

ESMA
FINANCE FINLAND RESPONSE TO THE ESMA GUIDELINES ON CERTAIN ASPECTS OF THE MIFID II REMUNERATION REQUIREMENTS

Q1: 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.

Career progression might have an impact on fixed remuneration but that is not always the case. Fixed remuneration is usually based on experience, level of responsibility and market practice, but it is not usually dependent on performance or sales targets. Titles and extended responsibilities (such as committee memberships) etc. are all encompassed in career progression but are not necessarily accompanied by an increase in fixed pay.

It should also be noted that there is a difference between setting “*appropriate criteria to align the interests*” as formulated in the question and avoiding criteria which creates conflicts, which is required in paragraph 25. The difference is significant since there are plenty of positions held by relevant persons where criteria for career progression which increases fixed remuneration is neutral re client interests or not linked to client interests. This is the case for instance for certain support functions where a requirement to align with client interests would narrow the scope of criteria available and in some cases make the criteria unfit or inadequate to judge increases in fixed compensation.

Q2: Do you agree with the suggested approach on career progression? Please also state the reasons for your answer.

We agree with the first sentence in paragraph 25. However, the example given in second sentence extends beyond the requirements in Delegated Regulation (EU) 2017/565 (“Regulation”). The Regulation requires the absence of a conflict: “*not to create a conflict of interest or incentive that may lead relevant persons to favour their own interests or the firm's interests to the potential detriment of any client*”¹. The wording in paragraph 25 refers to “*remuneration that may create conflicts of interests that may encourage such relevant persons to act against the interests of their firms' clients*”. ‘*May create a conflict that may encourage*’ is broader and more indirect than Article 27(1). ESMA Guidelines should adhere to the scope of the Regulation. Extending the scope might make it difficult to set compliant criteria due to the presence of the two ‘mays’ which creates undue uncertainty and can lead to unproductive speculation. The proposed amendment to the wording is shown below in red:

¹ Article 27(1)

*“For instance, firms’ career progression management systems should not be used to reintroduce quantitative commercial criteria upon which may depend relevant persons’ career advancement and having an impact on their (fixed and/or variable) remuneration that **may** create conflicts of interests that may encourage such relevant persons to act against the interests of their firms’ clients.”* to match Article 27(1) of MiFID II Delegated Regulation: *“Remuneration policies and practices shall be designed in such a way so as not to create a conflict of interest or incentive that may lead relevant persons to favour their own interests or the firm’s interests to the potential detriment of any client.”*

Q3: 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.

The ability to use malus and particularly clawback are severely restricted by national laws of member states. For that reason, the language of paragraph 26 must be precise about the circumstances in which firms are expected to apply ex post adjustments. In addition to this, words such as ‘misconduct’ are preferred to “negative staff performance” since the latter can refer to underperformance against set targets and is not comparable to the seriousness of misconduct.

Given the differences between member states on the ability to use malus and clawback, the requirement for firms to “consider including ex-post adjustment criteria” strikes the right tone. This way, firms can assess and set such criteria at the appropriate level for their jurisdiction.

The extension of ex-post adjustment to those who were not directly engaged in misconduct is excessive. It would require firms to apply malus to or even clawback remuneration to individuals who were not responsible for any wrongdoing. The wording only requires that the person worked in the area where events crystallised “*Ex-post adjustment mechanisms... should also be applied to the relevant persons whose responsibilities and roles include the areas where the relevant events crystallised*” and that the person has “*an impact, directly or indirectly, on the investment and ancillary services provided or on the corporate behaviour of the firm*”. This wording requires no nexus between the person and the wrongdoing and no responsibility on the part of the person for the wrongdoing. Such a link and a degree of responsibility are prerequisites for any consideration of ex post adjustment.

With respect to deferring variable remuneration under paragraph 29, a reference to proportionality is a must. Although the paragraph requires firms to “consider paying the variable remuneration partly upfront and partly deferred” and does not require that variable remuneration must be deferred, firms should only be expected to consider deferring remuneration when the amounts in question are significant. This matters for two reasons. First of all, there are significant costs and resources associated in running deferral systems. The costs outweigh the benefits if the requirement is extended to all

remuneration, even small amounts. Additionally, the incentives offered by remuneration will be diluted, from the employee's perspective, if even small amounts are deferred.

Q4: Do you agree with the suggested approach on ex-post adjustment criteria? Please also state the reasons for your answer.

See the previous answer.

Q5: Do you agree with the added focus and suggested approach on the remuneration policies and practices for control functions and members of the management body or senior management? Please also state the reasons for your answer.

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Q6: Do you believe that guideline 1 should be further amended and/or supplemented? Please also state the reasons for your answer.

FFI suggests some amendments:

Paragraph 18: The level of detail that is suggested to be included in a management body level document i.e. the remuneration policy is excessive. Including details on how, for instance, a client satisfaction criteria is measured, specifying the data and thresholds used would mean that all criteria used in the firm would need to be approved by the management body. The objective of the paragraph "*to ensure that [qualitative criteria] are not being used to indirectly reintroduce quantitative commercial criteria that may create conflicts*" can be achieved by requiring firms to document the measurement of such criteria without having this description included in the remuneration policy.

Paragraph 19: The reference to "equally weighted" is unnecessarily specific as the objective of conflict of interest mitigation can be achieved through different means, not solely through "equally weighted criterion".

Paragraph 31: The requirements on weights are new and unduly restrict how firms assess performance. The wording in the paragraph would exclude firms from grouping criteria and assigning weights to each group or performing holistic assessments of criteria. The weight per criterion and consequences per criterion can, as a result of their inflexibility and formulaicness, lead to outcomes which do not reflect an individual's performance as a whole.

Q7: Do you agree that the remuneration policy should not only be reviewed on a periodic basis but also upon the occurrence of certain ad hoc events as described in new general guideline 2? Please also state the reasons for your answer.

FFI agrees that certain significant ad-hoc events should trigger the review of the policy, e.g. remarkable changes in the structure. However, changes in the relevant legislation in the middle of the year and/or remuneration period should not trigger the

review of the policy. These kinds of changes should be taken to account when planning and adjusting the next remuneration policy. Otherwise, changes should be done constantly, and the bureaucracy outweighs the benefits.

Q8: Do you agree that the persons involved in the design, monitoring and review of the remuneration policies and practices should have access to all relevant documents and information to understand the background to and decisions that led to such remuneration policies and procedures? Please also state the reasons for your answer.

FFI agrees that persons involved in designing, monitoring and review of the remuneration policies should have access to the relevant general documentation. However, they should not have access to the individual remuneration data, which should be seen as a confidential personal data, which use is restricted to HR or other relevant body.

Q9: Do you believe that guideline 2 should be further amended and/or supplemented? Please also state the reasons for your answer.

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Q10: Do you agree with the amendments made to guideline 3? Please also state the reasons for your answer.

According to the guidelines (paragraph 50), information management tools should be used to capture the qualitative data required to determine the remuneration. Qualitative elements should also be part of the criteria in the personal assessment. FFI supports the principle of using data whenever it is possible, but in practice it means that designing and monitoring of the remuneration needs more resources than before, which might be problematic especially in the short run. There is a danger, that the requirements become too complicated, costly and burdensome to follow.

Q11: Do you believe that guideline 3 should be further amended and/or supplemented? Please also state the reasons for your answer.

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Q12: Do you agree with the deletion of Section V.III. of the 2013 guidelines? Please also state the reasons for your answer.

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Q13: Do you agree with the arguments set out in the cost-benefit analysis in Annex IV? Do you think that other items should be factored into the cost-benefit analysis and if so, for what reasons?

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