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EACB Answer to ESMA's public consultation on Guidelines on certain aspects of the MiFID II remuneration requirements

October 2021

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Introduction

The EACB welcomes the opportunity to submit its answer to the ESMA's consultation on the guidelines on MiFID II remuneration requirements.

The topic of regulating and supervising the remuneration of employees involved in the provision of investment services to clients is not a new one, having been tackled by way of introduction of guidelines by ESMA back in 2013. Since then, several articles under MiFID II and its Delegated Regulation also cover this topic all the way from organisational requirements, conduct of business, conflicts of interest and supervision by national competent authorities (NCAs). Indeed all MiFID II companies and persons in scope have fully adopted these rules, and NCAs have also adopted the ESMA guidelines in their regulatory monitoring and supervision.

We thus do not see the exact justification to impose additional requirements beyond the current ESMA guidelines and the MiFID II requirements on remuneration. **In particular, we do not support the inclusion of all types of remuneration - including fixed remuneration - in the scope of the guidelines.** Fixed remuneration as the ongoing salary is not used for rewarding sales results and so there is no evident danger for an employee to act detrimentally to the clients' interests.

Moreover, we support the comments made by the ESMA Securities and Markets Stakeholder Group (SMSG) in their advice dated 13 October 2021 (ESMA22-106-3638) that:-

- the relevance of the guidelines is difficult to assess, e.g. when talking about the proposals on career progression, the SMSG asks: *"Is this guideline a response to malpractices or a desk-based proposal?"* (paragraph 5, page 2, SMSG advice); and
- *"warns against intruding into labour legislation, which remains primarily a national competency under the Treaty on the Functioning of the European Union. Legal conflicts may arise in this respect for the financial institutions implementing the guidelines"* (page1, SMSG advice).

In this context, we wished to respond to specific questions within the consultation paper. Please find our answers below for more information.

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Questions and answers

1 Do you agree that career progression is likely to have an impact on fixed remuneration and that, consequently, firms should define appropriate criteria to align the interests of the relevant persons or the firms and that of the clients in respect of all types of remuneration (not just in respect of variable remuneration)? Please also state the reasons for your answer.

It is quite normal that career progression can have an impact on the fixed remuneration of relevant persons, because an evolving career takes into account the attaining of new qualifications and experience of the individual. Furthermore, the expectations required for the job increase and/or change with each promotion. Employees expect to be remunerated for such progression and any increase in fixed remuneration is justified by specific requirements of a position, but also by social and market aspects. In doing so, the investment firm takes into account a combination of aspects, such as:-

- the investment firm's interest in retaining the individual employee (individual suitability and career progression potential, replaceability from the company's own personnel pool);
- the conditions on the regional and nationwide personnel market for relevant persons with a corresponding level of qualification (wage level in the sector-specific and cross-sector competition for qualified skilled employee);
- personal expectations of the relevant person (qualified specialist) from the point of view of employee retention; and
- determination of an appropriate level of remuneration in so-called mixed functions, i.e. activities that include other advisory and/or other activities in addition to the provision of investment services or ancillary services.

However, the above criteria do not justify a direct supervisory impact on fixed remuneration practices as suggested within ESMA's consultation paper. An employee's fixed remuneration is not oriented towards variable (quantitative or qualitative) criteria. Indeed, the above criteria are related to the investment firm's performance capability and their individual weighting. The aspect of individual personnel policy, which is reflected in the individual contractual remuneration agreement, is also recognised and accepted by law and case law. Therefore, no regulatory and supervisory measures intended to avoid a conflict of interest can be established for fixed remuneration.

Moreover, the concept of remuneration defined in paragraph 5, Article 5 of the Delegated Regulation (EU) 2017/565 must always be taken as a basis. According to Article 5(5), "remuneration" means all forms of payments or financial or non-financial benefits provided directly or indirectly by firms to relevant persons in the provision of investment or ancillary services to clients. Recital 40 of the Regulation refers to payments and services which are provided due to "the provision of investment or ancillary services". The inclusion of fixed remuneration would mean including the current salary in the scope

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of the ESMA guidelines, which does not fit within the above-mentioned scope. This is because the current fixed remuneration of an employee is not used to reward sales success, i.e. it is not provided in connection with securities services or ancillary services.

In conclusion, we support deletion of the part in paragraph 25 (page 23) of the ESMA consultation paper, which states: "*...and having an impact on their (fixed and/or variable) remuneration*" in order to avoid any misunderstandings.

2 Do you agree with the suggested approach on career progression? Please also state the reasons for your answer.

The EACB does not agree with the suggested approach as already explained in our answer to question 1.

In our view, a remuneration practice must be designed in such a way that client interests are not impaired. Relevant persons are clearly informed in advance and in writing about the remuneration practice, particularly regarding the criteria for the amount of remuneration as well as about the stages and time schedule of their performance assessment.

Moreover, it needs to be clarified in paragraph 25 (page 23) of the consultation paper that the requirements for career progression do not apply to investment firms that are bound by collective agreements. Adding supervisory requirements to the criteria relevant for career progression would therefore represent an inappropriate interference in the autonomy of collective bargaining.

Conditioning career progression would also lead to a different treatment of existing staff and new hires. While investment firms can hire an external applicant with a certain fixed remuneration, the same fixed remuneration could only be awarded to an existing staff member moving up the career ladder after further criteria have been checked. However, since career progression is about concrete objective framework conditions (decision-making competence, qualification), this distinction is inappropriate.

3 Do you agree that, to align the interests of relevant persons or the firms with the interests of clients on a long-term basis, firms should consider the possibility to adjust remuneration previously awarded through the use of ex-post adjustment criteria in their remuneration policies and practices (such as clawbacks and malus)? Please also state the reasons for your answer.

We do not agree with the use of clawbacks or malus regulations or the introduction of ex-post adjustment criteria for variable remuneration, especially when considering the existing contractual protection of the employee. Work and wages are reciprocal, and any clawbacks based on a "catalogue of criteria" do not fit in systematically. Against the background of the autonomy of collective agreements, there are considerable doubts as to whether such requirements would be enforceable at all.

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**4 Do you agree with the suggested approach on ex-post adjustment criteria?
Please also state the reasons for your answer.**

Regarding the suggested ex-post judgement criteria in the consultation paper (paragraphs 27 to 29 of Guideline 1), we would like to point out that remuneration practices must already be reviewed regularly. It must also be ensured that cases in which relevant persons do not act in the interest of the client can be effectively identified and counter measures are to be initiated. In our view, these provisions are thus already sufficient to effectively counteract possible conflicts of interest.

Contact:

The EACB trusts that its comments will be taken into account.

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