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BVI[1] position on ESMA guidelines on certain aspects of the MiFID II remuneration requirements (consultation paper)

In general, we welcome a review of ESMA's guidelines on remuneration policies and practices under the MiFID from 2013. As ESMA states in its consultation paper, Directive 2014/65/EU (hereafter: MiFID II) now contains specific remuneration requirements that notably include some of the recommendations set out in the 2013 guidelines.

However, we are very concerned that the companies covered by the future MiFID II remuneration guidelines might impose additional requirements that go beyond what is required by law. We see multiple interactions especially in the remuneration rules introduced under different pieces of EU legislation which overall amount to a huge practical burden for the affected market participants. The need for new requirements should therefore be carefully considered. This applies to the scope of the new guidelines as follows:

- The vast majority of our members, being **investment management companies**, provide services and products under Directive 2011/61/EU (hereafter: AIFMD), Directive 2009/65/EU (hereafter: UCITS Directive) and the corresponding ESMA guidelines under AIFMD and UCITS Directive; most of them with an additional authorisation to provide certain MiFID services such as individual portfolio management or investment advice with additional requirements of MiFID II. However, only if and to the extent that they provide MiFID services, the ESMA MiFID II remuneration guidelines also apply to them in relation to those services. However, not all MiFID II requirements apply here. Article 6(4) of the UCITS Directive and Article 6(6) of AIFMD only refer to Articles 2(2), 12, 13 and 19 of the MiFID that means the corresponding Articles 2(2), 15, 16, 24 and 25 of MiFID II. This does not involve the governance rules of Article 9 of MiFID II, so that the respective ESMA guidelines do not apply here for AIF and UCITS managers which provide MiFID services. This should be explicitly clarified. Moreover, we are in favour of the approach that only the AIFMD/UCITS remuneration guidelines should apply or should be qualified as more effective for aligning the interests of the relevant individuals with those of the clients of MiFID services of individual portfolio management or non-core services such as investment advice.

- Several our members are **investment firms** and as such provide mere MiFID services and are additionally covered by the new remuneration requirements of Directive (EU) 2019/2034 (Investment Firms Directive, IFD). First, we miss a reference to the IFD framework and the specific remuneration rules of investment firms (cf. Article 26(1)(d) and Article 30 of IFD) in the consultation paper. Moreover, small and non-interconnected investment firms in the meaning of Article 12 of Regulation (EU) 2019/2033 (Investment Firms Regulation, IFR) are not required to implement special IFD remuneration policies, in particular the requirements on deferral and pay-out in instruments or ex-post adjustment criteria such as malus or clawback under IFD. They should be exempt from those rules because the provision on remuneration and corporate governance laid down in MiFID II are sufficiently comprehensive for those types of investment firms (cf. recital 22 of IFD). We therefore

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 116 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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strongly disagree with the concept of applying additional requirements (such as malus or clawback) also to these small and non-interconnected investment firm since this would be an overly broad interpretation of the MiFID remuneration rules (cf. paragraph 26 and 29 of the drafted guidelines).

- We strongly urge the ESMA to **limit the MiFID remuneration guidelines to a minimum standard** as is required under the MiFID II because of the additional sector-specific remuneration requirements under CRD V (for credit institutions), UCTS Directive and AIFMD (for asset managers) and IFD (for investment firms). Any amendment on supervisory policies leads to further additional expenses which should be avoided.

Finally, we propose to set up a **transitional provision** for the implementation of the new MiFID II guidelines in such a way that the new guidelines shall apply for the business year following the date of application.

We have the following additional remarks to the specific questions raised in the consultation paper:

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.

The career could certainly have an impact on fixed remuneration, but other aspects have an impact too, such as legal and collective bargaining regulations or supply and demand on the labour market. Quantitative criteria, such as customer satisfaction, are only a snapshot and therefore, in our opinion, not suitable for measuring the longer-term fixed remuneration.

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

No. We do not agree with the suggested approach on career progression. Career progressions are already subject to the concept and definition of remuneration and must therefore already consider customer interests.

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.

We disagree with such an approach. The ex-post adjustment criteria are already addressed under the sector-specific remuneration requirements such as CRD V, IFD, UCITS Directive and AIFMD. These sector-specific ex-post adjustment criteria only apply to identified staff which do not match with relevant persons addressed under MiFID II. With the introduction of a malus and clawback regulation also for relevant persons, the companies would not be able to maintain the current approach to apply these criteria to identified staff only. Practically, this would lead to the need to implement a second risk taker group, since risk takers and relevant persons according to MiFID do not overlap 1:1. This would mean a significant additional effort which should be strictly avoided.

Moreover, as described in our introductory remarks, such an approach will lead to a considerable effort for small and non-interconnected investment firms which is not required by law under MiFID II and would contradict the objective of the new IFD framework.

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

There is no need for further criteria. The regular review of the remuneration system already considers that client interests are safeguarded, violations are effectively identified, and countermeasures are initiated.

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.

We do not agree with the added focus and suggested approach on the remuneration policies for control functions and members of the management body or senior management. Additional regulations to avoid possible conflicts of interest are not necessary only for these types of persons. This applies even more as the sector-specific remuneration requirements under IFD, CRD V, UCITS Directive and AIFMD already contain comprehensive provisions on identifying staff and applying strict pay-out rules for them.

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

In our opinion, no further additions are needed (see above).

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.

We do not agree with an amendment that the remuneration policy should not only be reviewed on a periodic basis but also upon the occurrence of certain ad hoc events. In practice, compliance with the rules of conduct is reviewed annually as part of the staff appraisals on the achievement of objectives. The basis for the review is admonitions and warnings issued during the year as well as compliance-relevant violations. In our opinion, this aspect is sufficiently considered. In addition, breaches of good conduct are linked to bonus reductions, so that a more regular cycle would not be expedient.

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.

We do not see the need to require such additional rules. According to the sector-specific remuneration rules and the corresponding EBA and ESMA remuneration guidelines, these kind of governance concerns are already addressed where a remuneration committee is required and provided with all relevant and necessary information. For small and non-interconnected investment firms, such a detailed approach seems not appropriate because of the structure of these firms and the application of the proportionality principle.

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

We do not consider any further changes necessary.

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

The examples of good practice listed are, in our opinion, unsuitable. For example, customer interviews are very subjective and therefore not suitable to be used as an objective assessment criterion.

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

We do not consider any further changes necessary.

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

Section V.III. of the 2013 guidelines deals with competent authorities' supervision and enforcement of remuneration policies and practices. We do not see the need for maintaining that section because there is no legal requirement to do so.

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?

We would like to highlight that the remuneration policies and systems have already reached a very high degree of complexity due to the existing legal and supervisory requirements. This is accompanied by a very high level of effort for implementation. We see multiple interactions especially in the remuneration rules introduced under different pieces of EU law which overall amount to a huge practical burden for the affected market participants.

Asset managers offering services and products under different sectoral remuneration requirements are legally required to comply with three different sets of rules regarding remuneration of their personnel. It is a common practice that all these services are provided jointly within an entity by specialised management teams. Thus, it is very common for management companies to have management teams for e.g. European corporate bonds, North American or South-East Asian equities which then provide their services to all AIFs, UCITS and individual portfolios focusing on these markets. In Germany, we are not aware of any management company which differentiates employees according to the legal structures of the managed products, e.g. UCITS employees, AIF employees and MiFID employees. In most situations the affected employees need to be remunerated according to AIFMD, UCITS and MiFID rules. Applying all these rules simultaneously within one employment contract is barely possible. Therefore, any amendment on supervisory policies or legal requirements leads to further additional expenses. The necessity of new requirements should therefore be carefully considered.