

FINNIUS

Gender-neutral remuneration policies – inclusion in regulatory law

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 7 MINUTES

For those of you who have missed it, March 15 was Equal Pay Day. This day was dedicated to equal pay for men and women, but was also intended to indicate how many months women in 2022 need to earn what men earned in 2021: 14.5 months. According to the American organization equalpaytoday.org.

Equal pay for men and women is also a hot topic in (European) regulatory law. Since the implementation of the Fifth Capital Requirements Directive (CRD V) in December 2020 and the Investment Firm Directive (IFD) in October 2021, institutions' remuneration policies must be gender-neutral. Although CRD V and IFD refer to, respectively, banks and investment firms, the Dutch legislator has opted for a broader scope of application and has included the requirement of a gender-neutral remuneration policy in the part of the Financial Supervision Act (Wft) that relates to all financial institutions.^[1] With regard to the interpretation of the requirement of a gender-neutral remuneration policy, there is still some ambiguity. What is a gender-neutral remuneration policy? How is it determined and do institutions know when it is met? I have listed a number of starting points.

Zeitgeist

The requirement for gender-neutral remuneration policies is entirely in keeping with the current zeitgeist, in which diversity is no longer absent from board cultures and gender neutrality in general is a very hot topic. A 2020 report by the European Banking Authority (EBA) reported that only 8% of CEOs of European banks and investment firms are women and only one-fifth of positions on the boards of Europe's largest banks are held by women.^[2] Frank Elderson, Vice-President of the Supervisory Board of the European Central Bank (ECB) and Elizabeth McCaul, Member of the Supervisory Board of the ECB, wrote in their blog in mid-2021 that although more women are being appointed, it is still too slow.^[3] In line with the desire for more women at the top, equal pay is not a crazy goal.

Thus, in the Netherlands, the requirement for a gender-neutral remuneration policy applies to all financial institutions, regardless of size. The legislator says about this:

“The new requirement will apply to all financial institutions that have remuneration policies in place, as the measure is introduced on a generic basis. Moreover, the requirement follows from the principle of equal pay for male and female employees as laid down in Article 157 of the Treaty on the Functioning of the European Union, so it may be assumed that the remuneration policies of financial institutions already comply with it.” ^[4]

What is a gender-neutral remuneration policy?

For the interpretation of the concept of gender-neutral remuneration policy, the explanatory notes to the Wft and the IFD refer to CRD V.^[5] CRD V defines 'gender-neutral remuneration policy' as

follows:

“Gender-neutral remuneration policy” means a remuneration policy based on equal remuneration of male and female employees for equal or equivalent work.”

This definition is very limited and still raises many questions: what is ‘equal pay’, what is ‘equal or equivalent work’, and how to deal with workers who cannot be defined as male or female?

EBA Guidelines for Sound Remuneration Policies

The EBA’s revised Guidelines on Sound Compensation Policies, effective December 31, 2021, dwells extensively on gender-neutral remuneration policies.^[6] In it, the EBA refers to the principle of equal pay for male and female employees for equal work or work of equal value as set forth in Article 157 of the Treaty on the Functioning of the European Union (TFEU). Remuneration policies should not discriminate between men, women and ‘diverse genders’. By adding ‘diverse genders’ the EBA goes further than CRD V. It is not clear what exactly is meant by ‘diverse genders’. In fact, the EBA wants to leave this open:

“While the TFEU and CRD do not specify a diverse gender, many Member States have implemented such gender to ensure that there is no discrimination of e.g. transgender persons. The principle of gender neutrality should apply to all genders. There is no other effective option that avoids gender discrimination of any kind.”

The revised guidelines further stipulate that institutions should properly document the value of a particular job or position, e.g., in job profiles and make it clear which jobs (or seniority) have an equal value, e.g., in a classification system. The criteria used for this purpose should be applied in the same way for all employees.

Specific attention is paid to the ‘gender pay gap’. This is the difference between the average gross hourly wage of men and women expressed as a percentage of the average gross hourly wage of men. Institutions should identify and monitor the gender pay gap for ‘identified staff’, members of the management board, members of the supervisory board and other employees. The gender pay gap does not take into account factors such as part-time employment, career breaks, type of job and forms of remuneration other than salary. In this sense, the gender pay gap only shows change or progression of a given gender-neutral remuneration policy. Institutions provide information on the gender pay gap to DNB. DNB uses this information to benchmark developments and practices in the field of remuneration. DNB also notifies the EBA of this information.^[7] It is striking that the information relating to the gender pay gap does not (yet) have to be made public, e.g. in an annual report or on the website of an institution.

Other leads

There are two other guidelines that pay broad attention to diversity and gender neutrality. Both guidelines are also applicable since the beginning of 2022.

The EBA's revised internal governance guidelines^[8] require that all necessary measures be taken to prevent any form of discrimination. Discrimination in these guidelines includes equal opportunities for all employees regardless of gender. The guidelines stipulate that all of an institution's policy documents, including the remuneration policy, policies regarding training and education, policies aimed at internal vacancies, etc., should be gender neutral.^[9]

The EBA and ESMA's revised guidelines on reliability and suitability requirements for members of the management body and key function holders^[10] call on institutions to ensure appropriate representation of all genders within the management body, without setting a minimum representation threshold. Thus, it is not the case that – in regulatory law – there is a minimum requirement of men or women on the board of an institution.^[11] However, this call in combination with a gender-neutral remuneration policy does lead to more balance in the management and/or supervisory body.

It is important to always keep in mind that the EBA and ESMA guidelines in principle apply to banks and investment firms. For the interpretation of a gender-neutral remuneration policy by other institutions, the criteria elaborated in these guidelines do not apply in principle. However, since the standard of a gender-neutral remuneration policy in the Wft is an open standard and the legislator refers in the explanatory memorandum to CRD V for the interpretation thereof, it would not surprise me if DNB and the AFM also look at these guidelines in the case of smaller institutions.

Finally, institutions can take inspiration from the European Commission's proposal for a directive to strengthen the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency and enforcement mechanisms.^[12] This directive aims to uncover unconscious gender bias in pay and job evaluation systems by promoting remuneration transparency, but also includes extensive explanations and definitions of key concepts such as 'equal or equivalent work'.

In (very) short

Diversity and gender neutrality are not only an integral part of the social debate, but also play a important role in regulatory law. A new element is the gender-neutral remuneration policy. When drawing up their policies, institutions will have to make sure that their job profiles, classification systems and remuneration do not make a distinction between men, women and 'diverse gender'. In addition, institutions will be required to identify and monitor the gender pay gap. By the end of 2023, the EBA will report on institutions' implementation of gender-neutral pay policies. To be continued.

^[1] Article 1:117, first paragraph, Wft.

[\[2\] EBA report on the benchmarking of diversity practices.](#)

[3]

<https://www.bankingsupervision.europa.eu/press/blog/2021/html/ssm.blog210615~31020cb68d.co.uk.html>

[4] See *Parliamentary Papers* 2019 – 2020, 35 559, no. 3, p. 24.

[5] See *Parliamentary Papers* 2019 – 2020, 35 559, no. 3, p. 32 and article 3, first paragraph (12) IFD.

[\[6\] EBA Final report on Guidelines on sound remuneration under CRD.](#)

[7] See Article 75 CRD V.

[\[8\] EBA Final report on Guidelines on internal governance under CRD.](#)

[9] See under 101 of the EBA Internal Governance Guidelines.

[\[10\] EBA and ESMA Final GL on the assessment of suitability of MB members and KFH.](#)

[11] With effect from January 2022, Section 2:142a of the Dutch Civil Code requires that, in the case of listed companies, at least one-third of the supervisory board must consist of women and at least one-third must consist of men. An AMvB is currently pending in which large companies will be required to report in their management report on (among other things) the male-female ratio on the management and supervisory boards.

[12] <https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52021PC0093&from=NL>. This proposal is currently being discussed in the European Parliament.

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