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Press and Information

Advocate General's Opinion in Case C-507/13
United Kingdom v Parliament and Council

# Advocate General Jääskinen considers that the EU legislation limiting the ratio of bankers bonuses compared to their basic salary is valid

*Imposing a fixed ratio for bonuses in relation to the basic salary does not limit the total amount of pay*

Following the global financial crisis in 2008, the EU adopted a broad range of measures designed to enhance the regulation and stability of its financial institutions. During the discussions surrounding the adoption of these measures it was considered that the design of the remuneration schemes within these institutions was one of the major contributors to the crisis. Often involving sizeable bonus pay-outs in comparison to salaries, this encouraged employees to engage in excessive risk taking in order to share in the banks' short term profits, but not in the cost of their failures which, in the most serious cases, were borne by the taxpayer. The "Capital Requirements" package of legislation adopted in 2013 by the Council and the Parliament (known as the CRD IV Package and composed of a Directive[1] and a Regulation[2]) therefore included a series of measures to regulate this matter.

The CRD Directive includes a provision that imposes a set ratio between the fixed remuneration (basic salary) and variable remuneration ("bonus") for individuals whose professional activities impact on the risk profile of their financial institutions. The directive stipulates that these employees cannot be paid bonuses in excess of 100% of their basic salary, or 200% if Member States decide to confer this power on shareholders, owners or members of these financial institutions. The directive also confers the power on the European Banking Authority (EBA) to draft regulatory technical standards specifying the criteria used to identify individuals who would fall within the scope of the directive.

For its part, the CR Regulation calls for compulsory disclosure by financial institutions of the ratio outlined in the directive, and the number of individuals being remunerated over a certain threshold. It also requires these institutions to disclose information about the total remuneration of each member of their management body or senior management should this be requested by the Member State or the competent authority.

The United Kingdom brought an action asking the Court to annul these particular provisions of the directive and regulation. The UK believes that the measures fixing the ratio of variable to fixed remuneration could not be adopted using the Treaty provisions concerning the freedom of establishment and the freedom to provide services (Article 53(1) TFEU) but fall within the realm of social policy and as such within the competence of the Member States. The UK also argues that the provisions infringe the principles of proportionality and subsidiarity, that the directive violates the principle of legal certainty, that the conferral of powers to the EBA is illegal, and that the regulation's measures requiring disclosure of remuneration infringes the right to privacy and data protection rules.

[1] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing directives 2006/48/EC and 2006/49/EC, OJ 2013 L 176, p. 338.
[2] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176, p.1.

In his Opinion today, Advocate General Niilo Jääskinen suggests that all the UK's pleas should be rejected and that the Court of Justice dismiss the action.

As regards the principal argument of the UK, that the measures were adopted using an incorrect legal basis, the Advocate General notes that the Court has already held that measures aimed at promoting the harmonious development of the activities of credit institutions throughout the EU by eliminating any restrictions on freedom of establishment and freedom to provide services, while increasing the stability of the banking system and the protection of savers, can be based on Article 53(1) TFEU.[3] Given that the variable component of remuneration impacts directly on the risk profile of financial institutions, it can affect the stability of financial institutions who can operate freely across the EU, and in consequence that of the financial markets of the EU. As such, the measures challenged by the UK are related to the conditions of access to and pursuit of activities of financial institutions in the internal market.

As to whether these measures should be considered to fall within the realm of social policy, the Advocate General accepts that the determination of the level of pay is unquestionably a matter for the Member States. However, fixing the ratio of variable remuneration to basic salaries does not equate to a "cap on bankers bonuses", or fixing the level of pay, because there is no limit imposed on the basic salaries that the bonuses are pegged against. The 100% ratio introduced by the legislation can attach to any sum of money that a bank is prepared to pay by way of fixed salary. The fact that this ratio can be increased to 200% or fixed at a rate lower than 100% by the Member States underscores the absence of any "capping" effect. As there is no legal limit to the basic salary that can be paid there is no limit to the total level of pay.

In response to the UK's argument that the disclosure of the total remuneration for each member of management would be contrary to EU data protection law, the Advocate General observes that this disclosure is not mandatory but rather a discretionary power conferred on Member States. When considering any demand for such information, Member States would be legally bound to comply with EU data protection legislation and the financial institution may of course challenge the legality of any such decision before the appropriate judicial authority.

On the issue of whether the conferral of powers on the EBA is illegal, Advocate General Jääskinen notes that the powers delegated to the Commission and to the EBA by the directive only relate to non-essential technical elements, the strategic and political choices having been taken in the basic legislative act. Moreover, the EBA is merely empowered to elaborate non-binding draft measures which cannot pass into law unless then adopted by the Commission. Having no legal effect, proposals by the EBA are therefore incapable of affecting the rights and obligations of the individuals concerned. As a consequence, this delegation of power to the EBA is valid.

As to the UK's contention that the principle of legal certainty is violated by the fact that the provisions apply to employment contracts concluded before the entry into force of the directive, the Advocate General retorts that the financial institutions received notice of further legislation on remuneration well in advance of the transposition dates contained in the directive. Combined with the wide media attention surrounding this issue and the publication of the directive in the Official Journal in June 2013, the Advocate General concludes that the measures would have been well known and prepared for by the time they took effect at the beginning of 2014.

Finally, Advocate General Jääskinen finds no legitimate grounds for the UK's claim that the contested provisions infringe the principles of proportionality and subsidiarity, affirming that the objective of creating a uniform regulatory framework of risk management could not have been better achieved by national governments as opposed to the EU.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

[3] Case C-233/94 *Germany* v *Parliament and Council*

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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