



12 February 2019

BUSINESSEUROPE POSITION PAPER ON DRAFT REMUNERATION GUIDELINES IMPLEMENTING SHAREHOLDERS RIGHTS DIRECTIVE (SRD)

I. INTRO

Following its participation in the European Company Law Expert Group meeting of 29 January 2019 which was dedicated to the draft guidelines on remuneration (implementing the shareholders' rights directive), BUSINESSEUROPE would like to submit its written comments on the future guidelines.

II. KEY MESSAGES

- ✓ BUSINESSEUROPE supports the key principle that the guidelines shall be non-binding in nature and not effectively broaden the disclosure requirements in the Shareholders Rights Directive (SRD). Any other approach would be a violation of the legal basis for the guidelines.
 - The guidelines should aim to help and guide companies on how the information required by SRD could be presented in a clear and understandable way taking into account the great variety of companies that need to comply with SRD, the different national settings, national corporate governance codes and the intended flexibility offered to companies by the non-binding nature of the guidelines.
 - Any information that is not a legal requirement stemming from the SRD is voluntary which means it should be left for the markets to decide (e.g. internally by companies, between the companies and their stakeholders, via national corporate governance codes or other non-binding guidelines). Therefore, if any voluntary information is included in the guidelines it must be made clear that companies remain free whether to include it in the remuneration report.
 - To encourage some degree of standardized presentation without violating the above principles, the guidelines should generally set out options, principles and/or objectives for companies (a flexible framework) rather than prescribing a very specific presentation. Where only one option or example is presented, it should be made clear that other options could also serve the purpose.
 - The guidelines could give special focus to some of the key legal requirements of the SRD which give rise to practical uncertainty, e.g. "awarded or due" in relation to pension or termination pay.



- ✓ BUSINESSEUROPE supports the key principle that the guidelines should not require unnecessary duplication of information. Cross-references should therefore be encouraged, where appropriate.
- ✓ The guidelines should not put pressure on companies to disclose more detailed information than required by the SRD or to reveal business sensitive information. E.g. the description of “confidentiality” in the COM discussion paper of 14 January 2019 gives the impression that companies have less flexibility on the level of detail to disclose than what is set out in the SRD.
- ✓ BUSINESSEUROPE is of the opinion that stakeholders should have an opportunity to be consulted on the draft guidelines.

III. **SPECIFIC COMMENTS to the COM discussion paper**

a) Achieving some degree of standardized structure

BUSINESSEUROPE sees added value in the guidelines setting out a frame for the order of presentation (structure) to encourage a more standardized presentation, but any such frame would need to be flexible (set out options) and make clear that other ways of presentation could also fulfil the requirements of the SRD.

b) Presentation of graphical information and/or verbal narratives

BUSINESSEUROPE agrees that at least some of the required information could often benefit from being presented graphically. However, there are many techniques of presenting information in a “clear and understandable” way, “providing a comprehensive overview”, and in relation to the information required by Article 9b(1)(b) “presented together in a manner which permits comparison”. The guidelines should therefore not present “tables” as the only way of showing information graphically. Tables can be used as an example, but it must be made clear that other ways can be just as good, e.g. circle or bar graphs.

The same applies to verbal narratives as an alternative or supplement to graphical presentations. Verbal narratives can add value or in some cases make a graphical presentation unnecessary, but it all depends on how self-explanatory the graphical presentation is or how clear the verbal narrative is. The guidelines could guide on what *could* be a good presentation but must make the necessary reservations about alternatives and highlight that the above-mentioned principles from the SRD are ultimately what needs to be complied with.

One way of guiding on the possibility to add verbal narratives as a supplement to graphical information could be to say that verbal narratives *should* be added “*where it is necessary to understand the information given in a graphical presentation*”. Apart from this situation it should be made clear that verbal narratives are voluntary but *could* be added where it “adds value” for the stakeholders.



c) Roles of directors

Differing remuneration arrangements often apply to directors with different functions (most notably executive and non-executive board members), and therefore such information, where applicable, should be provided in a manner which allows to distinguish and assess the remuneration of different (groups of) directors.

d) Confidentiality and the level of detail in the disclosure

Some of the language used in the section on confidentiality in the discussion paper from 14 January, might lead to the interpretation that disclosure of all detailed elements of the director's pay, the performance criteria, the performance achieved etc. are legal requirements stemming from the SRD, with a narrow possibility to exclude business sensitive information. In our view this is not an accurate reflection of the SRD. Instead, the directive requires clarity and transparency about the remuneration policy and the report intentionally leaving some flexibility to the individual companies and their shareholders as to the actual level of detail. This serves primarily to preserve a level of confidentiality necessary to protect companies' position against their competitors as well as to protect the privacy rights of directors.

For instance, it is clearly stated in recital 29 that the remuneration policy "*can be designed as a frame*" within which the pay of directors is to be held. This principle of flexibility applies to all the requirements to the remuneration policy, e.g. the requirement in Article 9a(6), sub para 3, to "indicate the financial and non-financial performance criteria".

Also, the SRD's requirements of the remuneration report are formulated with a good level of flexibility, e.g. in Article 9b(1)(a), which states that the report shall contain "*information on how the performance criteria were applied*". It does not say "shall contain the performance criteria applied".

On top of this, recital 45 of the SRD stresses that the directive's transparency requirements, including those regarding the remuneration policy and report, "*are not intended to require companies [...] to disclose [...] information the disclosure of which would be seriously prejudicial to their business position [...]*".

The guidelines should therefore loyally reflect that the SRD provides individual companies and their shareholders room for flexibility as to the level of detail in the reporting requirements – and on top of this, should never be obliged to disclose business sensitive information.

In practical terms, most business sensitive information will often be related to performance criteria, performance achieved etc.; which makes it paramount that such information should be handled with care.

It is true that some information can be less sensitive to disclose *ex post* than *ex ante*. However, the guidelines should be very careful to recommend anything on *ex post* disclosure since this is – for several reasons - not a legal requirement in SRD.



Therefore, in addition to the above, the following considerations should be taken into account when drafting the guidelines:

- The legal requirement in the SRD is not full disclosure of every detail. Requiring companies to state the reason “*justifying the omission of the detailed specific information*” cannot be based on the SRD.
- Ex post disclosure can also be business sensitive. It is not always possible “to indicate when” business sensitive information will no longer be sensitive.
- Ex post disclosure is not covered by the SRD at all. Article 9b specifically says: “comprehensive overview of the remuneration [...] awarded or due *during the most recent financial year*”. Recommending companies to provide supplementing details about other financial years, sometimes perhaps several years back, cannot be based on SRD.

Companies could of course decide to provide such information voluntarily, which could develop into a best practice, but the guidelines must distinguish between SRD-requirements and other (non-legally binding) information.

We should be careful that too detailed reporting requirements end up directing companies to structure their remunerations in a similar kind, and not in a way that promotes the individual company or, in the prolongation, the European economy. If the information becomes too detailed there is also a risk of a race to the top with directors in companies not wishing to remain in the lower tier.

e) Hypothetical payments

In accordance with Article 9b of the SRD, hypothetical pay which is not “awarded or due” during the most recent financial year should not be included in the guidelines. The remuneration policy sets out the potential for hypothetical payments.

However, it is important that there is some guidance on what is covered by “awarded or due”. Uncertainty seems mainly to be related to pension and termination pay. Guidance should be aligned with market practices.

f) Share buybacks

Share buybacks should not be part of the guidelines as they have no legal basis in the SRD. Share buybacks are a normal corporate action just like share increases, share reductions, dividend payments etc. which can all influence the value of shares and therefore potentially indirectly also influence executive pay, but they are strategic, financial decisions with no connection to decisions on executive pay.

g) Comparative information on the average pay of employees - “company” or “group”

The guidelines should remain within the legal remit of the SRD, which explicitly says “the company”. Some companies will voluntarily want to go further and report on group level, e.g. worldwide or on the part of the group employing workers in the same country as the



listed company. The guidelines should leave it to the individual company to decide whether to report on company level, group level or a restricted group level, depending on what the company believes makes most sense and where the company has good data quality.

h) The start of the 5-year comparison

SRD is silent on whether companies are required to report five years back already from 2020 (i.e. going back to 2016) or only report five years back when 2020 will be the first year in the comparison. BUSINESSEUROPE believes that since the SRD does not regulate this, companies should not be required to report five years back already from 2020. It should be taken into account that it can be very difficult or even impossible to report meaningfully about a time period before the SRD came into force, because reporting systems simply had not been set up for that purpose at the time.

i) Verbal summary on the performance and key events

There is no legal basis in the SRD for requiring companies to insert a verbal summary on the performance and key events of the company under the financial year in the remuneration report. Therefore, the guidelines should not comprise it. Such information belongs to and is already reported in the quarterly reports. A requirement to include a verbal summary in the remuneration report would go against the key principle that “the guidelines should not require unnecessary duplication of information that has already been provided”.

j) Presentation of information on market value of share-based remuneration: at the time of award or time of vesting

On this specific issue, several members indicated that the remuneration report in Article 9b of the SRD should preferably present the value of share-based remuneration according to accounting standards (IFRS).
