Consultation Response - EBA draft Guidelines on sound remuneration policies – 4 June 2015

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The Dutch Banking Association (NVB) is the representative voice of the Dutch banking community with over 80 member firms, large and small, domestic and international, carrying out business in the Dutch market and overseas. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

NVB response to the public consultation the EBA draft guidelines on sound remuneration policies

The NVB welcomes the European Banking Authority 's initiative to launch a public consultation on its draft guidelines on sound remuneration policies in order to provide more clarity and further detail of the differences between fixed and variable remuneration stemming from the CRD IV. The Dutch Banking Association believes in a robust governance arrangement with remuneration policies and practices that are consistent with and promote a sound and effective risk management. This paper is a complement to NVB's response to the consultation, which you will find below.

In the Netherlands the Act on Remuneration Policies of Financial Undertakings (Wet beloningsbeleid financiële ondernemingen - Wbfo) was introduced recently. With the introduction of the Dutch Banking Code in 2009), which was drawn up by the NVB in cooperation with the Dutch Ministry of finance, with its restrained remuneration policy increasingly linked to longer-term goals Dutch banks have a long-lasting experience in this very important matter.

Remuneration policy has been greatly restrained in the Netherlands by the introduction of the Banking Code in 2009 followed by European regulations on remuneration policy for senior managers and key executives. The Code prescribes that a bank shall implement a meticulous, restrained and long-term remuneration policy that is in line with its strategy and risk appetite, objectives and values, taking into account the long-term interests of the bank, the relevant international context and wider societal acceptance. The supervisory board and the executive board shall take this basis into account when performing their tasks in relation to the remuneration policy.

Last year a new Banking Code is designed – along with the Social Charter and the introduction of the bankers' oath, rules of conduct and disciplinary scheme to make a major contribution to public trust in banks and their role in the community. Consequently, the principles in the updated Code emphasis the importance of a sound, balanced and sustainable remuneration policy. The Social Charter, the Banking Code and the rules of conduct associated with the bankers' oath together form a package called 'Future-oriented Banking'. The package is endorsed by all members of the Dutch Banking Association. With this package we would like to demonstrate what we stand for and what we want to be held accountable for in the ongoing renewal process: as individual banks and as an industry at the heart of the community.

According to the new package the bank will implement a detailed, restrained and long-term remuneration policy that is unambiguous and transparent and in line with national and international regulations. The remuneration policy will have a primarily long-term focus and be in line with the bank's risk policy.

The Dutch Act on Remuneration Policies of Financial Undertakings is part of the Dutch government's wider endeavors aimed at a sound and sustainable Dutch financial sector, to which a far more strict bonus law of max 20% is applied. Beside that, the Act introduces all-encompassing legislation that requires financial undertakings to maintain sound remuneration policies and to curb excessive variable pay, which was already addressed by the our Future-oriented Banking package.

There are currently a number of clear trends: banks' remuneration policies are being moderated and the public debate also addresses the role of banks in society and their actions are watched critically. That also explains why we think it is important to contribute to this public consultation.

We would like to stress that we have worked very closely together with the European Banking Federation on this file and we fully agree with the comments of the European Banking Federation on the EBA draft guidelines. We share the concerns by the EBA's opinion requiring application of all remuneration related provisions of the CRD IV/CRR to all banks without consideration of inter alia their size and complexity. The general and fundamental principles of EU-law including the principle of proportionality cannot be disregarded.

The comment from NVB focuses more on legal and technical aspects of the Guidelines and aims at contributing to more clarity and practicability of the Guidelines.

Q 1: Are the definitions provided sufficiently clear; are additional definitions needed?

Currency conversion

7. Institutions which award remuneration in a currency other than euro should convert the thresholds within Article 4 of the RTS on identified staff and within these guidelines based on the exchange rate used by the Commission for financial programming and the budget for December of the previous year.

Comments:
We understand that EBA prefers to use a single exchange rate to ensure better comparison across the countries. However, we request EBA to consider the related administrative burden and would propose to allow institutions to use an individual exchange rate.
If EBA wants to stick with a single exchange rate, we would suggest to use an exchange rate earlier than December (e.g. September) to have more time to carry out the identification process. Besides EBA might consider using an average exchange rate to prevent unnecessary high fluctuations.

Q 2: Are the guidelines in chapter 5 appropriate and sufficiently clear?

Remuneration policies for all staff, including identified staff

8. Institutions should differentiate within their remuneration policy between identified staff and other staff and ensure that remuneration policies comply with the respective CRD requirements and these guidelines. With regard to different categories of identified staff, institutions should implement specific remuneration policies and risk alignment mechanisms as appropriate to ensure that the impact of the staff on the institutions risk profile is appropriately aligned with their remuneration.

Comments: If our understanding is correct, the language “different categories of identified staff” would refer to the categories of Identified Staff mentioned in Directive 2013/36/EU: (1) senior management (2) high earners (3) staff engaged in control functions and (4) other Identified Staff

10. All institutions should comply with regard to the remuneration policy for all staff with the principles set out in Article 92 of CRD for remuneration policies and consider which elements of the remuneration policy on the variable remuneration of identified staff under Articles 94 of CRD should be included in the remuneration policy for all staff. Annex 1 to these guidelines indicates the requirements for which an institution-wide application to all staff in line with the additional guidelines provided is required, recommended or voluntary.

Comments:
It must be noted that the scope of the articles 92 and 94 of CRD is defined in these provisions themselves: these provisions state to what extent these apply to senior management and/or identified staff only or to all staff. In other words, the policy choices of the EU legislator with respect to the scope of these provisions is laid down in Union law. The Guidelines however, require that these provisions are applied beyond their scope, e.g. by requiring or recommending that provisions which are applicable to a certain category of identified staff only, are applied to all staff.
Such an expansion of the scope of the articles 92 and 94 of CRD does not meet the requirement of article 75 paragraph 2 that the guidelines comply with the principles set out in these articles. This rather entails a change of these Union law provisions, which is clearly outside the mandate of article 16 paragraph 1 of the EBA founding Regulation 1093/2010. For both reasons, this section should be deleted.

In addition, annex 1 only refers to the CRDIV articles. We would like to have the articles of the EBA remuneration guidelines added to annex 1 (as originally done in the CEBS guidelines).

17.The management body in its supervisory function (hereafter 'supervisory function') should be responsible for adopting and maintaining the remuneration policy of the institution, and overseeing its implementation to ensure it is fully operating as intended. The supervisory function should also approve any subsequent material exemptions made for single staff members and changes to the remuneration policy and carefully consider and monitor their effects.

This guideline may conflict with national company law as the remuneration and remuneration policy of staff, other than board members, may in certain jurisdictions, including the Netherlands, not belong to the authority of the management body in its supervisory function. At best, the remuneration policy for this category of personnel is subject to the approval of the management body in its supervisory function (the supervisory board in the two-tier board model), but the initiative and the adoption of this policy belongs to the authority of senior management (the management board in the two-tier board model). It is a generally accepted principle of national and EU company law that in the two-tier board model, the supervisory board should refrain from involving itself in the management of the company (article 40, paragraph 1 of Regulation (EC) No 2157/2001 on the Statute for a European Company).
It may also conflict with national company law in a different way as national company law may require that the remuneration policy of senior management (the management board in the two-tier board model) is adopted by the general meeting of shareholders.
We furthermore note that sections 18, 19, 22, and 25 sometimes do take into account the existence of remuneration committee (which is required for significant institutions: article 95, paragraph 1 of CRD) and sometimes ignore this and assign tasks which would belong with the remuneration committee to the management body. As a consequence, the guidance provided by the Guidelines is less than optimal.

Q 3: Are the guidelines regarding the shareholders' involvement in setting higher ratios for variable remuneration sufficiently clear?

Section 36b requires that if an institution exercises its voting rights as a shareholder of a subsidiary, this institution should seek a mandate from its' own shareholders' meeting, either by a direct vote on the matter or through a shareholder-approved remuneration policy.
This requirement is in addition to the requirements of article 94 paragraph (g) (ii) of CRD, which are correctly reflected in section 36a.

Article 94 paragraph (g) (ii) of CRD is a political compromise between the supporters of stricter rules on the one hand and the supporters of more flexibility on the other hand.
Whatever the merits of this political compromise, the Guidelines, however, are not the appropriate instrument to "improve" this compromise by introducing additional requirements, such as in section 36b. These additional requirements would interfere with and dilute this compromise and would aim to create new Union law. Again, this does not meet the requirement of article 75 paragraph 2 that the guidelines comply with the principles set out in articles 92 to 94. This creation of new Union law also goes beyond the ensuring of common, uniform and consistent application of Union law as referred to in article 16 paragraph 1 of the EBA founding Regulation 1093/2010.

Company law (either legislation, case law or legal doctrine) of a number of EU member states adheres to the principle of "board autonomy". This principle entails that the management body of an institution is entitled to act on matters within its authority, without prior instruction, mandate or approval of any other corporate body, unless explicitly required pursuant to the law. The voting of shares in the institutions' subsidiaries is such a matter which is reserved for the management body. Accordingly, the requirement of section 36b that the management body of the parent institution should seek prior approval or a mandate from its' shareholders' meeting is not in agreement with these member states' company law.

For all these reasons section 36b should be deleted.

Section 36g is superfluous as the concept of "represented"/"representation" is well-known in EU company law (e.g. article 44 of Directive 2012/20/EU and article 7 paragraph 1 of Directive 2011/35/EU) and enshrined in the company laws of the member states, in some cases since time immemorial. It needs no clarification nor institution-specific internal policies, which would be a novum for this long-standing concept. Accordingly, this section should be deleted also.

Q 4: Are the guidelines regarding remuneration policies and group context appropriate and sufficiently clear?

64. Staff seconded from a parent undertaking in a third country to an EU subsidiary or branch who, were they employed directly by the EU subsidiary or branch, would fall into the scope of identified staff and therefore should also be subject to the provisions of Articles 92, 93 and 94 of CRD and applicable Regulatory Technical Standards as they are implemented in the Member State where the subsidiary or branch is established. For the purposes of short term secondments, for example where a person is only residing in a Member State for a few weeks to carry out project work, that person should be subject to such provisions only if the person would be identifiable under the applicable RTS, taking into account the remuneration awarded for the time period of and the role and responsibilities during the secondment.

Comments:
With regard to short term secondments, e.g. where a person is only residing in a Member State for a few weeks to carry out project work, EBA is requested to provide an exemption for identified staff selection in case the time period is limited (e.g. less than 3 months). Selection of identified staff for only a couple weeks will lead to burdensome administrative complexity.
We assume this (entire) article is only applicable to parent undertakings in third countries.

Q 5: All respondents are welcome to provide their comments on the chapter on proportionality, with particular reference to the change of the approach on 'neutralisations' that was required following the interpretation of the wording of the CRD. In particular institutions that used 'neutralisations' under the previous guidelines for the whole institution or identified staff receiving only a low amount of variable remuneration are asked to provide an estimate of the implementation costs in absolute and relative terms and to point to impediments resulting from their nature, including their legal form, if they were required to apply, for the variable

remuneration of identified staff: a) deferral arrangements, b) the pay out in instruments and, c) malus (with respect to the deferred variable remuneration). In addition those institutions are welcome to explain the anticipated changes to the remuneration policy which will need to be made to comply with all requirements. Wherever possible the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately for the three listed aspects.

The change in EBA’s approach towards proportionality has a high impact on costs and administrative burden for small banks with non-complex activities and will not contribute to the goal of risk mitigation. Due to the impact on costs it will therefor have a negative impact on the competitiveness of these small non-complex institutions.

We suggest a threshold regarding the deferral of variable pay and other risk mitigating measures. Deferral of small amounts of variable pay is an administrative burden and is not in line with the goal of risk mitigation.

We suggest to have one mandatory threshold within Europe to create a level playing field.

73. *Where the CRD sets some specific requirements with numerical criteria (e.g. the minimum deferral period of three to five years; the minimum portion of 40 to 60 % of variable remuneration that should be deferred, the minimum portion of 50 % of variable remuneration that should be paid in instruments), institutions should apply the criteria based on proportionality, considering that in particular for significant institutions and their senior management and members of the management body more strict criteria should be set, and in any case apply at least the minima criteria set out in the CRD.*

Not all banks have tradable shares. Some Dutch banks are owned by public sector institutions. Creating new non-financial instruments would, if possible at all, place a huge financial and operational burden on these banks if they would need to comply with the minimum set of criteria set out in the CRD.

Q 6: Are the guidelines on the identification of staff appropriate and sufficiently clear?

86. When applying the quantitative criteria of the RTS on identified staff, institutions should take into account all monetary or non-monetary fixed components of remuneration awarded for professional services of the preceding financial year and all monetary and non-monetary variable components awarded for the preceding financial year. Where institutions use multi- year accrual periods, they should consider the variable remuneration accrued for the preceding period, even if the award will be made only at the end of the performance period.

Comments:
Institutions should take into account all fixed and variable non-monetary components of remuneration. We suggest to permit institutions, in line with the exemptions made in section 185, to omit monetary or non-monetary fixed components of remuneration that are not material.

100. The criteria included in the RTS on identified staff and those additionally set by the institutions should be applied both by institutions on a solo basis, using the figures and considering the situation of the individual institution, and in addition by the consolidating institution on a consolidated basis, including also all subsidiaries not subject to CRD, using the consolidated figures and considering the *consolidated situation and the impact on the institutions' risk profile on a consolidated basis. The same applies for the sub-consolidated level.*

Comments:
We would like to know what the role is of local regulators going forward. Can we trust on the identified staff selection of the entire group to be subject to the supervision of the ECB instead of potentially having also local regulators still supervising identified staff selection in the countries?

106. Subsidiaries that are not themselves subject to the CRD are not required to perform an identification process on the solo level. For those subsidiaries the assessment should be performed by the consolidating institution, based on information provided by the subsidiary. Institutions falling within the scope of the CRD (credit institutions and investment firms) should conduct their own self-assessment for the identification of staff on the solo level. Small and less complex institutions which are included in an identification process on a consolidated basis may delegate the practical application of the identification process on a solo level to the consolidating institution.

Comments:
In our view paragraph 9.5 needs more clarification. With reference to section 100, we assume EBA intends to ensure that selection on a solo basis takes place at the level of the (licensed) institution, where such institutions should include subsidiaries and branches in their selection process.

Q 7: Are the guidelines regarding the capital base appropriate and sufficiently clear?

No comments.

Q 8: Are the requirements regarding categories of remuneration appropriate and sufficiently clear?

120. Remuneration awarded under long term incentive plans, where parts of the remuneration are awarded at a certain point of time based on the discretion of the institution and other parts are awarded at a later stage, based on the condition that staff remains with the institution or other conditions, is variable remuneration. For the calculation of the ratio between the variable and the fixed component of remuneration the following should apply:

- *a. the parts of long term incentive plans that are awarded at a later stage and are only awarded if the underlying conditions are met should be taken into account in the accrual period when the remuneration is awarded;*
- *b. all upfront parts and parts to which no condition applies should be taken into account in the performance year where the long term incentive plan is awarded.*

Comments:
EBA is requested to confirm that:
- Pay-out requirements as stated in CRDIV do not qualify as LTI
- LTI without future performance restrictions should be taken into account at the time of award
- LTI with future performance restrictions can be taken into account at the time of vesting

The definition of a long term incentive plan is not entirely clear. It is difficult to determine which plans fall exactly under the definition. To us it's uncertain whether STI (deferrals) can indeed be excluded.
It seems that LTI's should be taken into account in the fixed to variable ratio upon the moment of vesting, however the term 'vesting' is not used in the article, while it is included as a definition. How

to deal with LTI's that were granted before the enactment of CRDIV c.q. publication of the guidelines?
EBA is encouraged to revise this article and consider to take LTI's into account in the ratio upon award instead of vesting. This provides more certainty and is more feasible.

Q 9: Are the requirements regarding allowances appropriate and sufficiently clear?

No comments

Q 10: Are the requirements on the retention bonus appropriate and sufficiently clear?

No comments

Q 11: Are the provisions regarding severance payments appropriate and sufficiently clear?

140. Institutions' remuneration policies should specify the possible use of severance payments relating to the early termination of a contract, including the maximum amount that can be awarded as severance pay to categories of identified staff.

Comments:
We would like to underline that severance payments are very country specific. It would be practical and welcomed when the mandatory regime in each country can be followed and that only (material) deviations from the mandatory regime have to be specified and maximized.
More guidance is requested on expectations from EBA with regard to this article. We assume a maximum <u>percentage</u> can be used. Mentioning the maximum amount will be difficult to implement in practice.

142. Severance payments should not provide for a disproportionate reward, but for an appropriate compensation of the staff member in cases of early termination of the contract, must reflect performance achieved over time and must not reward failure or misconduct. The amount of severance pay awarded should be risk-adjusted.

Comments:
It is unclear to us what is meant with severance pay awards to be risk-adjusted. Further guidance by EBA is requested in this respect.

166. Where remuneration is fixed remuneration according to the guidelines in section 11, but is paid out in instruments, institutions and competent authorities should consider if the instruments used renders the fixed component of remuneration to a variable component of remuneration as a link to the performance of the institution is established. Institutions should not use financial instruments as part of the fixed remuneration to circumvent variable remuneration requirements and the instruments used should not provide for incentives for excessive risk taking.

Comments:
It is unclear to whether the use of fixed shares, where employees are awarded a fixed nominal amount mandatorily converted into shared to create alignment, is allowed (as part of fixed compensation) or whether ECB approval is necessary in this respect.

Q 12: Are the provisions on personal hedging and circumvention appropriate and sufficiently clear?

No comments

Q 13: Are the requirements on remuneration policies in section 15 appropriate and sufficiently clear?

Remuneration of members of the management body

170. Where variable remuneration is awarded in instruments, appropriate measures should be taken to preserve the independence of judgment of those members of the management body, including the setting of retention periods until the end of the mandate.

Comments:

We would advise EBA not to link the retention periods to the mandate, in order to continue the alignment after the mandate has ended. A maximum of 5 years retention would be sufficient in our view.

Q 14: Are the requirements on the risk alignment process appropriate and sufficiently clear?

No comments

Q 15: Are the provisions on deferral appropriate and sufficiently clear?

236. Significant institutions should in any case apply, at least for members of the management body in its management function and senior management, deferral periods of at least five years or longer.

In our opinion a 3-year deferral period (as stated in CRD IV) would be sufficient for the senior management. A mandatory 5 year deferral period for senior management would entail an expansion of the scope of CRD IV.

Q 16: Are the provisions on the award of variable remuneration in instruments appropriate and sufficiently clear? Listed institutions are asked to provide an estimate of the impact and costs that would be created due to the requirement that under Article 94(1)(l)(i) CRD only shares (and no share linked instruments) should be used in parallel, where possible, to instruments as set out in the RTS on instruments. Wherever possible the estimated impact and costs should be quantified and supported by a short explanation of the methodology applied for their estimation.

255. Institutions should not pay any interest or dividend on instruments which have been awarded as variable remuneration under deferral arrangements to staff, this includes that interest and dividends payable during the deferral period are not paid to staff after the deferral period ended. Such payments should be treated as received and owned by the institution.

Comments:

Compensation of interest or dividend on deferred equity is not allowed according to this section. We think that this is not in line with the scope and mandate of CRD IV and that this does not contribute to risk mitigation.

Q 17: Are the requirements regarding the retention policy appropriate and sufficiently clear?

No comments

Q 18: Are the requirements on the ex post risk adjustments appropriate and sufficiently clear?

No comments

Q 19: Are the requirements in Title V sufficiently clear and appropriate?

No comments

Q 20: Are the requirements in Title VI appropriate and sufficiently clear?

No comments

Q 21: Do institutions, considering the baseline scenario, agree with the impact assessment and its conclusions?

1. Contrary to EBA's opinion, costs are more significant than low. EBA is correct that the changes mainly lie in new policymaking and implementation with global scope. In addition, the extension of the Identified Staff population and application of requirements to Identified Staff or even all staff requires significant additional resourcing.
2. We very much subscribe to the need for a higher level of harmonization, to start with across countries, where we see a task for EBA to ensure a level playing field (i.e. not allowing countries to deviate on topics like thresholds, etc.).

Q 22: Institutions are welcome to provide costs estimates with regarding the costs which will be triggered for the implementation of these guidelines. When providing these estimates, institutions should not take into account costs which are encountered by the CRD IV provisions itself.

No comments