

Nordic Financial Unions

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NFU Response to ESMA Guidelines on Remuneration Policies and Practices

Summary of main points

- Whilst supporting remuneration policies that contribute to investor protection, NFU strongly emphasizes that remuneration is an issue that should be left to the social partners to decide upon within the framework of collective bargaining. Remuneration and pay is, according to art. 153.5 in the Treaty on the Functioning of the European Union (TFEU), not for the EU to deal with.
- Any guidelines and recommendations issued in the area of remuneration must be accompanied by a clause that safeguards social partners' absolute right to assume responsibility for remuneration principles and systems that contribute to investor protection.
- At the same time, addressing the issue of aggressive sales targets is important. Excessive sales targets are detrimental to consumer protection as well as employees' health and well-being at work.

General remarks

NFU agrees with many of the ideas behind the draft guidelines presented by ESMA. Risky conduct of business and conflicts of interest between the pressure to sell and the obligation to provide sound advice played a part in creating the turmoil of the financial crisis of 2008. Aggressive sales targets and merit rating systems constitute not only a threat to consumer protection but are also detrimental to employees' health and well-being at work. Addressing these issues is therefore of highest priority, but should not be done without taking into account the social partners' absolute right to negotiate, conclude and enforce collective agreements.

NFU has repeatedly pointed out to the Commission as well as other European institutions including the ESAs that the issue of the European legislator regulating remuneration is of particular interest to the Nordic countries, since this regulation may impose restrictions on the right to free collective bargaining.

The social partners can, and must be allowed to, assume the responsibility of sound and sustainable remuneration principles. NFU strongly supports the idea of remuneration policies and practices that are consistent with sound conduct of business and that promote investor protection. But NFU believes that remuneration policies should be left to the social partners to decide upon, since pay is, according to art. 153.5 in the Treaty on the Functioning of the European Union (TFEU), not for the EU to deal with.

This has also been acknowledged in Recital 14 in the directive 2010/76/EU on capital requirements for the trading book and for re-securitisations:

Recital 14: The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular to the provisions of Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the rights, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

With this in mind, it is therefore highly unsettling that ESMA does not mention this particular reference in its draft guidelines – not least since it is also part of the legislative basis of the CEBS Guidelines on Remuneration Policies and Practices (CEBS, 10 December 2012). The ESMA also makes an explicit reference to CRD remuneration requirements without making this reference.

The provisions in recital 14 are of highest importance to the trade union movement, and a vital component of the Nordic model, based on collective agreements. It is unacceptable to present a set of guidelines where recital 14 is excluded as it is agreed language in both CRD III and CEBS remuneration guidelines. The contents of the recitals must be seen as a unity in one context, and excluding the provisions in recital 14 in these guidelines will take the provisions on remuneration in a direction that clearly not was intended by the European legislator.

There are many examples throughout the draft ESMA guidelines where the proposed wordings clash with the right of free collective bargaining. An emblematic example is § 50 regarding approval of remuneration policies:

Q6. Do you agree that the design of remuneration policies and practices should be approved by senior management or, where appropriate, the supervisory function after taking advice from the compliance function? Please also state the reasons for your answer.

Another highly problematic example is the proposed scope of the guidelines. It is proposed to encompass, among others, "client-facing front-line staff, sales force staff, and/or other staff indirectly involved in the provision of investment services" as well as "relevant persons involved in claims handling, claims processing, client retention and in product design and development".



All of these groups of staff are to a large extent covered by remuneration agreements concluded in collective bargaining by national social partners in the Nordic countries. The ESMA draft guidelines therefore aim at the very heart of the Nordic model.

Accordingly, the provisions on remuneration must be without prejudice to the social partners' right to conclude collective agreements in accordance with national laws and traditions. The guidelines propose to lay down provisions that diminish this right, containing measures that might hamper the autonomy of social partners to negotiate on the contents of collective agreements. Where remuneration is set through collective bargaining, management or any other part of a company can never approve the design of such policies as this is dealt with by the social partners. The inclusion of recital 14 would, therefore, provide the necessary guidance on how to interpret the guidelines, i.e. that they concern provisions in individual contracts not covered by collective agreements.

Through the inclusion of recital 14 in both CRD III and the CEBS Guidelines on remuneration, the collective bargaining process has been acknowledged as a vital instrument regarding the regulation of remuneration in the financial sector. NFU urges ESMA to include it in its guidelines as well, to prevent harming the well-functioning collective bargaining systems in the Nordic countries.

The issue of remuneration can also be discussed from a hierarchical perspective. The principle behind EU directives is that they lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. In this respect, the impact of recommendations and guidelines stemming from the EU must not be underestimated, even if they, technically speaking, are voluntary.

Furthermore, the independence of ESMA and its Members is critical, which is also pointed out by ESMA itself. In the Regulation establishing ESMA it is stated that ESMA shall act independently and objectively in the sole interest of the European Union as a whole and "shall neither seek nor take instruction from Union institutions or bodies, from any Government of a Member State or from any other public or private body."

For the sake of accountability and reliability it is of the utmost importance that ESMA's guidelines do not become a tool for the Commission to use in order to enact intrusions on the rights of the social partners. The Commission has recently been very frank about its intentions to involve itself more heavily in the field of wages and collective bargaining. In DG ECFIN's report Labour market reforms in Europe, 2012, reforms that decrease worker and social rights are systematically rated by the Commission as "employment friendly".

For example, it is explicitly pointed out that interventions aimed at the decrease of bargaining coverage or (automatic) extension of collective agreements and an overall reduction in the wage-setting power of trade unions is desirable, and potentially leading to better employment outcomes.



The role of ESMA should not be to impose legislation (through guidelines) on the Member States based on pre-fabricated (and erroneous) opinions by the Commission, but rather to guide the legislator towards a reasonable legislation that can be supported by the citizens of Europe, including its workers. The above-mentioned reforms are not the answer.

The guidelines must therefore be revised on these matters, and it must be made clear that any provisions regarding remuneration policies in financial institutions do not apply to remuneration policies and provisions agreed in collective agreements.

About NFU

Nordic Financial Unions (NFU) is the voice of the employees in the Nordic financial sectors. We are an organisation for co-operation between trade unions in the banking, finance and insurance sectors of the Nordic countries. Through our eight affiliated unions in Denmark, Sweden, Norway, Finland and Iceland we represent 160 000 members – a vast majority of the employees in the Nordic financial sectors. Together, we work for sustainable financial sectors.

NFU acknowledges that this consultation reply will be published.

Yours sincerely,

NORDIC FINANCIAL UNIONS (NFU)

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