Deutsche Börse Group

Response

to EBA/CP/2023/08

"Draft Guidelines on the benchmarking of diversity practices including diversity policies and gender pay gap under Directive 2013/36/EU and under Directive (EU) 2019/2034"

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A. Introduction

Deutsche Börse Group ("DBG") welcomes the opportunity to comment on EBA's consultation paper "Draft Guidelines on the benchmarking of diversity practices including diversity policies and gender pay gap under Directive 2013/36/EU and under Directive (EU) 2019/2034" – EBA/CP/2023/08 – issued on 24 April 2023 (in the following referred to as "Draft Guidelines").

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such acts as a provider of regulated Financial Market Infrastructures ("FMI").

Within DBG, according to applicable national law, the following 6 legal entities are in scope of the European Capital Requirements Directive ("CRD"): Eurex Clearing AG (ECAG), located in Germany, classifies as credit institution and one is of the leading European Central Counterparties ("CCP"). Clearstream Holding AG ("CH"), located in Germany is acting as a financial holding company and is supervised on a consolidated level for the credit institutions and the (I)CSDs Clearstream Banking AG, located in Germany, and Clearstream Banking S.A., located in Luxembourg. Clearstream Fund Centre Holding S.A. ("CFCH") acts as a parent company for the new established fund centre and credit institution Clearstream Fund Centre S.A. ("CFCL"). According to the national law, one legal entity of DBG classifies as a class 2 investment firm and thus falls under the scope of Art. 26 of the Investment Firm Directive ("IFD"). 360 Treasury Systems AG ("360T") is licensed as a Multilateral Trading Facility ("MTF") providing trading solutions for the FX market.

DBG welcomes the EBA's approach to better monitor and identify trends in the diversity efforts of institutions and investment firms. We believe that diversity, both in the workforce and in the management, is critical to our global success and have set accordingly internal targets in this area. More generally, however, we recognise that diversity can have many dimensions, not all of which can be measured, or should be measured, in such a way as to derive immediate benefit. We generally consider the guidelines as comprehensible but like to highlight that some items require clarification to provide the data as requested. This refers in particular to the components that must be taken into account when calculating the total remuneration of the management board, as well as the methodology and timing of the sample determination.

The document at hand contains our dedicated response to selected questions raised in the consultation paper.

B. Comment

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

To provide the requested data in the highest quality, we believe that institutions, investments firm and NCAs would benefit from a prolonged implementation timeline. Considering the national adoption process of the EBA guidelines, and the actions, measures and technical solutions that legal entities need to undertake we propose an implementation timeline with a data collection performed in 2026, with the reference date 31 December 2025. With regard to the definitions, we would like to highlight the following two points. We appreciate the clearer definition of "geographical provenance" by setting a minimum timespan of three years. However, there is some uncertainty caused by the definition of a "significant institution" as national legislation might set different criteria compared to the European definition. To avoid any misunderstandings, we propose to delete the following part from the definition: "[...] or national law, based on the assessment of the institutions' size and, internal organisations, and the nature, scope and complexity of their activities".

Q2: Is the section 1 on the sample of institutions and investment firms appropriate and sufficiently clear?

We understand that once a sample has been selected, it will remain for the next data collection and the selected institutions and investment firms will be retained. As the data collection takes place every 3 years, rules should be established for changes to the sample, e.g., in cases where institutions or investment firms merge, close down or undergo other restructuring measures that have a material impact on the management board. The guidelines should therefore contain appropriate exit and entry rules for the compilation of the sample.

No. 14 states that the sample may include more than one institution or investment firm in a group. We would like to point out that this places an unnecessary burden on entities operating in a group, which we consider inappropriate. Finally, a clear explanation of the process timeline from the EBA provision of how to structure the sample to the NCAs to the request to the institutions and investment firms, would greatly assist the planning of the institutions and investment firms. It is also important to consider external audit periods and special audits by the NCAs when defining "good times". We therefore propose to set fixed dates in Q3/Q4 of the respective year.

Q3: Are the section 2 on the procedural requirements appropriate and sufficiently clear?

With regard to no. 18 (which should also apply to no. 20), we would recommend extending the delivery period from 15 June to 15 October (with regard to no. 20 from 31 July to 30 November), as the variable remuneration for the previous performance year is paid out in the first half of the reporting year. This would also reduce the burden on institutions and investment firms during the reporting season at the beginning of the year.

Q4: Are the general specifications for the data collection appropriate and sufficiently clear?

No comment.

Q5: Are the specifications on the collection of data of members of the management body (read together with the definitions) appropriate and sufficiently clear?

Regarding no. 25 and 26, we understand that data for executives and employees below the level of the board of directors are not to be reported, otherwise we would like further details on how these employees are to be treated when reporting the requested data. With respect to no. 26b, we request further clarification on the term "irrespective of whether they are members of the board elected by the shareholders". As the link to the CRD VI review is stated, we recommend adjusting the proposed timeline as stated under question 2 to avoid inconsistency.

Q6: Is the section on the instructions for the calculation of the gender pay gap appropriate and sufficiently clear?

In relation to no. 32a, we recommend in general that institutions and investment firms should define and report only those benefits that they have assessed to be significant or material. Alternatively, we suggest that non-monetary benefits should not be taken into account or that a monetary limit should be introduced (e.g. only non-monetary benefits exceeding an annual equivalent of a certain amount of euros should be taken into account). This would considerably reduce the administrative burden for companies without jeopardising a reliable assessment of the gender pay gap.

Regarding no. 32b, it is not sufficiently clear which pension benefits are to be classified as discretionary pension benefits and should be taken into account. We would recommend including only discretionary pension benefits that are not regular (e.g. paid only as a one-time payment) to provide more clarity. For no. 32c it is not sufficiently clear which variable remuneration is to be classified as "awarded" for the respective performance period. We recommend including definitions of the terms "award", "grant" and "payout" in the guidelines.

Regarding no. 32d, we recommend including so-called "buy-outs" (compensation payments for economic disadvantages resulting from the premature termination of the previous employment relationship) as a subcategory of guaranteed variable remuneration. Furthermore, we would recommend adding information of on the treatment of share plans. In particular, we are interested in the reference date used to calculate the value.
In general, we recommend excluding those categories of employees that are subject to specific retirement plans, e.g. in Germany, partial retirement ("Altersteilzeit") provides for a salary reduction during the active phase without a reduction in working hours, with the consequence that the gender pay gap reporting would be distorted.

Q7: Is the section on data quality appropriate and sufficiently clear?

No comment.

Q8: Are the Annexes on the data collection appropriate and sufficiently clear?

Overall, the templates in the Annex provide good guidance for data collection and are reasonable. However, we would like to point out some ambiguities or ask for further clarifications. Regarding Annex I, we would like to ask for a definition of the date for which the data should be reported and would recommend reporting as of 31 December of the respective year.

In relation to Annex III, we recommend that the sentence "Where committees are in place [...]" is amended to add "that are required by regulatory requirements" for clarification. For example, CSDs are required to implement "user committees" (Art. 28, Regulation (EU) 909/2014). This would allow for better comparability between institutions and investment firms in the sample.

In relation to Annex VII, the term "cross-border basis with material business activities" is not sufficiently clear to us. In defining materiality, a reference to existing definitions would be helpful or, alternatively, indicators that can be used to determine materiality. In addition, we would require further guidance on how to derive the data for the term "at least one director has a geographical origin that spans a period of at least three years" and would recommend that the "geographical origin" should also be derived from the "nationality" of the employee.

With regard to Annex VIII and Annex IX, it is very challenging to report these data on "educational background" and "professional background" in such detail and the effort is therefore not appropriate. We would like to point out that in the case of a small number of directors, data protection requirements could not be met and could be traced back to individuals.

With respect to Annex X (in general and in particular Annex X d)) it is requested to provide the information whether "age" is taken into account in the recruitment process. We kindly ask you to consider that national legislation (such as the Equal Treatment Act, in Germany “Allgemeines Gleichbehandlungsgesetz”) prohibits any discrimination on the basis of aspects such as ethnic background, gender or age, and therefore these aspects are not part of the recruitment process. With regard to Annex X c), we recommend that the information on "Target: % set in percentage (two digits, e.g. 33.33%) in the diversity policy, including in cases where this is applicable under national law" allow to include a reference target date to allow better compatibility. Lastly, for Annex XI -, Gender Pay Gap Benchmarking, the small number of individuals and their remuneration enables to trace back to the remuneration data of the CEO respectively the chairperson of the non-executive directors and data protection requirements could not be complied with.

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We are at your disposal to discuss the issues raised and proposals made if deemed useful.