

21 March 2022

European Banking Authority  
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CS 30154  
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France

Dear Sir / Madam

## **Guidelines on the benchmarking exercises on the remuneration practices and gender pay gap under Directive (EU) 2019/2034**

We are pleased to contribute to this European Banking Authority (EBA) consultation on behalf of the Deloitte firms in Europe<sup>1</sup>.

We note that the consultation paper consists of two parts:

- a) The remuneration data collection exercise; and
- b) The gender pay gap data collection and disclosure exercise.

We have chosen to respond to the gender pay gap data collection only as we have reviewed both elements of the consultation and are of the view that it is the gender pay gap elements of the proposals which would benefit from further consideration.

We have provided our comments in line with the specific questions in the consultation paper. However, we have also included further comments relating to other sections of the consultation where we felt it was relevant to provide comments.


For context, this document includes input from Deloitte professionals from a number of European jurisdictions reflecting their experience with relevant local reporting requirements.

We would be very happy to discuss our views in response to this consultation if that would be useful at any point.

Yours faithfully



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<sup>1</sup>For more information see [Deloitte](https://www.deloitte.com).

## Response to the EBA consultation on the benchmarking exercise on remuneration practices and gender pay gap under Directive (EU) 2019/2034 (as published on 21 January 2022)

Deloitte (“Deloitte” or “We”) have prepared this document in response to the consultation paper published by the European Banking Authority (“EBA”) on 21 January 2022.

### Background and rationale

With regard to the consultation material in the “background and rationale” and “compliance and reporting obligations” sections of the document, we would observe the following:

#### Section 3.2 – Competent Authorities (enforcement)

We understand that the Competent Authorities in the relevant jurisdictions will be required to determine whether they will adopt these guidelines and will be responsible for identifying the individual investment firms that are required to report under the guidelines.

The consultation paper does not however currently comment on whether the guidelines will introduce any implications or consequences for investment firms that do not adhere to the guidelines, or how those will be administered. For instance, would the Competent Authorities be responsible for ensuring that investment firms comply with the guidelines? Would the guidelines require the Competent Authorities to apply penalties for non-compliance or give Competent Authorities the potential option of naming any investment firms that fail to comply with the requirements? Does the EBA intend to provide guidelines to the Competent Authorities on appropriate provisions?

#### Section 3.3 – Collected data at an individual level

In Section 3.3 the consultation states that the data for “gender pay gap will be collected only at the individual level”. It is not immediately clear how ‘individual level’ is defined. We assume this means individual firm level as opposed to the remuneration of a ‘group’ of individuals being reported on a consolidated basis (for example those at the same grade). It would be helpful to provide further clarity in terms of the basis on which gender pay gap data is to be collected, to ensure consistency across all reporting investment firms.

#### Section 3.8 – Reporting threshold

We understand that the guidelines are intended to apply to investment firms with at least 50 staff members. Our understanding is that investment firms should treat identified staff within their total staff number for the purposes of determining whether reporting will be required. We would recommend that when the final guidelines are prepared, this is explicitly stated.

#### Section 3.8 – Which “staff” count towards the reporting threshold?

The reporting thresholds refer to the number of “staff members”. It is unclear whether this only includes employees or whether it would also include those with “worker” status or independent contractors in certain circumstances.

In the UK, the government published guidance confirming that the UK gender pay gap regulations extend to:

- *“people who have a contract of employment with [the company] (including those employees working part-time, job-sharing and employees on leave);*
- *some self-employed people (where they must personally perform the work); and*
- *partners that are salaried, or are LLP members who are treated as employees for payroll purposes”.*

The scope of the reporting obligations should be clarified in the final guidelines in order to ensure clarity for the firms within scope.

### Section 3.8 – Gender Pay Gap metrics

We understand that investment firms are required to report their mean and median gender pay gaps for the entire staff populations and details of the male to female split within the four quartiles if they have more than 50 staff members.

Where the investment firm has more than 250 staff (staff where identified staff are treated as staff for that test), the investment firm should, in addition to the requirements for 50 staff provide the data as set out above and provide the mean and median pay gaps within each of the four quartiles.

If the investment firm has more than 250 identified staff, the investment firm should provide all of the above data and, in addition, provide the male to female split within the four quartiles for identified staff only and the mean and median pay gaps within these quartiles.

We would hope that the final guidelines make clear the specific reporting requirements for investment firms at each of the relevant thresholds. To make the explanation clearer, could this be presented in a table within the support document to clearly show the requirements for the investment firms?

### **Q1: Is the section on subject matter, scope, definitions, addresses and implementation appropriate and sufficiently clear?**

We understand the Competent Authorities will be responsible for collating the data provided by the investment firms before providing it to the EBA.

The consultation paper is not clear as to whether there are any additional reporting requirements for the investment firms beyond providing the data to the Competent Authorities. Will the guidelines require the investment firms to individually report their gender pay gap information to the public, for example on the investment firms’ websites or within their accounts?

We note that a number of the investment firms will already be subject to local gender pay gap reporting, with different requirements to those proposed in Section 8 (Annex V).

The consultation paper states that the data provided to the Competent Authorities will allow them to benchmark gender pay gap data and monitor the impact of measures implemented to address pay inequalities. However, the consultation paper does not mention what the EBA intends to do with the data provided by the Competent Authorities. Does it intend to publish the results and, if so, would that

information be anonymous and/or firms able to provide an accompanying explanation re. their respective data?

## **Q2: Is the section on the scope of investment firm appropriate and sufficiently clear?**

The consultation paper is sufficiently clear in respect of the intended scope of the proposed guidelines. We do however note that that proposed threshold of 50 staff appears to be a lower threshold than those set in local gender pay gap reporting requirements across Europe.

To support with the implementation of the reporting, has the EBA considered whether a higher staff threshold could be applied in the first year(s) of the requirements, which is then tapered down once reporting has been established?

Section 4.15 states that investment firms “should endeavour to collect” data from different groups of investment firms. Does the EBA intend to provide the competent authorities with target collection numbers? Furthermore, does the EBA intend to provide guidance for what data the competent authorities will provide to the EBA? To the extent that an investment firm’s data is shared with the EBA, will the investment firm be made aware of this?

## **Q3: Is the section on the procedural requirements appropriate and sufficiently clear?**

### Section 4.17 – Reporting basis

Section 4.17 states that investment firms will need to report their gender pay gap data every three years by 31 May starting in 2024. We note however that a number of jurisdictional gender pay gap requirements operate on an annual basis.

While employers might welcome the reduced compliance requirement of the reports being three yearly, we do question whether tri-annual reporting would sufficiently influence employers to make positive change. We would recommend annual reporting, to allow investment firms, the Competent Authorities and the EBA to better monitor any fluctuations in gender pay gap data and the impacts of any policies introduced to address any gender pay gaps within the businesses.

This should also allow the EBA to compare the investment firms’ gender pay gap data against a wider European workforce (noting that per the 2021 European Commission proposal for an equal pay Directive<sup>1</sup>, the gender pay gap in the EU remains around 14%). Reporting the data on an annual basis will also limit the impact of staff turnover within the data and allow for more meaningful comparisons.

Many investment firms have a financial year end of 31 December, however, there will be a number of investment firms that have an alternative year end. Has the EBA considered whether it should apply the use of a fixed “snapshot date” for all investment firms (for example, 31 December)? This would ensure that investment firms are all reporting based on the same period, limiting the impact of external factors and enabling like for like comparisons between investment firms.

Furthermore, this would ensure that all businesses have the same period of time in which to collate the gender pay gap data. For example, as currently drafted, the proposed guidelines would provide an

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0093&from=EN>

investment firm with a March 2023 year end, 14 months to undertake the requirements, as opposed to five months for an investment firm with a 31 December 2023 year end.

Nonetheless, as noted above, a number of European jurisdictions have already introduced local gender pay gap reporting requirements. The use of either a 'snapshot date' or the investment firms' year end dates are unlikely to align to the 'snapshot dates' required by local gender pay gap reporting. For example, employers in Ireland are expected to have a snapshot date of 1 June (when the legislation is finalised during 2022). We also note that the European Commission's approach to its equal pay proposals is to introduce a requirement for equal pay reviews but does not specify a methodology or approach that local jurisdiction must apply.

**Q4: Is the section on the procedural requirements for Competent authorities appropriate and sufficiently clear.**

N/A

**Q5: Is the section on the instructions for the remuneration benchmarking exercise appropriate and sufficiently clear?**

N/A – As noted above, the comments provided in our response are limited to the benchmarking exercise alone.

**Q6: Is the section on the instructions for the gender pay gap benchmarking exercise appropriate and sufficiently clear?**

Section 8.39 – Employees within scope

Section 8.39 states that the gender pay gap data benchmarking exercise should consider '*Staff that is predominantly active in the Member State where the investment firm is established. Staff located in branches in another Member State or in a third country should not be included in the calculation*'.

Investment firms will have head offices located in one particular jurisdiction but will operate in a number of other jurisdictions through subsidiaries or branches. This raises a number of considerations:

- Our understanding based on the consultation wording is that the reporting would only be required for staff/identified staff of the investment firm situated in the jurisdiction where the head office is located (rather than the scope applying to multiple jurisdictions)
- Will additional reporting be required on a Group-wide basis (i.e. all employees where the relevant thresholds are met across the Group)??
- If so, will the requirement be for that entity to submit their data to the Competent Authority in their jurisdiction or to the Competent Authority of the Group?

In our experience, many investment firms are established in one member state but have significant workforces in other member states as well. Reporting on the data in one member state only may give a skewed view to the EBA regarding Union-level data, contrary to the purpose of the proposed guidelines.

We recommend that the intended requirements are clearly defined within the final guidelines as the current wording could be interpreted in a number of different ways.

## Section 8.40(b) / Section 8.42(e) – Employees on reduced pay

Under Section 8.40(b) the guidelines exclude employees who are on reduced pay as a result of parental leave, sick leave or special leave at the end of the financial year. This approach aligns with the methodology applied within the UK gender pay gap guidelines, for example, whereby employees on leave are only removed from the calculations where they are considered to be receiving reduced pay. To the extent that they are receiving their full ordinary pay in the period despite their leave, they are included within the calculations.

Section 8.42(e) appears to suggest that employees who have been on leave during the financial year - resulting in them receiving reduced pay - should be included within the gender pay gap calculations, with the amount grossed-up to establish the FTE amount, which contradicts section 8.40(b) outlined above. Our view is that these two scenarios are the same thing but with different instructions. It is our view that these approaches should be aligned to ensure consistency and avoid any potential misinterpretation of the guidelines. Our recommendation is that where employees receive reduced pay during the financial year as a result of parental leave, sick leave or special leave, they should be excluded from this exercise. Including the employees on a FTE basis presents a risk that the pay data included is higher/lower than the correct position and would impact the calculations.

## Section 8.42 – Gross annual remuneration

Investment firms must establish staffs' total gross annual remuneration, being the sum of fixed and variable remuneration. It is not clear from the definition provided whether this means pay actually paid (and benefits provided) in the 12 months of the year/to the snapshot date or whether this should be based on individual's salary at the snapshot date/year end and the value of benefits provided at that particular date (but for a 12 month period).

We think it would be helpful to update the definition of the total gross annual remuneration to make it clear whether this should be considered on a paid basis, or not, to avoid potential misinterpretation and ensure consistency.

## Section 8.42 – Salary sacrifice

The consultation does not mention how investment firms should treat salary sacrifice arrangements for the purposes of determining employees' gross annual remuneration figure. Under salary sacrifice, employees will surrender an amount of their fixed remuneration, often in return for an employer provided benefit.

We would recommend that the final guidance be clear on how to treat salary sacrifice arrangements. Our view is that if the benefit that is provided will be included in the total remuneration, then the paid salary amounts should be reduced, particularly as the value of the benefit will be included within the total remuneration figure in any event. However, it is noted that in 42(b), regular pension contributions are not to be included in the total remuneration and therefore in this instance there could be a disparity if the pay figure after salary sacrifice is used but the corresponding pension amount is not included.

## Section 8.41 / 8.42(a) – Salary Full Time Equivalent annual remuneration

Section 8 Paragraph 41 stipulates that the investment firms should use employees' annual gross remuneration on a full-time equivalent basis. Paragraph 42(a) states that taxable benefits should be considered when calculating employee's total annual remuneration.

We believe a number of benefits provided to staff will be a fixed amount whether or not the worker works full time or part time. The requirement under Section 8.42 does not currently distinguish between the fixed remuneration, variable remuneration and the benefits included within the calculations.

We would therefore recommend that the guidance in respect of this point is expanded to confirm that the FTE calculation does not include the non-monetary benefits provided which are already on an annual basis but provided to staff who work part time.

We would also recommend that further guidance is provided in an example where an employee is provided with a benefit in place of a benefits allowance and whether the allowance forgone should be excluded for the purposes of the calculations.

## Section 8.47 – Gender Identity

Section 8 Paragraph 47 (b) states that *“Staff members of a gender different from the male or female gender should be allocated to the gender they identify with or **if this is unknown or if it is different from the male or female gender, those staff members should be allocated to the male or female gender that in total has the lower number of staff members**”*. (our emphasis)

In our view, the allocation of staff members whose gender is unknown or is different from the male or female gender, to the male or female gender that in total has the lower number of staff members, may artificially reduce an organisation's gender pay gap.

In one country, the approach taken in the relevant guidance which accompanies the local gender pay gap regulations is as follows:

*“It is important for employers to be sensitive to how an employee identifies in terms of their gender. The regulations do not define the terms ‘men’ and ‘women’ and the requirement to report your gender pay gap should not result in employees being singled out and questioned about their gender.*

*To reduce the risk of singling out and questioning employees about their gender you should:*

- *locate employees' gender identification using information employees have already provided for HR/payroll, if such records are regularly updated*
- *where this information is not available or may be unreliable, you should establish a method which enables all employees to confirm or update their gender. This can be done by inviting employees to check their recorded gender, and update it if required*
- ***in cases where the employee does not self-identify as either gender, an employer may omit the individual from the gender pay gap calculations.*** (our emphasis)

We would suggest that a similar approach is taken here, namely that investment firms are encouraged to ask staff to confirm or update their gender and that where any Staff do not self-identify as either gender, that individual staff member may be omitted from the calculations.

