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Targeted consultation on the draft guidelines on the standardised presentation of the remuneration report under Directive 2007/36/EC as amended by Directive(EU) 2017/828 ('Shareholders' Rights Directive')

Fields marked with * are mandatory.

Introduction

Disclaimer

Nothing in this document commits the European Commission or prejudices any decision by the Commission regarding the preparation of the non-binding guidelines on the standardised presentation of the remuneration report.

Directive 2007/36/EC of the European Parliament and of the Council of 11 of July 2007 on the exercise of certain rights of shareholders in listed companies, as amended by Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 as regards the encouragement of long-term shareholder engagement requires in its Article 9b that companies (which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State) draw up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration of their directors. According to the Directive, the report shall include all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors, in accordance with the company's remuneration policy.

Article 9b(6) of the Directive gives a mandate to the Commission to adopt guidelines to specify the standardised presentation of the Report with a view to ensuring harmonisation in this regard.

When preparing these guidelines, the Commission has consulted stakeholders both through the Commission Expert Group on Technical Aspects of Corporate Governance Processes and thereafter convening the Member States in a meeting of the Company Law Expert Group, in compliance with Recital 49 of the Directive (EU) 2017/828.
The Commission has taken into account the comments of the Expert Groups and is now consulting on the draft guidelines before their planned adoption in June 2019. Member States and stakeholders are invited to provide written comments by 21 March.
The consultation document has been drafted by the services of the European Commission to facilitate a targeted consultation on the possible content of the guidelines. Comments on this document should be submitted by the end of Thursday 21 March 2019, through this online facility created for this purpose. Comments submitted after that date, and comments not submitted through the online facility, will not necessarily be taken into consideration.
Nothing in this document commits the European Commission or prejudices any decision by the Commission regarding the preparation of the guidelines on the remuneration report.

Consultation document: draft guidelines on the remuneration report

RRG_draft_21012019.pdf

Privacy statement on the protection of personal data regime for this consultation

Privacy_Statement_for_Guidelines_Targeted_Consultation.pdf

Information about you

*Are you replying as:

- ○ a private individual
- ◉ an organisation or a company
- ○ a public authority or an international organisation

*First name and last name:

Christiane Hölz

*Name of your organisation:

DSW e.V.

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*Is your organisation included in the Transparency Register ?
(If your organisation is not registered, we invite you to register here (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en), although it is not compulsory to be registered to reply to this consultation. Why a transparency register? (http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY_TRANSPARENCY_REGISTER))

- ◉ Yes
- ○ No

*If so, please indicate your Register ID number:

880020819551-97

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- ○ Consumer organisation
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- ○ Media

- (selected) Non-governmental organisation
- Think tank
- Trade union
- Other

* Where are you based and/or where do you carry out your activity? Please specify your country.

Germany

* **Important notice on the publication of responses**

Received contributions, together with the identity of the contributor, may be made publicly available, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. Do you agree to your contribution being published? (see specific privacy statement: cfr. supra)

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Your opinion

1. Do you have any comments on Chapter 1 “Introduction” and Chapter 2 “Purpose” of the draft guidelines?

3000 character(s) maximum

DSW welcomes the idea of the guidelines to streamline and standardise the remuneration reporting of companies in EU Member States and by that to enhance comprehensiveness and comparability for stakeholders. As other jurisdictions, like the US show, it is possible to present directors remuneration of different kinds of companies (different size, different business area...) in a streamlined way. In our opinion, the increasingly complex nature of compensation systems across Europe should not drive EU legislators to adopt guidelines that allow for a large amount of flexibility as this would mean reducing the comparability and also the understandability for shareholders, investors and other stakeholders. Rather, the EU legislators should provide for a stable and harmonised framework for remuneration disclosure within which companies should adapt their individual disclosure. Experience shows that even very complex compensation systems can be explained in a very simple and readable way.
We therefore are very supportive of accompanying tables and graphs that help readers easily catching sight of the most important information while we consider that narrative explanations (even more in footnotes) should be used only very restrictively as they often are overlooked, not understood and in any case lack comparability.
However we consider that the number and content of tables recommended by the draft guidelines will not help stakeholders to easily figure out what directors' of a certain company have earned in the reported year and how their remuneration followed the performance of the company and recommend to reduce the information overload in order to enhance understandability for the addressees. In our view, three tables for the description of executive compensation plus one for the non-executive remuneration should be sufficient in order to inform stakeholders about everything necessary to understand a company’s pay system and the correlation between pay and companyperformance.
Very important in our view is the clear distinction that needs to be made throughout the report on remuneration granted for and remuneration received for a certain year.
Last but not least we strongly recommend to separate in any table used in the guidelines between non-executive and executive (supervisory board and management board members’ remuneration) as their compensation is not comparable and typically follows different rulesets.

2. Do you have any comments on Chapter 3 “Scope” of the draft guidelines?
3000 character(s) maximum

3. Do you think it is appropriate to have a clarification of the notion of “awarded or due” benefits in the guidelines and if this is so, do you consider that the explanation included in the footnote to chapter 3 “Scope” is clear enough?
3000 character(s) maximum

We consider it very important to have a very clear definition of the term “awarded or due” as stakeholders need to understand that certain parts of directors’ compensation have not yet materialised. We would wish for a clearer definition to that end.

4. Do you have any comments on Chapter 4 “Key principles” of the draft guidelines?
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No. 3: DSW considers that companies should not only report on changes to the methodology but also on changes to benchmarks and performance criteria used to measure directors' compensation. As an example we point to EBITDA being often used as a criterion for variable pay. EBITDA however is not based on a harmonised definition. So even in case a company continues to use EBITDA to measure eg. the short-term performance of its directors, the earnings development can be measured completely different year over year without this being obvious to stakeholders. DSW is of the opinion that also such changes should be disclosed by companies. In addition we are questioning the very soft wording in no. 3 and recommend to change "Where the methodology has been changed compared with a previous report, a note would be helpful to explain the change and the effect of this change" to "Where the methodology, performance criteria or a benchmark have been changed compared with a previous report, companies should explain the change and the impact of this change on directors' remuneration."
No. 4: DSW points to the fact that the hyperlink option does not work in case of reports distributed in paper format. Such paper format reports however are still requested and read by many shareholders. Also these shareholders should be provided with the opportunity to have easy and free of charge access to the linked documents that are listed in this paragraph. In addition, DSW asks to highlight that cross-references to other sections in the annual report should only be used where no individual compensation figures need to be explained. As an example we refer to the pension arrangements that may differ significantly among different directors as well as compared to employees. A (cross-referenced) pension or share scheme information in the notes to the financial statements relates to the pension arrangements or the long-term incentive of a specific director would not contribute to an easily understandable remuneration report.
No. 5: For clarification DSW recommends to add "and in absolute figures".

5. Chapter 5: Do you have any comments on Section 1 “Introduction” and Section 2 “Total remuneration of directors” of the draft guidelines?
3000 character(s) maximum

DSW supports the overall structure of the guidelines but has several remarks regarding clarity and content.
Section 1: We recommend to combine the "highlights summary" and the subsequent "more comprehensive overview". We would find it preferable if indeed only the key elements regarding directors' compensation would be described in this section to not distract the reader through lengthy other descriptions. These key elements should be ordered by importance and should include - beyond what is described in no. 2 of this section - also the following information:
- changes to methodology/performance factors/benchmarks used
- last voting outcome relating to directors' remuneration
- increase in fees due to contractual or other agreements that have not been approved by shareholders

Section 2: DSW is very concerned that the guidelines seem to mix up two different approaches in presenting directors' compensation. Table 1 is titled "Remuneration of Directors FOR the reported financial year". We understand this as any information AWARDED or GRANTED to directors FOR a specific financial year, regardless whether the director has received this compensation or not during that specific year. However, no. 2 and no. 3 in this section seem to allow companies to use table 1 (also?) to present compensation that is DUE FOR a specific year, in other words remuneration directors have RECEIVED FOR a specific year. DSW considers that publishing both data sets ("paid for" and "granted for") is very valuable for stakeholders but that these data sets need to be treated in different tables and separately in any explanatory notes:
Remuneration GRANTED FOR a certain financial year allows stakeholders to understand the cost of the company for a certain director at grant date.
Remuneration RECEIVED FOR a certain year allows stakeholders to understand how much money a director had finally earned in the reporting year from (previously) granted remuneration.
Combining both granted and actually received remuneration in one table does not enable shareholders to get a clear picture of directors' compensation, on the contrary this would be very misleading as certain compensation elements would be counted twice. We therefore urge the Commission to clearly distinguish both in the tables as well as throughout the guidelines between remuneration RECEIVED FOR a specific year and remuneration GRANTED FOR a specific year.
In addition, we see no added value in presenting compensation from undertakings of the same group in a separate table 1 BIS and suggest to recommend that companies present the overall compensation of their directors, regardless of whether it comes from group companies or the parent company, in one single table 1.
Last but not least we recommend to include the service period of directors (full year or start/end date) in table 1 instead of adding a respective note to the table.
We furthermore find that table 1/bis are designed for executive directors only. Non-executive directors normally receive different kinds of remuneration components, like for example compensation for committee memberships or attendance/meeting fees. Therefore, we suggest to divide the executive and the non-executive directors' compensation in all tables throughout the document and also throughout the guidelines and provide guidance also for non-executive board members remuneration.
No. 5 "Explanatory notes": The guidelines seem to leave a lot of flexibility in explaining deviations from or explanations to table 1 in notes. DSW is concerned that companies may make extensively use of this opportunity to the detriment of comparability and harmonisation of remuneration reports. Furthermore, we point to the fact that footnotes are often overread or not understood by readers and should therefore be avoided as far as possible (see for example https://www.siemens.com/investor/pool/en/investor_relations/Siemens_AR2017.pdf, as of p. 46 where footnotes make directors' compensation hardly understandable).

General: This explanation should - next to changes to the methodology - also include changes to performance criteria or benchmarks, see comment above.
Name of director, position: As stated above, we recommend to add the term of office of the directors to table 1 instead of adding it in form of a footnote or note. This enhances understandability and comparability.
Fringe benefits: We recommend that the nature of fringe benefits/perquisites should only be explained in a note where they exceed a certain threshold.

For further explanations to this section, see question 14, please.

6. Chapter 5: Do you have any comments on Section 3 “Share-based remuneration” of the draft guidelines?
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DSW underlines the necessity to include any share-based remuneration component in this section of the guidelines - be it a programme with a cash payout or with a payout in shares or virtual shares and welcomes that the Commission has obviously taken this approach. Share-based compensation components is the most complex compensation part and as such it is of utmost importance that stakeholders understand:
- how the programme is designed (part of the notes)
- how much remuneration under this programme may cost the company
- how much a director may at max earn under the programme over which period of time and what the downsize of the plan is.
We wish to reiterate that especially for share-based remuneration the clear distinction between remuneration granted and remuneration received needs to be followed.
Missing in the tables in our view is how many shares have been exercised during the reporting year and year -1. A respective column would have to be included in a to be added table Remuneration paid.
Last but not least DSW questions where share matching plans will be disclosed in this section and recommends that the guidelines clarify how these plans are being disclosed.

7. Chapter 5: Do you have any comments, in particular, on the valuation of share based remuneration (market value and additional value according to IFRS methodology) included in Section 3 “Share-based remuneration” of Chapter 5 of the draft guidelines?
3000 character(s) maximum

DSW considers it important that the guidelines recommend the use of a common valuation method as only this ensures at least a certain comparability across companies and Member States. We prefer for the determination of the value of share-based awards at grant date to publish the fair value accounting although we are aware that the determination of the fair value is based on certain assumptions, eg. regarding base rate and volatility of the underlying share.

8. Chapter 5: Do you have any comments on Section 4 “Any use of the right to reclaim” of the draft guidelines?
3000 character(s) maximum

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We agree with the information to be disclosed if remuneration has been
reclaimed. In addition, we suggest to add to the guidelines the recommendation
to disclose when the remuneration has been reclaimed and when it has been repaid
or when it will be repaid to the company.
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9. Chapter 5: Do you have any comments on Section 5 “Information on how the remuneration complies with the remuneration policy and how performance criteria were applied” of the draft guidelines?
3000 character(s) maximum

We question whether separating the performance information from the overall remuneration information contributes to the understandability of the remuneration report. As stated above we consider that it enhances understandability to have all necessary and meaningful information combined in two tables: one for the compensation granted and one for the compensation paid. In addition, a separate table for share-based remuneration may be warranted to further explain this complex pay component. Instead of separating the information under section 5.5 in a separate table, DSW suggests to add the minimum/target/maximum pay for each component, not only for the variable component, to table 1 in both granted and paid version. In the note section below, companies should then inform the stakeholders about the performance targets and the (ex post) target achievements – either by narrative description or in a small table.
As regards maximum award achievement, DSW would – if the Commission decides to leave table 4 as it is – recommend to
- separate minimum/target/maximum award achievement in three separate columns, not two;
- add in column 4 under c) the target achievement (in percentage); here we would like to raise the Commission's attention to the fact that target achievement does not necessarily have to be linear which makes the percentage achievement an important figure for stakeholders;
- to clarify in the explanatory notes to which point in time the award achievements relate: either to the time of grant or to the time of exercise of the share-based award? For both points in time, the information on (esp.) maximum awards is important for stakeholders to understand the current performance of a director and the potential cost under a certain programme for the company.
Variable remuneration: DSW regrets that the disclosure regarding variable remuneration (both over one year and over several years) is recommended in a limited way. We point to the positive experience with the German Corporate Governance Code model tables (https://www.dcgk.de/en/code/current-version/appendix-model-tables.html). Here, companies have to disclose all compensation elements granted for and all compensation elements received in the reporting and the previous year in two separate tables. Furthermore, and this is a very important information for stakeholders to assess the performance of an individual director, companies are recommended to disclose the potential maximum and minimum amount of each compensation component plus the target figures. With this information, stakeholders can compare the performance of directors of the same company and find out whether directors have reached their performance goals or not. We therefore recommend to build on this good expertise from Germany and add a respective recommendation to the draft guidelines.
DSW suggests that the guidelines in this section include a clear recommendation to provide for an ex-post disclosure of performance targets to enable stakeholders to understand how variable pay followed performance. Insofar we urge the Commission to go beyond their statement in no.8 of its "Key Principles".
DSW furthermore reiterates that any table in this section and the guidelines themselves need to clearly distinguish between compensation granted for and compensation received in the reporting year and year -1.

For further explanations to this section, see question 10, please.

10. Chapter 5: Do you have any comments on Section 6 "Derogations and deviations from the remuneration policy and from the procedure of its implementation" of the draft guidelines?3000 character(s) maximum

Further explanations to question 9
No. 5 “Explanatory notes”: The guidelines seem to leave a lot of flexibility in explaining deviations from or explanations to table 1 in notes. DSW is concerned that companies may make extensively use of this opportunity to the detriment of comparability and harmonisation of remuneration reports. Furthermore, we point to the fact that footnotes are often overread or not understood by readers and should therefore be avoided as far as possible (see for example https://www.siemens.com/investor/pool/en/investor_relations/Siemens_AR2017.pdf, as of p. 46 where footnotes make directors’ compensation hardly understandable).

General: This explanation should – next to changes to the methodology – also include changes to performance criteria or benchmarks, see comment above.
Name of director, position: As stated above, we recommend to add the term of office of the directors to table 1 instead of adding it in form of a footnote or note. This enhances understandability and comparability.
Fringe benefits: We recommend that the nature of fringe benefits/perquisites should only be explained in a note where they exceed a certain threshold.
Variable remuneration: DSW regrets that the disclosure regarding variable remuneration (both over one year and over several years) is recommended in a limited way. We point to the positive experience with the German Corporate Governance Code model tables (https://www.dcgk.de/en/code/current-version/appendix-model-tables.html). Here, companies have to disclose all compensation elements granted for and all compensation elements received in the reporting and the previous year in two separate tables. Furthermore, and this is a very important information for stakeholders to assess the performance of an individual director, companies are recommended to disclose the potential maximum and minimum amount of each compensation component plus the target figures. With this information, stakeholders can compare the performance of directors of the same company and find out whether directors have reached their performance goals or not. We therefore recommend to build on this good expertise from Germany and add a respective recommendation to the draft guidelines.
DSW suggests that the guidelines in this section include a clear recommendation to provide for an ex-post disclosure of performance targets to enable stakeholders to understand how variable pay followed performance. Insofar we urge the Commission to go beyond their statement in no.8 of its “Key Principles”.
DSW furthermore reiterates that any table in this section and the guidelines themselves need to clearly distinguish between compensation granted for and compensation received in the reporting year and year -1.
Extraordinary items: The guidelines should recommend that an explanation is provided whenever non-recurring remuneration has been awarded or paid in the reported financial year.
Pension expenses: DSW sees no added value in naming the pension arrangement (defined benefit). Preferable would be recommending an explanation of the pension arrangement(s) including if pensions have a variable part or not. In addition, DSW urges the Commission to further recommend requiring companies to disclose the service cost recognised in accordance with IFRS in the reported fiscal year and year -1.
Next to the pension obligations for the company (cost for the company) it is – inversely to other remuneration components – furthermore a valuable information for stakeholders how much directors will receive (gain for directors) upon retirement. This pension entitlement in our view should also be included in the report. Furthermore, DSW considers it relevant to get information on the duration of pension commitments and whether arrangements for descendants etc. exist. We recommend to add this information to the notes.
Proportion of fixed and variable remuneration: Again, DSW wants to reiterate that the guidelines need to clearly state the relation of fixed to variable pay

both for remuneration granted and for remuneration paid. To avoid distortions we suggest to exclude extraordinary items (column 3) from the calculation of this proportion.

11. Chapter 5: Do you have any comments on Section 7 “Comparative information on the change of remuneration and company performance” of the draft guidelines?
3000 character(s) maximum

DSW asks for clarification whether the information to be added in table relates to remuneration granted for or received for the reported financial year and in the preceding five years. According to our understanding, that figure should be encouraged to be used that provides for the highest comparability to employees' compensation. We consider this would be the remuneration received for the reported year as this reflects in our view the remuneration model of the majority of employees aside of directors.
We are not in favour of annualising a director's remuneration where he or she does not hold its mandate throughout the full financial year as this does not reflect the full cost for this specific director and may lead to distortion in comparing the board's compensation to that of the employees. Also in a situation where a director changes position within the board (ordinary executive board member becomes CEO) during the financial year only the actual cost paid to him or her should be used for comparison in this table. The notes should however explain these specificities.
Company performance: Here, the guidelines should state clearly whether the information relates to the net profit/loss for the company or for the entire group. As we recommend regarding the disclosure of employees' remuneration, also here DSW suggests that the guidelines recommend the disclosure related to the whole group.
Furthermore, DSW suggests that the guidelines add a recommendation that companies should – next to the net profit/loss – publish their specific key performance indicator/s (KPI/s) and their annual changes.
We additionally ask for clarification how many financial and non-financial metrics are expected to be displayed. Where companies may have more than 4 or 5, this table quickly can become meaningless for its readers. Furthermore we ask for clarification whether also individual metrics are expected to be included in this table.
Average remuneration of directors vs. employees: We note that the Commission has restricted the information on employees to what is required by the Shareholder Rights Directive II, i.e. to the employees of the company itself. While we would have preferred the disclosure of average employee figures from the whole group, we note that the Commission has taken our concerns on board insofar as it has added at least the suggestion to extend this information to all employees of the entire group where companies find it more meaningful or informative. We recommend that in the notes to this table the guidelines recommend to add numeric information on the number of FTEs considered for this table (e.g. all FTE at the end of the reporting year or all FTE averaged during the reporting year of the company/the entire group) to allow for a minimum of comparison of the disclosed figures.
Furthermore, DSW questions whether the comparison of a certain director's compensation to the average employees' compensation brings any added value for stakeholders. Insofar we suggest to add a line to this table where the average directors' compensation is displayed and can be compared with the average employees' figure.
Especially in this table we recommend to clearly distinguish between executive and non-executive directors remuneration (management and supervisory board members). As the compensation of non-executives normally is significantly lower than that of executives, combining both figures would lead to distortions.

12. Chapter 5: Do you have any comments on Section 8 “Information on shareholder vote” of the draft guidelines?
3000 character(s) maximum

13. Do you have any comments on Chapter 6 “Transitional regime (first reporting years)” of the draft guidelines?
3000 character(s) maximum

DSW considers that the transitional regime is not necessary and that companies should not be enabled to not publish the full set of information as soon as the Shareholder Rights Directive II gets into force.

14. Do you have any additional comments on the draft guidelines as a whole?
3000 character(s) maximum

Further explanations to question 5
Extraordinary items: The guidelines should recommend that an explanation is provided whenever non-recurring remuneration has been awarded or paid in the reported financial year.
Pension expenses: DSW sees no added value in naming the pension arrangement (defined benefit). Preferable would be recommending an explanation of the pension arrangement(s) including if pensions have a variable part or not. In addition, DSW urges the Commission to further recommend requiring companies to disclose the service cost recognised in accordance with IFRS in the reported fiscal year and year -1.
Next to the pension obligations for the company (cost for the company) it is – inversely to other remuneration components – furthermore a valuable information for stakeholders how much directors will receive (gain for directors) upon retirement. This pension entitlement in our view should also be included in the report. Furthermore, DSW considers it relevant to get information on the duration of pension commitments and whether arrangements for descendants etc. exist. We recommend to add this information to the notes.
Proportion of fixed and variable remuneration: Again, DSW wants to reiterate that the guidelines need to clearly state the relation of fixed to variable pay both for remuneration granted and for remuneration paid. To avoid distortions we suggest to exclude extraordinary items (column 3) from the calculation of this proportion.

Final general remark
Last but not least, DSW suggests to clearly separate tables for executive and non-executive (or management and supervisory) board members, also in table 5. Their compensation components follow completely separate rules and are currently not published together in any Member State, as to our knowledge. The guidelines should therefore suggest two different sets of tables for these different kinds of board members. For non-executive directors, all remuneration elements (at least base salary, committee fees, attendance bonuses, variable short- and or long-term compensation, fringe benefits) should be disclosed separately, too.

Contact

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