



21 March 2019

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

I. INTRO

Following its participation in the European Commission Company Law Expert Group meeting of 29 January 2019 and subsequent written comments on the principles of the future guidelines, BUSINESSEUROPE would like to respond to the above consultation on the draft guidelines.

II. KEY MESSAGES

- ✓ BUSINESSEUROPE welcomes the fact that several of its concerns and suggestions have been taken into account, namely:
 - It has been **made clearer** that:
 - the guidelines are **non-binding**,
 - **companies are free to use alternative information methods**,
 - the need for **narrative information depends on the information given** in tables/graphics and vice versa,
 - and some **cross-referencing is encouraged**.
 - Mentioning of details such as “*hypothetical payments*” and “*share buy backs*” has been dropped from consideration, “*ex post disclosure*” is explicitly mentioned as voluntary and more emphasis is generally put on the actual SRD legal requirement to present only what is “*awarded or due*” to directors in the “*most recent financial year*”.
 - Clarity on the fact that **comparative information** on the average pay of employees only needs **to be made for the “company” while group level reporting is voluntary** – and clarity that there is a **transitional regime** for the first reporting years.
- ✓ However, on other points BUSINESSEUROPE **regrets that in many sections of the draft guidelines there is content that is clearly not a legal requirement in the SRD**. This is in contradiction with the legal basis and risks confusing companies and stakeholders on which are legal requirements, and which are voluntary information initiatives. This content should **be either deleted or at least be clearly labeled** as non-SRD-requirements.



- ✓ For reporting requirements covered by the SRD, the non-binding nature of the guidelines would **suggest more frequent use of the word “could” rather than “should”**. This type of language is even more relevant when the guidelines go beyond SRD requirements.
- ✓ The guidelines should loyally reflect the flexibility in the SRD regarding the level of detail in the remuneration report. This is currently not the case, especially as regards **disclosure of performance criteria**.

III. **SPECIFIC COMMENTS to the draft guidelines**

The disclaimer Box “Important”

BUSINESSEUROPE supports stressing upfront that the guidelines are non-binding and do not create any new legal obligations, and to the extent the Communication interprets the SRD it is without prejudice to the interpretation of the ECJ.

Chapter 2 - Purpose

BUSINESSEUROPE would suggest to make the interests of the reporting companies more prominent.

In its present form, the interests of companies are presented as secondary to the interests of investors and even employees. The aim of the remuneration report is first and foremost to provide transparency on the actual remuneration in the *individual* listed company, hold directors accountable and give the shareholders of the individual company the means to oversee the implementation of the remuneration policy. The demand for comparability between the reports of different companies is a legitimate, but secondary interest from some shareholders and investors, in particular in the case of cross-border investments (cf. SRD recital 49). However, the interests of the individual reporting company remain very relevant also in that context.

Chapter 4 – Key principles

4.4. Cross references

BUSINESSEUROPE can agree in principle that the report should be self-standing in relation to the information required by the SRD. However, since the draft guidelines include various information items that are not required by the SRD, without expressly saying so, it becomes unclear which information the recommendations on cross-referencing apply to. For example, there is no legal requirement in the SRD to have an introduction to the remuneration report as recommended in chapter 5.1 of the guidelines.



We agree that any cross-referencing should be made with hyperlinks to sources that are immediately available. If the hyperlink directs you directly to the right place we do not find it necessary to require “a search function”.

4.6. Narrative information and tables

BUSINESSEUROPE supports the new wording that “narratives are encouraged where they facilitate the understanding of the reported information”.

BUSINESSEUROPE also supports that “graphics” is mentioned together with “tables”. However, elsewhere the guidelines still say that part of the report should consist of specific tables. Although it is already sufficiently clear that the guidelines are non-binding, BUSINESSEUROPE thinks it should be explicitly stated that companies are free to present the information in any other graphical way, if it is just as clear as in a table.

4.8. Confidentiality

BUSINESSEUROPE supports the explicit mentioning of the recital about confidentiality in the SRD, but we still believe the overall description in section 4.8, when in combination with the requirements in Chapter 5.5, is not a loyal reflection of the legal requirements in the Directive. See more on this in our comments to section 5.5 below.

Although the wording “*When companies find it meaningful, ex post disclosure of performance targets could be provided.*” makes it clear that this is not a legal requirement, BUSINESSEUROPE would prefer its deletion. It seems paradoxical to include *ex post* disclosure in a report about “the most recent financial year”. If companies choose voluntary *ex post* disclosure, they should also be free to decide how and where to disclose it.

Chapter 5 - Standardised presentation

5.1. Introduction

The SRD generally requires the remuneration report to include the information mentioned in sections 5.2 to 5.8, although as indicated below some specific information mentioned in these sections goes beyond SRD requirements.

There is no requirement in the SRD to make an introduction to the presentation of the mandatory information. We do not contest potential added value of doing so, but that would depend on how the mandatory information is presented, how complex it is and on the priorities of the company and its specific stakeholders.

The guidelines should therefore make clear that any introduction is voluntary, offer guidance on the situations in which an introduction could add value (see above), and give more emphasis to flexibility in stating that companies *could* (not should) choose to include in an introduction.

Information about the general performance and events of the company is already to some extent required under chapter 5.5 (information on how total remuneration complies



with policy and how performance criteria were applied) and 5.7 (five-year comparison with company performance). Further information can of course be given in an introduction and many companies will probably do so, but it will not always be necessary. If further background information is voluntarily given it should obviously be possible to use cross-referencing to existing documents where relevant information is already available.

5.1.2. and 5.1.3

Where the remuneration report is complex, we agree that a brief highlights summary could add value, but we find the description of what the highlights summary should include too prescriptive.

We also find it too prescriptive to say that a summary of the highlights “should” be followed by “*a more comprehensive overview where the company can present further and more detailed information about the most relevant facts and developments in the performance and business environment as well as the major decisions that may have affected the remuneration in the reported financial year*”.

It would be more appropriate to suggest that companies *could* include in the introduction “*the most relevant factors influencing the executive remuneration in the financial year and any other information necessary to understand the remuneration report*”.

It is currently recommended to include in the introduction: “*To the extent applicable, the company may in this part also explain in more detail e.g. how the vote or the views of shareholders on the remuneration report of the most recent financial year were taken into account.*”. This information, however, is also recommended to be included in point 5.8, without any cautioning that the same information should not be given twice.

BUSINESSEUROPE agrees that some of the information in points 5.2-5.8 could sometimes be more appropriate to include in an introduction, instead of in a separate section, if the company chooses to have an introduction. This could be the case for the information in 5.4 (use of reclaim), 5.6 (derogations) and 5.8 (shareholder vote/views), especially if there is not much to report on these issues. Therefore, the guidelines should allow flexibility on these issues. For the information required by 5.2, 5.3, 5.5 and 5.7, it makes more sense to recommend separate sections and a specific order of presentation.

5.2 Total remuneration of directors

5.2.2

BUSINESSEUROPE supports the guidelines saying explicitly that presenting the same information also for the financial year before the financial year covered by the SRD requirements is voluntary (wording “*may also present*”).

However, there is no legal basis in the SRD to also require that “*the table should include the information necessary to allow a comparison on the respective remuneration and pension expense for the previous financial year*”. Many companies will probably voluntarily do so, but it is not a legal requirement and therefore should not be presented



as one. Shareholders can easily find that information in the previous remuneration report, if the company does not voluntarily present it again in the new report.

5.2.5.

The explanatory notes to Table 1 and Table 1 BIS are generally very helpful.

We support the flexibility provided by saying that the information on remuneration received from the same group could either be presented separately in Table 1 BIS or in a note to Table 1.

The item “fringe benefits” should perhaps be deleted as it is not a legal term used under the SRD. It is incorrect to refer to work-related travel as benefit. It is a cost and not part of the remuneration.

Due to the drafting the multi-year variable pay reporting requirement seems to capture both awards made and due which is not the intent as this can result in a double count.

5.3.4. Share-based remuneration

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). Creation of a parallel system of valuation would be costly and confusing.

5.5. Information on how the remuneration complies with the policy and how the performance criteria were applied

As for “information on how the performance criteria were applied”, the guidelines suggest a level of detail that goes beyond the legal requirement in the SRD. There is a difference between [1] “information on how the performance criteria were applied” (the legal requirement in the SRD) and [2] disclosure of every detailed performance target and measured performance, except where such disclosure would be seriously prejudicial to the company (the approach which seems to be intended in the draft guidelines).

Companies are free to choose the highest level of detail as seems to be suggested in the draft. On the other hand, companies should not be pressured by the guidelines to disclose information that is detrimental (not just seriously prejudicial) to the interests of the company and therefore also detrimental to its shareholders, employees and other stakeholders. Some of the language in section 5.5 (and 4.8) should be changed to more loyally reflect the flexibility in the level of detail provided by the SRD.

The requirement to publish the details of the performance contracts of directors and its fulfillment could potentially lead to the publication of the company’s business strategy. Therefore, this requirement should be restricted to a generic description of the performance criteria only.



Care should be taken not to create a situation where too detailed reporting requirements end up directing companies to structure their remunerations similarly, and not in the way that promotes the individual company and, in the long run, the European economy.

5.5.2.

It is currently said that “*the Report should explain how the remuneration during the reported financial year has complied with the remuneration policy and contributed to the (specified) long-term interests and the sustainability of the company*”.

We do not understand why “(specified)” has been added and what the legal basis is for adding it. It is a requirement in the SRD, Art. 9a, that the remuneration policy shall explain how it contributes to the company's long-term interests. But that is not the same as requiring the company to specify what its long-term interests are.

5.5.4.

BUSINESSEUROPE appreciates the acknowledgement that the nature and/or complexity of performance criteria can make it more meaningful to give information as a narrative or a combination of table-based and narrative information.

5.5.5.4 Measured performance and actual award outcome

This column suggests a level of detail beyond the SRD. This should be addressed (deletion or clarification).

5.7. Comparative information

BUSINESSEUROPE supports the clarification that only “company” level information is legally required regarding the average remuneration for FTE’s, and that “group” level information is voluntary. Since anything else than company level is voluntary, it could also be foreseen that some companies would report – not on a full group level – but on a more restricted group level, e.g. for the employees of the group working in the same country as where the company is situated. The guidelines might therefore use more flexible wording than referring only to either “company” or “entire group”.

The SRD does not require the five-year comparison to include the total remuneration of the current financial year, because it is not the purpose of the comparison. Moreover, this information is already given in Table 1. We therefore disagree that copying this information also in to Table 5 is “necessary to ensure a meaningful comparison”. Suggesting that companies *could* add this information is more appropriate.

Comparisons should only begin with the actual implementation of the directive and should not date back to the years before 2019/20.

BUSINESSEUROPE supports the clarification about which directors are covered by the comparison requirement.

Making a statement that the information on company performance should “*relate on the net profit and loss*” can be misleading and simplistic. The directive itself states in Recital 29 that the remuneration policy should contribute to the business strategy, long-term



interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives. Thus, the application of short-term indicators such as net profit and loss should be deleted. In our view, there will be no information gap as net profit and loss are published in the annual financial report anyway. Furthermore, figures on net profit or loss do not necessarily represent the full situation of the company. Also, requiring companies to justify why there is a change of methodology on the performance is not a legal requirement according to the SRD.

It should be clarified that presenting annual change in percentages or in absolute number is not a legal requirement and therefore recommending both approaches to be used by the company is not convincing.
