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EACB Draft Position on EBA Consultation Paper on Draft Guidelines on Remuneration Policies and Practices Related to the Sale and Provision of Retail Banking Products and Services

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EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



Introduction

The EACB welcomes the opportunity to participate in the public consultation on the EBA draft Guidelines on Remuneration Policies and Practices Related to the Sale and Provision of Retail Banking Products and Services (EBA draft Guidelines).

Generally, we support the EBA initiative to align remuneration incentives with the interests of the customers in a way that would prevent mis-selling and enhance consumers' protection. This approach is not completely new for the European regulators, so eventually it is also known at national level too. Yet, although there are similar provisions already in force in terms of content, they are based on a different personal and material scope of application. In particular, ESMA has issued similar guidelines¹ which apply to employees and products from the area of investment services (ESMA guidelines), while the current EBA draft Guidelines relate to the offering and provision of banking products and services by employees in retail banking (credit agreements and other forms of credit, deposits, payment accounts, payment services, payment instruments, other means of payment and electronic money). Thus, according to the EACB members the challenge would be more how to expand the scope of applications of rules which are already to a great extent part of the European and the national regulatory frameworks. An indispensable condition for this would be the good alignment between the various legal provisions, which would ensure their consistent and efficient application. Such an alignment should be more comprehensive and capture all existing relevant rules.

EACB members also note that while the legitimate ultimate aim of the EBA draft Guidelines is to prevent the design of remuneration systems that allow customers' interest to be negatively affected, this should not discourage the relevant staff members from active sales policy. Active selling is crucial to good customer service and generally, the business model of a retail bank naturally focuses on a good and fair relationship with customers. Therefore, from a more general perspective, the institutions should be able to align their remuneration policy and practice with other prudential requirements (such as business strategy, objectives, values), while duly considering their customers' interests.

Finally, EACB gladly takes this opportunity to comment on some specific draft provisions with a view to contribute to an efficient regulatory solution.

EACB General Comments

EACB members note that the multitude of new regulatory rules in recent years has resulted in a number of separate provisions for the remuneration practices of different employee categories or different services offered by them. However, there does not seem to be an overall concept aligning these measures. In consequence, a reasonable implementation of regulatory law into the remuneration practices of the institutions is becoming increasingly difficult. This is because individual directives, regulations, guidelines or their respective national implementations are based on different scopes of application and definitions of "relevant persons". However, in small and medium-sized institutions especially, employees offer services to

¹ ESMA Guidelines on remuneration policies and practices (MiFID)



consumers (private clients) as well as to business clients and it is not unusual for employees to advise on product categories which are subject to different regulatory requirements. Thus, an employee who offers financial instruments, credits and other banking products for consumers will be subject to a range of partially different regulatory rules on European level, which are governing his actions and remuneration.

The application of all the regulatory standards altogether could be quite burdensome for all institutions, and in particular the medium-sized institutions hardly stand a chance to comprehend and follow-up on regulatory requirements. At the same time, however, there are several overlappings to be found with European regulatory frameworks for the remuneration systems.

In this respect, the relationship between the current EBA draft Guidelines to the ESMA guidelines is particularly unclear. The ESMA guidelines aim to protect the clients' interests, especially regarding retail clients. However, within the framework of the MCD and the current EBA draft Guidelines the focus lies on consumers. In our understanding consumers are just a subset of "clients" and the latter category also includes cooperative customers and SMEs. If the EBA intends to set different regulatory requirements for consumers and for clients in general, it should also underline the objectives for doing so. In case the EBA draft Guidelines remain unchanged in view of the notion of consumers, it will remain to be seen how the national legislator will implement the guidelines in this respect.

Finally, we also note that the relation between the current EBA draft Guidelines with the EBA Guidelines on Sound Remuneration Policies should be clarified. Given the broader scope of the EBA Guidelines on Sound Remuneration Policies and their subsidiary application, inconsistencies should be avoided.

Specific comments on the EBA draft Guidelines

Q1: Do you agree with the Guideline 1 on design? (Part 4, Section 4.1)

Paragraph 4.4.1.1

With reference to draft paragraph 4.4.1.1. , which lays down the features of the design of the remuneration policies, we note that it should be clarified that the design and implementation of remuneration policies and practices takes duly into account all prudential requirements, including among them the rights and interests of consumers. The relevant level 1 acts do not provide a possibility for a restrictive design of such policies, where one of the requirements is given an exclusive preference. Thus, for instance, Directive 2013/36/EU (CRD IV) specifically stipulates in Article 92(2)(b) that the remuneration policy has to be in line with the business strategy, objectives, values and long-term interests of the institution as well. Directive 2014/17/EU (MCD), too, is based on the same standards that include legitimate recognition of interests of the institution (Article 5 (3) b) .

In this context, we note that occasionally conflict of interests might arise in all aspects of life. This is recognised under paragraph 4.4.1.2., which envisages that, when designing the remuneration policies and practices, institutions should consider whether these policies and practices introduce any risks of detriment to consumers and should mitigate such risks from arising. But in such cases, what is decisive from a



regulatory point of view, is that there are effective measures put in place to prevent adverse affects on the consumers' interests.

Thus, in our opinion, the EBA draft Guidelines would benefit from a more precise wording that reflects the need for the institutions to align their remuneration policy and practice with all legally provided criteria and not to exclusively focus on a single one, while also ensuring that there are solid safeguards for the consumers' protection.

Paragraphs 4.4.1.4. and 4.4.1.5.

Pursuant to paragraph 4.4.1.4. und 4.4.1.5. the institutions shall define appropriate qualitative and quantitative criteria to assess performance of a relevant person in the remuneration policy.

In this context it should be noted that due to the variety of banking products and categories of relevant staff members (service and client advisors, private bankers, branch managers), it's only possible for institutions to create a broad and wide range of performance-measuring criteria.

Paragraph 4.4.1.6.

Pursuant to paragraph 4.4.1.6., the institution should not design remuneration policies and practices that promote, to the potential detriment of the customer, the offer or provision of a specific product or category of products that is more profitable for the institution. It is unclear against what criteria the "potential" detriment would be measured. Besides, this alone could constitute an infringement of consumers' rights.

The suggested wording significantly restricts the institutions' choices for product and risk strategies and affects their product portfolio decisions. Given the limited possibilities for the banks to "promote" products which fit into the banks' growth/sales/product strategies, the variety of the offered products may easily be reduced and eventually the existing product market-share levels will be preserved.

The institutions, just as much as actors in other sectors that affect the consumers' financial situation (sale of real estate, cars or other objects of value), should retain the opportunity to achieve returns. Profitability as such is not a bad thing. From a consumer/client protection perspective, it should not be relevant whether a product is more profitable for the bank than another product, as long as the consumers' wishes and potentials are safeguarded. Such a restriction of remuneration policy would unreasonably endanger the opportunity to achieve returns and to safeguard the future existence of the institution.

Paragraph 4.4.1.7.

In case an institution's remuneration policy allows for variable remuneration in addition to fixed payments, the ratio between the fixed and variable components has to be appropriately *balanced* and take into account the rights and interests of consumers. In addition to this, a flexible policy on variable remuneration is required, including the possibility to pay no variable remuneration at all where appropriate. In this respect, the EACB notes that the EBA adopted last year extensive Guidelines that consider the fixed and the variable components of the remuneration, also reflecting on the need for them to be appropriately *balanced*



(paragraph 30 EBA Guidelines on Sound Remuneration Policies). In this context, the current drafting of paragraph 4.4.1.7. may be interpreted as either leading to some overlaps with the EBA Guidelines on Sound Remuneration Policies, or as introducing an additional balance test exclusively for the sales staff without clear indications of its features and without reference to the legal base.

Furthermore, the EACB notes that Article 94 (1) (g) CRD IV has already introduced a general ceiling governing the ratio between fixed and variable remuneration components, the so-called “maximum remuneration ratio”. The current draft provision of paragraph 4.4.1.7. may easily result in additional burdens for the banks as they will be forced to apply additional criteria when deciding on the ratio of fixed and variable components of the remuneration, even if the maximum remuneration ratio is not exceeded. This goes beyond the mandate provided under some Level 1 acts. The European Commission has only recently studied the impacts of the maximum remuneration ratio and that the results of this public consultation have not been published yet.

In light of the aforementioned, we are of the view that the requirements set out in paragraph 4.4.1.7. do not seem to be appropriate at this point in time.

Q2: Do you agree with the Guideline 2 on documentation? (Part 4, Section 4.2)

Paragraph 4.4.2.1.

The scope of the documentation exercise does not seem to be fully precise. Thus, it is unclear how the documentation may go beyond (to the extent it “is not limited to”) the objectives of these policies and practices. Additionally, the current wording creates uncertainties as to whether such documentation could be also discretionary requested for staff members not covered by the current EBA draft Guidelines. This may lead to unjustified burdening on some institutions. Some clarifications have to be made and in any case, the requirement should not go beyond the scope of the Guidelines which regulate similar subject matter in a different area (investments.)

Paragraph 4.4.2.2.

It is not clear how banks can record the practical implementation of remuneration policies and practices. How to demonstrate compliance to Competent Authorities is already explained in paragraph 2.1. (“The institution should document remuneration policies and practices [...] and make them available to the competent authorities upon request.”). Paragraph 4.4.2.2. seems to be unclear and, at the same time, superfluous. In fact, the documentation and the related storage is adequate to demonstrate that remuneration policies and practices are compliant with the regulation to Competent Authorities. For avoidance of any misinterpretation and in order to insure more clarity, we suggest that paragraph 4.4.2.2. be deleted.



Q3: Do you agree with the Guideline 3 on approval and monitoring? (Part 4, Section 4.3)

Paragraphs 4.4.3.1., 4.4.3.2. and 4.4.3.4.

The management body structures in the EU are diverse. Since the “management body” is widely defined in the EBA draft Guidelines, so as to capture the management body in its management and supervisory function, further clarification of who will eventually be responsible for the institutions’ remuneration policies and practices could be helpful (paragraph 4.4.3.1.). In the same vein, it would be a very useful precision also for the purposes of paragraph 4.4.3.4., according to which changes to the remuneration policies could be made only with an approval of the management body or its delegate, respectively.

In a similar fashion, in order to properly assess the proposed draft provision in paragraph 4.4.3.2. and to avoid its future mis-implementation, it should be clearly specified that the “independent advice” should be provided by an independent internal control function, or an independent internal body, or, where established, by the Remuneration Committee of the bank and not by an external body. Seeking external advice would only entail disproportionate additional costs for the institutions.

Paragraph 4.4.3.3.

In our view it’s the general role of the compliance function to analyze how the remuneration policies and practices affect the institutions’ compliance with legislation and regulations and internal policies, including with the current draft EBA Guidelines, once they become effective. This is also in line with the EBA Guidelines on Sound Remuneration Policies, adopted in late December 2015. This, however, is without prejudice to the role of the internal audit function, which should carry out a review of the design and implementation of the remuneration policies in general, and policies to the sales staff in particular. This should be clearly outlined, to ensure more consistency and avoid misinterpretations in application. The entire monitoring mechanism has to be aligned with the EBA Guidelines on Internal Governance and its forthcoming modifications.

Q4: Do you see a need for any additional requirements?

As stated above, the EACB members are of the view that there should be an alignment of the existing requirements that would avoid overlapping and ensure consistent application, rather than ever-enhancing rules applicable in various areas.

Q5: Do you have any other comments?

Paragraph 4.2.8 and 4.2.9.

The EACB members find concerning the possibility left to the competent authorities to apply the EBA draft Guidelines in relation to other persons other than consumers (paragraph 4.2.8. of the draft Guidelines). Firstly, we note that the main purpose of the EBA draft Guideline is to protect consumers, while the SMEs



and micro-enterprises generally relate to banks for commercial reasons, in a “B2B” connection. Secondly, leaving to Member States the freedom to rule or not, on this specific point, may lead to different regulatory solutions with distortive effects from a competition point of view. Therefore, we suggest deleting the paragraph 4.2.8.

In a similar fashion and for sake of the consistent application of the EBA draft Guidelines EU-wide without knock-off effects on competition, the discretion provided to the competent authorities under paragraph 4.2.9. to extend further the scope of the guidelines should be removed.

Paragraph 4.2.13.

Since the definition of “remuneration” is key for the proper application of the EBA draft Guidelines, we stress on the need to specify how to assess all non-monetary forms of remuneration and in particular career progression. It should be clarified that such advantages have to consider “non-monetary forms of remuneration” only when they are directly and solely linked to the sale of a specific retail banking product or service.

Examples of bad/good practices referred to in the Consultation document (paragraphs 3.2.14. and 3.2.15.)

The EBA draft Guidelines seem to have been developed against a background of both undesirable remuneration examples and benchmark remuneration policies and practices that have to be encouraged. In this respect, while we appreciate the clarity such an illustrative approach brings, we note that the proper judgement on such practices and policies requires their in-depth analysis. Their universal categorization as “bad” or “good” is hardly convincing since they very much depend on the individual circumstances in which they are applied and on the criteria against which they are measured.

In paragraph 3.2.14. (Rationale) the EBA lists a number of bad practices that should be avoided in the future to ensure enhanced consumers’ protection. According to the EBA an example of such a bad practice is the organization of competitions among staff members with a view to incentivize them to outperform their peers. In this context, we note such a generalization has to be avoided. Indeed, when carried out “in a right way”, such kind of incentives may ensure more active staff involvement in offering relevant products and high-quality services to consumers, which eventually may lead to an improved customer experience.

Furthermore, in paragraph 3.2.15. (Rationale) the EBA provides a list of good practices and policies, which if applied, may enhance customers’ protection. In this context the EACB members note that the example as laid down by paragraph 3.2.15. (second indent, p.9) basically corresponds to the “deferrals” which are outlined in the EBA guidelines on sound remuneration policies (EBA/GL/2015/22). In this context, the EBA has issued its „Opinion on the Application of Proportionality“ of 21 December 2015 (EBA/Op/2015/25), in which deferrals are discussed as well: with respect to the administrative burden and the low amount of variable remuneration, the EBA expressly asks for legislative amendments of the CRD-IV directive in order to allow for an exclusion of small and non-complex institutions from the obligation to use deferrals. **In our view, all provisions regarding remuneration techniques should remain reserved for the EBA guidelines on Sound Remuneration Policies.**



Against this backdrop, we specifically outline the requirement for the financial institution to pay out the variable remuneration in several tranches over an appropriate time period in order to adjust for, and take into account, the long term outcomes for the consumers (paragraph 3.2.15., second example). In case the EBA aims at the customer's return, it should be made clear that, at the time of sale, the return of a product crucially depends on the choice of risk and the development of various economical determining factors. As long as the consumer does not opt for a fixed interest rate and a specified term there are limits to the predictability of long term outcomes for the consumer, if they are open to prediction at all. At any rate, the remuneration of the bank employee is most likely of no relevance in this context. The customer's return is dependent on his intentions in choosing a product and on the degree of risk he is willing to take. With regard to the mis-selling by staff in financial institutions, it is impossible to draw conclusions from the final return of a product. In certain cases, this can even lead to significant contradictions with regard to the qualitative requirements for customer advice. This could be the case, if a client is not advised properly and the advice does not take into account the clients potential and his risk affinity, but the risk materializes in a high return for the customer nevertheless.

In addition to this, the practice of payments in tranches is economically unsound in many cases, in which only low amounts of variable remuneration are paid. To stretch these kinds of payment over a period of time would only cause additional administrative burdens that would be out of proportion to the amount of variable remuneration in question. The call for more elaborate remuneration schemes would only promote the transformation of variable remuneration elements into fixed payments and the deletion of such remuneration elements without substitution. Although the requirement of payment in tranches is not taken up by the actual guidelines under paragraph 4.4. of the consultation paper, it should be avoided in the document altogether for the reasons stated above.

In paragraph 3.2.15. (sixth indent, p. 9) the EBA describes as an example for good practices contacting a sample of consumers after they have been offered or provided a banking product. This should be done by staff independent from relevant persons. The purpose of contacting consumers is to survey consumers' satisfaction with the services offered. However, customer satisfaction is generally hard to measure, if it is a measurable criterion for the protection of consumers' rights and interests at all. This is because the quality of consumer feedback is dependent on many factors which are not related to the remuneration of staff. Moreover, EBA's restriction regarding the staff members eligible for contacting consumers (independent from relevant persons) would entail the necessity for institutions to either train employees for this purpose or to hire additional staff. This would result in a substantial amount of additional costs for the institutions, in particular for the smaller institutions, while only providing little information as to the protection of consumers' rights and interests.



Contact:

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

For further information or questions on this paper, please contact:

- Mr. Volker Heegemann, Head of Legal Department (Volker.Heegemann@eacb.coop)
- Ms. Teodora Magdalinceva, Legal Adviser (Teodora.Magdalinceva@eacb.coop)