Targeted consultation on the draft guidelines on the standardised presentation of the remuneration report under Directive 2007/36/EC as amended by Directive(EU) 2017/828 ('Shareholders' Rights Directive')

Fields marked with * are mandatory.

Introduction

Disclaimer

Nothing in this document commits the European Commission or prejudices any decision by the Commission regarding the preparation of the non-binding guidelines on the standardised presentation of the remuneration report.

Directive 2007/36/EC of the European Parliament and of the Council of 11 of July 2007 on the exercise of certain rights of shareholders in listed companies, as amended by Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 as regards the encouragement of long-term shareholder engagement requires in its Article 9b that companies (which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State) draw up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration of their directors. According to the Directive, the report shall include all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors, in accordance with the company's remuneration policy.

Article 9b(6) of the Directive gives a mandate to the Commission to adopt guidelines to specify the standardised presentation of the Report with a view to ensuring harmonisation in this regard.

When preparing these guidelines, the Commission has consulted stakeholders both through the Commission Expert Group on Technical Aspects of Corporate Governance Processes and thereafter convening the Member States in a meeting of the Company Law Expert Group, in compliance with Recital 49 of the Directive (EU) 2017/828.

The Commission has taken into account the comments of the Expert Groups and is now consulting on the draft guidelines before their planned adoption in June 2019. Member States and stakeholders are invited to provide written comments by 21 March.

The consultation document has been drafted by the services of the European Commission to facilitate a targeted consultation on the possible content of the guidelines. Comments on this document should be

submitted by the end of Thursday 21 March 2019, through this online facility created for this purpose. Comments submitted after that date, and comments not submitted through the online facility, will not necessarily be taken into consideration.

Nothing in this document commits the European Commission or prejudices any decision by the Commission regarding the preparation of the guidelines on the remuneration report.

Consultation document: draft guidelines on the remuneration report

RRG_draft_21012019.pdf

Privacy statement on the protection of personal data regime for this consultation

Privacy_Statement_for_Guidelines_Targeted_Consultation.pdf

Information about you

* Are you replying as:

- ○ a private individual
- ◉ an organisation or a company
- ○ a public authority or an international organisation

* First name and last name:

Florence Bindelle

* Name of your organisation:

EuropeanIssuers

* Contact email address:
(The information you provide here is for administrative purposes only and will not be published)

info@europeanissuers.eu

* Is your organisation included in the Transparency Register ?
(If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. Why a transparency register?)

- ◉ Yes
- ○ No

* If so, please indicate your Register ID number:

20935778703-23

* Type of organisation:

- ○ Academic institution
- ○ Company, SME, micro-enterprise, sole trader
- ○ Consultancy, law firm
- ○ Consumer organisation
- ◉ Industry association
- ○ Media
- ○ Non-governmental organisation
- ○ Think tank
- ○ Trade union
- ○ Other

* Where are you based and/or where do you carry out your activity? Please specify your country.

Belgium

* **Important notice on the publication of responses**

Received contributions, together with the identity of the contributor, may be made publicly available, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. Do you agree to your contribution being published? (see specific privacy statement: cfr. supra)

- ◉ Yes, I agree to my response being published under the name I indicate (name of your organisation /company/public authority or your name if your reply as an individual)
- ○ No, I do not want my response to be published.

Your opinion

1. Do you have any comments on Chapter 1 “Introduction” and Chapter 2 “Purpose” of the draft guidelines?
3000 character(s) maximum

EuropeanIssuers members believe that the guidelines on remuneration report disclosure are a great opportunity to compare practices among the Member States, in order to identify common practices that are at the same time able to fulfill the requirements of the Directive 2017/828/EU (hereinafter the “Directive”).

The Report should be comprehensive yet concise, transparent, meaningful and simple. Nevertheless, it is of paramount importance to set it in a clearer way that 1) the communication provides only for non-binding guidelines, 2) it does not create any new legal obligation, 3) companies using these guidelines may also rely on EU-based or national frameworks, and 4) the guidelines do not constitute a technical standard.

Companies are already subject to various EU and local rules already requiring reporting on remuneration components, in some cases on individual basis, with different reporting standards. Therefore, we believe that any guidance on the remuneration report should offer only general principles. Flexibility is key in order for the guidelines to be compliant with various obligations and serve different purposes, also with the aim to avoid duplication of information which may lead to inconsistent disclosure.

We would also like to indicate the possible consequences of the new transparency regime also in regard of further developments in CSR regulation (e.g. Action 10 of the Action Plan on financing sustainable growth). There may be parts of remuneration linked to long term strategy that are confidential.

An example may be the development of innovative technology that is of utmost importance to the sustainability of companies in disruptive times but cannot be made public until the development reaches a certain maturity and so can be communicated to the capital market. Even though the competent director or manager should be incentivised to develop such type of technology, this fact cannot be reported in the remuneration policy nor in the report.

This specific disclosure will in such cases lead to evasive actions by either incentivising management in other areas or will push boards to make more use of discretional elements in remuneration. Therefore, we recommend in general to take an approach in these guidelines that takes into account these probably unintended side effects.

2. Do you have any comments on Chapter 3 “Scope” of the draft guidelines?
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Even though the guidelines do not apply to the establishment of the remuneration policy under Article 9a of the Directive, some key elements may be mentioned by cross-reference, in the remuneration report, where appropriate in order to avoid duplication of information.

3. Do you think it is appropriate to have a clarification of the notion of “awarded or due” benefits in the guidelines and if this is so, do you consider that the explanation included in the footnote to chapter 3 “Scope” is clear enough?
3000 character(s) maximum

It is important to clarify:
• The notion of “remuneration awarded or due” in respect of the most recent financial year in order to avoid misinterpretation, when it comes to the annual bonus, companies generally disclose the variable remuneration in respect of the financial year N-1 (2018), which is effectively paid the following year, in 2019. In France, for instance, the variable remuneration cannot be paid unless the general assembly has approved the remuneration report.
We understand through the definition included in the footnote p.3 that these two sets of information would be covered. When it comes to Long-term Incentive plans, we are not sure if this definition will cover for instance the award of bonus shares or stock options during the previous financial year or only when the performance conditions are fulfilled to earn the right of allocation during the financial year, or even both.
Any reporting requirement must not lead to the impression of readers that such (the same) remuneration component has been received twice while in reality it has been received once. As the presented tables leave no room to correct such impression the footnote on p.3 should be modified.

• The choice of 1) introducing a global total amount (Table 1, column 6) or 2) allowing different components (cash and equity-based ones) counted in different ways (paid out/ accrual basis for cash vs. fair value for the equity-based remuneration) should be left to the Member States. E.g. in Italy, there are two different total numbers (total cash and total fair value) while in France only a general total amount is indicated. Both situations should be considered as valid.

4. Do you have any comments on Chapter 4 “Key principles” of the draft guidelines?
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The guidelines should allow for flexibility regarding the structure and order of presentation. Furthermore, “should” need to be replaced by “may” in order to confirm their non-binding nature. In order to avoid lengthy reports, not all information should be specified in the Report. As such, cross-references should be generally admitted for background information published by the company elsewhere, if appropriate.

The draft guidelines require too many tables with too much numeric information. In particular, non-executive directors’ remuneration should be presented in a separate and simplified table; to provide more clarity, information regarding performance conditions should be presented in the same table together with the description of the components of remuneration subject to such performance conditions. The description of performance criteria isolated in a separate table does not provide clarity for investors.

Concerning executive and non-executive Directors, EuropeanIssuers believes that the guidelines should allow the distinction of remuneration arrangements: table 1 should be split in the dualistic system and simplified tables should be provided for non-executive directors.

5. Chapter 5: Do you have any comments on Section 1 “Introduction” and Section 2 “Total remuneration of directors” of the draft guidelines?
3000 character(s) maximum

With regards to Section 1, EuropeanIssuers would like to remind the European Commission that companies already have to disclose a general overview of the reported financial year. Repeating this sentence will lead to duplicate information. There is no need to regulate background information which can be adapted by companies according to their specificities by means of cross-references.

Regarding the highlights' summary, it should be optional and allow for cross-references. The highlights summary may include some general information on the most recent Remuneration Policy (e.g. date of approval/submission to shareholders' vote/date from which it takes effect – with a cross-reference to the company's website where it has been published).

With regards to Section 2, dual board companies should be allowed to separate into two tables the operational function and the supervisory function.

With regard to Table 1 we have some specific considerations:
• The legal basis for including a table requiring to provide both the information regarding the relevant financial year originates from let. a) and c) of the first paragraph of Art. 9b of the Directive. Therefore, the information regarding individual remuneration of the previous financial year must not be required within such a table.
Furthermore, we would like to underline that let. b), concerning the remunerations of previous financial years refers only "about the annual change of remuneration, of the performance of the company, and of average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison". Therefore, such comparative data are required only under these conditions, accordingly under Table 5 (par. 5.7).
• It should also be stated more clearly that fringe benefits (p. 8) only have to be reported if these costs are not work related or accounted for as cost. Additionally, reimbursement of expenses e.g. for non-executive directors should be clearly defined not to be remuneration, i.e. fringe benefits.

6. Chapter 5: Do you have any comments on Section 3 "Share-based remuneration" of the draft guidelines?
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Regarding § 1, it is not clear what the term "offer" refers to. This wording should be clarified.
Regarding §2, it is said that the tables should provide information about former directors to the extent that events related to share-based remuneration have taken place during the reported financial year. When it concerns LTI, it will lead to lengthy reports, especially for companies having changed very often their CEO. It would be preferable to require, for executive directors at the time of their departure, information on the amount of shares they hold and the main features of these plans.

7. Chapter 5: Do you have any comments, in particular, on the valuation of share based remuneration (market value and additional value according to IFRS methodology) included in Section 3 "Share-based remuneration" of Chapter 5 of the draft guidelines?
3000 character(s) maximum

Regarding §4, we do not agree with the valuation method proposed (market value of shares), which is commonly used in the UK, but not in other jurisdictions, and will not offer any comparability due to the fact that the structure of the share options plans differ from one another in Europe. If this method provides comparability in the UK, it is because there are similarities in the way share options plans are designed in this country regarding vesting periods, holding periods, used performance criteria etc.) which is not the case elsewhere. Therefore, companies generally refer to IFRS as requested by their national financial authorities and they should be allowed to keep this method.

For these reasons we would suggest:
• to consider – on equivalent basis – different valuation systems of equity compensation, considering also the extensive use of some methodologies within the EU (e.g. IFRS);
• for companies to clearly identify the alternative methods or systems used in the relative column (e.g. with a footnote).

8. Chapter 5: Do you have any comments on Section 4 “Any use of the right to reclaim” of the draft guidelines?
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EuropeanIssuers believes that the text takes the right approach by including 1) the name of the director subject to the reclaim, 2) the amount reclaimed and 3) the relevant year.

9. Chapter 5: Do you have any comments on Section 5 “Information on how the remuneration complies with the remuneration policy and how performance criteria were applied” of the draft guidelines?
3000 character(s) maximum

EuropeanIssuers considers that it is meaningless for shareholders to have in separate tables:
• on the one hand, the description of the variable remuneration or the description of the incentive plans;
• on the other hand, the performance criteria that apply to each remuneration component.

Performance criteria are directly linked to the design of the LTIP. Investors need to have in the same table a comprehensive description of each component of the remuneration including the performance criteria that apply to it. Anyway, companies often use graphs to explain the mechanisms of their long term incentive plans, which seems to be more apt for explanations.

Regarding performance criteria, the SRD (article 9b) does not mention the term “targets or objectives” nor does article 9a.

It should be clear that disclosure of performance targets should not be mandatory, especially if they are commercially sensitive. In that case, companies should be allowed to publish the performance scale of the incentive plans, the opportunity level (minimum and maximum bonus or award) in percentage of the base salary, the level of achieved results and the relative pay-out.

10. Chapter 5: Do you have any comments on Section 6 “Derogations and deviations from the remuneration policy and from the procedure of its implementation” of the draft guidelines?3000 character (s) maximum

It would be useful that the Commission provides examples of what may constitute an exceptional circumstance which allows to derogate from the remuneration policy.

11. Chapter 5: Do you have any comments on Section 7 “Comparative information on the change of remuneration and company performance” of the draft guidelines?
3000 character(s) maximum

First of all, on the average total remuneration of all Directors, pensions should be excluded due to the large range of regimes and their methods of calculation.

Regarding the performance of the company, the Commission should proceed with caution as the Shareholder Rights Directive does not mention nor prescribes any specific criteria.

There should be more flexibility on this point and companies should be free to use other metrics they deem appropriate, according to their business model, their strategy, the structure of their incentive system etc.

Moreover, the net profit criterion does not seem to fit the scope of describing the company’s performance in a long-term perspective.
Regarding Table 5, it should be clear that the reference to the “employees of the group” is only optional, as explained in this Section 5.7 (“Additionally, where companies consider it appropriate or more meaningful or informative, they may also provide numeric information including the employees of the entire group of companies, on a consolidated basis”).

12. Chapter 5: Do you have any comments on Section 8 “Information on shareholder vote” of the draft guidelines?
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We do not have any comments.

13. Do you have any comments on Chapter 6 “Transitional regime (first reporting years)” of the draft guidelines?
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We fully agree with the transitional regime which allows for some flexibility.

14. Do you have any additional comments on the draft guidelines as a whole?
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As mentioned before, the Report should be concise, transparent, meaningful and simple. The Report should not be too lengthy or overly complex. In order to avoid contradictions, repetitive tables and duplicated information, the draft guidelines should adopt a more flexible and clearly intelligible approach throughout their entirety.

In most Member States, the legal provisions regarding remunerations are supplemented by recommendations in the respective corporate governance codes and for most countries there are effective private monitoring system in place that give a sense of significance of the application of such best practices . The guidelines should give room for requirements stemming from soft law.

Deferred remunerations (commonly used in banks which are paid over several years) should not be included in the table for each reported financial year. In order to provide clarity, it is important to report once, in respect of the financial year where this remuneration is due.

Confidentiality is key. Guidelines should be useful for disclosing only relevant information and not become detrimental to the business of issuers or put the companies' ethos in question.

Ultimately, EuropeanIssuers would like to reiterate that the European Commission should not rush into publishing the guidelines before the Directive is transposed into national legislation. In fact, the Commission should wait for the Directive to be implemented in Member States, taking into account any potential difficulties or flaws felt at the national level, and only then introduce them as a guidance tool.

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