is stated in this paragraph that “Institutions should not award to a staff member multiple retention bonuses under the same event or justification or under simultaneous events or justifications” and we call on the EBA to clarify whether this means that there can be an overlap of retention periods.

Paragraph 147

While we understand the two methods proposed for the calculation of the bonus ratio, we would call on the EBA to provide with guidance where the final amount is based on performance criteria and therefore cannot be known upfront. In such situation, should the potential maximum amount be taken into account when using the method described in point a) or should credit institutions always use the method described in point b) or it is not possible to set a fixed amount?

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

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

Paragraph 164

We would like to EBA to clarify the meaning of “additional payments” as well as the specific inclusion of members of the management body as stated in this paragraph.

First of all, with regards to “additional payments” necessarily considered as “normal variable remuneration”, we consider that “any” additional payments in the context of the termination of the mandate of a board member should not be considered as variable remuneration. Obliging institutions to apply variable remuneration rules to any payment made after termination if these remunerations comply with all requirements in the guidelines does not clarify the severance payment regime. It would lead to a conflict between paragraphs 130 (previously 117) and new 164. This does not comply with CRD V regime which only requires for payments made to “risk takers” to “reflect performance achieved over time and not reward failure or misconduct”.

We therefore consider that paragraphs 165 to 173 are sufficiently clear with regards to the rules that should apply to severance payments. “Any” payment after termination should not be considered as variable remuneration.

Additionally, we recommend deleting the reference to members of the management body as compliance with the Guidelines would be made difficult given non-executive members of the management body have a remuneration structure that is different to more “traditional” risk takers and which do not operate on a contractual basis.

We would also suggest for the EBA not to refer to “regular end” of a contractual period as it would result in a new unregulated concept, different than “early” termination. Also, it is an issue in jurisdictions where indefinite contracts are widely used where contracts rarely have a “regular end”. The Guidelines would benefit in the EBA clarifying what it means by “regular ends”.

Paragraph 165

We would recommend amending point e) as a court ruling would be necessary for each case which is not workable. Our proposed wording would avoid reducing the efficiency as a means to avoid judicial disputes:

“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 ~~lead to a court ruling~~, to avoid a decision on a settlement by the courts”.

Paragraph 170

It should also be amended as it considers transactional severance as a variable which should be integrated in the ratio and differed. As such, we call on the EBA to come back to the wording in the previous Article 154 as the new wording makes it impossible to apply transactional agreements to regulated staff.

We also ask the EBA to clarify why non-competition clauses have been included separately from other severance payments. We wonder why the EBA does not include the comprehensive list of payments for which ratio, deferral and pay out instruments (new paragraph 165) as well as the severance payments for which ratio, deferral and pay out instruments is not mandatory (paragraph 170), in points b) and i) of paragraph 170. Finally, we consider that reference to this article should be avoided or specified to the requirements of article 94 which should apply to severance payments.

Paragraph 171

We consider it should be deleted as it would go against the institutions’ capacity to elaborate compensation packages. As a result, it would constrain their ability to remain competitive and attract talents.

Besides, the proposed wording seems to imply that the national competent authority would decide on the suitability for at least material payments of all severance payments/regimes. This seems to go beyond CRD’s objective and the EBA’s mandate.

Paragraph 274

We would call on the EBA to reassess the wording of the following sentence:” Institutions should ensure that they have awarded instruments available when the variable remuneration awarded in instruments vest” given shares are only available after the retention period.

Paragraph 276

Similarly, the sentence “Institutions should make sure that the awarded instruments are available for the pay out to staff at the latest when they vest” should be reassessed.

Appendix 1

Additionally, we would like to stress that the changes proposed are not clear and do not seem to meet the goal of the annex which is to map remuneration requirements. New articles have been introduced but without any scope of application associated.

Overall, we share similar concerns as the European Banking Federation expressed in its answer.

