



EBA/CP/2015/03

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04 March 2015

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# Consultation Paper

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## Draft Guidelines

on sound remuneration policies under Article 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013

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## 2. Responding to this Consultation

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The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 6.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

### Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 04.06.2015. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

### Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

### Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

### 3. Executive Summary

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Institutions have to apply sound remuneration policies to all staff and specific requirements for the variable remuneration of staff whose professional activities have a material impact on the institutions' risk profile (identified staff). Article 74 and 75 of Directive 2013/36 /EU (CRD) mandate the EBA to develop guidelines on both, remuneration policies for all staff as part of institutions internal governance arrangements and remuneration policies for identified staff.

The EBA's predecessor CEBS had already published guidelines on remuneration policies and practices which have been updated to reflect changes introduced by the CRD, the regulatory technical standards on criteria for the identification of staff, the regulatory technical standards on instruments which can be used for the purposes of variable remuneration, developments of remuneration policies in institutions and experiences in supervising institutions' remuneration policies.

Based on a preliminary legal analysis of the remuneration principles set out in Articles 92 to 94 CRD, the approach to the application of the principle of proportionality has been changed compared to the 2010 CEBS Guidelines with respect to the possibility to 'neutralise' some of those principles such as the deferral of variable remuneration, the pay out in instruments and the application of malus and clawback. The CRD does not provide for any explicit provision that allows for such waivers. The CRD IV allows for some flexibility to adapt the concrete manner and extent of the application of these rules to the size, internal organisation and nature, scope and complexity of institutions' activities. The requirements have, however, to be applied at least at the minimum thresholds set by the CRD IV. The principle of proportionality cannot lead to the non-application of these rules. For the purposes of legal certainty, the EBA has asked the European Commission for its view on the application of the principle of proportionality and whether it would be possible to allow waivers on the basis of the CRD and received the European Commission's interpretation that the remuneration requirements have to be applied without exemptions and exceptions to all institutions.

The EBA is investigating which specific situations would justify the application of the proportionality principle to the various remuneration provisions in an appropriate manner and extent and is therefore seeking additional input from industry on the impact of the application of these principles to all institutions, particularly to small and non complex institutions, and on the impediments for a full application as a starting point. However, the EBA is of the view that such provisions could be 'neutralised' for certain institutions that do not extensively rely on variable remuneration and, if confirmed by further analysis, also for identified staff that receive only a low amount of variable remuneration. To this regard, the Authority intends to send its advice to the European Commission suggesting legislative amendments that would allow for a broader application of the proportionality principle and is, therefore, asking all interested parties to provide input on this aspect that will be used to substantiate the EBA's opinion and to develop more concrete proposals.

The guidelines apply to all institutions and to competent authorities. For institutions the guidelines apply on an individual, consolidated and sub-consolidated basis. Competent authorities shall ensure the application accordingly at all levels.

Parts of the guidelines are applicable to all staff, ensuring that institutions have in place sound remuneration policies; other parts of the guidelines focus on the specific provisions applicable for the remuneration policies for identified staff. In particular for identified staff, the alignment of remuneration incentives with the institutions' risk profile and the interest of the owners is crucial.

The guidelines set out in detail the requirements for remuneration policies, the respective governance arrangements and processes which should be applied when remuneration policies are implemented. They provide details on the application of the requirements in a group context and with regard to the proportionate application of the CRD requirements. The guidelines clarify the requirements of the CRD regarding variable remuneration and how remuneration should be aligned to the risks of the institution and provide additional details on disclosures required in this area under the CRR.

According to the CRD, remuneration is either fixed or variable; there is no third category of remuneration. The guidelines set out criteria for the allocation of remuneration to its fixed and variable component, taking into account the EBA opinion and annexed report on the use of allowances. The correct mapping into these two categories is crucial for the calculation of the ratio between the variable and the fixed component and to safeguard that the limitation of this ratio is complied with.

The EBA is publicly consulting on guidelines on remuneration policies for three months, the consultation period ends 04 June 2015. The EBA aims to finalise the proposed guidelines during 2015, taking into account the comments received.

## 4. Background and rationale

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### Legal basis

The guidelines are based on Article 16 of EBA founding Regulation 1093/2010 as amended, Articles 74 and 75 of 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 (CRD) and Article 450 of 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 (CRR).

Article 74 of the CRD requires that institutions shall have sound internal governance arrangements, including remuneration policies and practices that are consistent with and promote sound and effective risk management and mandates the EBA to develop respective guidelines.

Article 75 of the CRD mandates the EBA to develop guidelines with respect to requirements contained in Articles 92 to 95 of the CRD. The EBA also issues guidelines on disclosure requirements under Article 450 of the CRR to ensure a consistent application of these requirements.

Explicit remuneration requirements have been initially introduced by Directive 2010/76/EU of the European Parliament and the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies (CRD III) which were repealed and replaced by similar requirements within the current CRD. The main changes introduced regarding the requirements on remuneration policies and variable remuneration are the introduction of a limitation of the ratio between the variable and the fixed components of remuneration to 100 % (where applicable 200 % with shareholders' approval) which should apply in any case to all institutions and to all their subsidiaries, stricter requirements regarding the application of *malus* and clawback to up to 100 % of the variable remuneration, requirements to pay out variable remuneration, where possible, also in other instruments under Article 94(1)(l)(ii) of CRD defined within the RTS specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration and more granular disclosure requirements.

The guidelines take into account the EBA opinion and annexed report on the use of allowances and the 'CEBS Guidelines on Remuneration Policies and Practices'<sup>1</sup> which will be repealed with

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<sup>1</sup> Published under: <https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-on-remuneration-policies-and-practices>

the coming into force of the final guidelines. When updating the CEBS guidelines the EBA considered results of the benchmarking of remuneration practices, experience gathered under the framework established under the CRD III and also the work of the Financial Stability Board regarding this matter. When developing these guidelines the EBA coordinated the work closely with the ESMA regarding guidelines on remuneration for investment firms.

In this context one should also refer to the guidelines on remuneration policies that ESMA will have to elaborate in close cooperation with EBA under Directive 2014/91/EU (UCITS V Directive), when these will have been issued. These guidelines will include provisions on how different sectorial remuneration principles, such as those set out in the AIFMD (Directive 2011/61/EU) and in the CRD, are to be applied where employees or other categories of personnel perform services subject to different sectorial remuneration principles.<sup>2</sup>

These guidelines should be read in conjunction with other relevant EBA guidelines in particular covering internal governance, the supervisory review process and disclosures.

## Rationale, objective and structure of the guidelines

According to Article 16 of the EBA founding regulation (1093/2010), as amended, guidelines aim to establishing consistent, efficient and effective supervisory practices within the European Union, and to ensuring the common, uniform and consistent application of Union law. To this end guidance is given for both institutions and competent authorities to ensure that a risk aligned remuneration culture and framework in the financial sector is implemented, maintained and further developed in line with the regulatory requirements.

The guidelines aim to ensure that a level playing field is preserved amongst institutions within Member States, taking into account the nature, scale and complexity of their activities. The guidelines complete the relevant provisions of the CRD and CRR in order to ensure that institutions implement sound remuneration policies which are based on sound governance processes, taking into account the institutions' risk strategy and profile, align the incentives of staff with the interest of owners and other stakeholders.

In line with the above-mentioned objectives, the guidelines contain requirements on remuneration policies for all staff and for staff whose professional activities have a material impact on the institutions' risk profile (identified staff) and their implementation, including governance arrangements, the identification process, remuneration practices, categories of remuneration, the variable remuneration, including risk alignment, pay out process and disclosure. In addition specific guidelines are provided for institutions which benefit from government intervention.

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<sup>2</sup> The ESMA guidelines are mandated under Article 14b(2), second sub-paragraph of Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

## Remuneration policies and group context

The guidelines differentiate between the requirements applicable to all staff and requirements applicable to identified staff. As identified staff have a higher impact on the risk profile it is appropriate that more stringent remuneration policies are applied.

The remuneration policy for all staff, including identified staff, must be consistent with and promote sound and effective risk management. The remuneration policy should be consistent with the long-term strategy of the institution including the overall business strategy, the corresponding risk strategy and appetite, including all risk types (e.g. credit, market, operational, liquidity, reputational and other risks). To be sound and effective, risk management must be in line with the respective regulatory requirements, including Articles 74 to 87 of CRD, the requirements on governance in Articles 88 to 91 of CRD and the EBA guidelines on internal governance, the requirements on the internal capital adequacy assessment process and the requirements of CRR for specific risk categories and the respective measurement approaches.

To set the appropriate incentives for long-term oriented and prudent risk taking, the remuneration policy and practices need to be transparent on the fixed remuneration, the variable remuneration and award criteria. Fixed remuneration should be permanent, predetermined, non-discretionary and non-revocable. Variable remuneration should be based on performance or in exceptional cases other conditions. Opaque remuneration policies, e.g. where the conditions for payments are not transparent, are discretionary or where adjustments of the remuneration depend unilaterally on the sole discretion of the institution, could have unforeseen effects on staffs' behaviour in terms of risk related decisions and are therefore not consistent with the above principles.

Implementing a sound remuneration policy is the responsibility of the management body and where applicable, the remuneration committee. In practice, the development of a remuneration policy needs to be supported by internal control functions and corporate functions to ensure that appropriate performance and risk measurement tools are used and that contracts between institutions and staff ensure that the remuneration policies are applied. Also business units need to be involved in the development of the remuneration policy as to set ensure that appropriate incentives in particular for identified staff within the business units are set. It is important that the remuneration policy is considered in the capital and liquidity planning so that it can contribute to safeguarding a sound capital base and does not lead to shortcomings in the institutions' liquidity.

The corporate bodies which have the competencies to approve the remuneration policy may differ among countries due to national corporate law. Additionally, in some countries the corporate body that approves the remuneration policy of the management and supervisory bodies may differ from the one that approves the remuneration policy for control functions. For these reasons, these guidelines should be read together with the relevant national legal provisions.

The identification of the body that performs the responsibilities of the management body in its supervisory function may differ among countries due to national corporate law. EBA is aware that

within Member States usually one of two governance structures is used, a unitary or a dual board structure; no particular structure is advocated. Regarding these issues the EBA guidelines on internal governance should be taken into account.

In accordance with the CRD, institutions have to apply the remuneration requirements at group, parent and subsidiary levels, including within subsidiaries that are not themselves subject to the CRD. Remuneration policies of different group entities within the scope of consolidation and of other subsidiaries should be consistent with the group's remuneration policy set by the consolidating institution. The remuneration policy needs to comply with additional requirements set within national company, labour and other relevant laws.

The scope of consolidation includes all institutions and financial institutions that are subsidiaries of the institution which is responsible for the consolidation; where requirements refer to the 'consolidated basis' or 'consolidated situation' the responsible EU parent institution, EU parent financial holding company or EU parent mixed financial holding company is responsible for the compliance with the respective CRD provisions and guidelines, this includes also subsidiaries which are not in the scope of the prudential consolidation and subsidiaries for which other specific sectorial directives (e.g. AIFMD and UCITS V) apply.

### **Remuneration Committee**

The guidelines should clarify which institutions are significant and therefore need to have a remuneration committee. Also where an institution is part of a significant group of institutions and a remuneration committee is established on the group level, all individual institutions that are significant need to establish their own remuneration committee in line with Article 95 of the CRD.

### **Proportionality**

When complying with the CRD and CRR remuneration provisions, institutions should apply them in a manner and to the extent that is appropriate to the institutions' size, internal organisation and the nature, scope and complexity of their activities. This proportionality principle, mentioned in recital 66, Articles 74 and 92(2) of the CRD and Article 450(2) of CRR, aims to match remuneration policies and practices consistently with the institutions' risk profile, risk appetite and strategy, so that the objectives of the obligations are more efficiently achieved.

Institutions have to implement remuneration policies in compliance with the specific provisions in a way that is appropriate for the respective category of staff, e.g. it can be appropriate that the remuneration policy sets out different maximum ratios for the variable remuneration or different deferral arrangements for specific categories of identified staff as their impact on the risk profile during the business cycle differs.

Although the former CEBS Guidelines on Remuneration Policies and Practices allowed for the so-called 'neutralisation' of some provisions in small and less complex institutions. The terms of the CRD do not explicitly grant for such a right and therefore the preliminary assessment of the EBA is

that a full waiver of the application of even a limited set of remuneration principles for smaller and non - complex institutions would not be in line with the CRD.

Therefore, the application of the principle of proportionality needs to be interpreted in a way that, of the possible manners and degrees to apply the corresponding CRD remuneration principle, the most appropriate according to the institution's size, internal organization and nature, scope and complexity of their activities, as required by Article 92 (2) CRD, should be applied. However, the principle itself cannot be disapplied.

Hence, where principles are more specific for instance where an explicit minimum threshold is set, such as in relation to the deferral of a portion of the variable remuneration or the pay out in instruments, then the 'extent' of compliance cannot fall below the figures as mandated in the principle (i.e. 40% deferral over 3 years, pay out of 50 % of the variable remuneration in instruments). However, more complex and larger institutions need to comply to a greater extent (e.g. by deferring more than 40% over 5 years or more and paying a higher part of variable remuneration in instruments).

The EBA is aware of the impact that this approach regarding the application of the proportionality principle to the CRD remuneration provisions may have on small and non-complex institutions when applying the remuneration principles and therefore, for the purposes of legal certainty, has sought further clarification from the European Commission's services, as to whether the application of the aforementioned proportionality principle as set out in the CRD would allow or not institutions, under certain conditions, to waive partially or fully some or all of the remuneration principles contained therein, and in particular their minimum quantitative thresholds. The EBA received confirmation from the EU Commission on the reading that Articles 92 and 94 CRD apply to all institutions, without any distinction, pointing beside others to the following aspects: the general principles as implicitly referred to in the introductory part of Article 92(2) CRD can in no way justify the non-application of one or the other rule contained in that provision, or indeed in Article 94(1) CRD. This applies in particular to the provisions referring to the deferral arrangements, the pay-out in instruments and the application of malus. Such provisions lay down clear rules and leave no room for exceptions or exemptions.

In addition, the EBA took into account the European Parliament (EP) resolution of 3 July 2013<sup>3</sup> on reforming the structure of the EU banking sector. The EP besides others urges the Commission and the EBA *'to ensure full and comprehensive implementation of (...) the provisions on compensation and remuneration (...) to continue the reform of banks' compensation and remuneration culture by prioritising long-term incentives for variable remuneration with larger deferral periods up to retirement, and to promote transparency of remuneration policies (...) to ensure that remuneration systems prioritise the use of instruments such as bonds subject to bail-in, and shares, rather than cash, commissions or value-based items (...), that compensation and remuneration systems at all levels of a bank reflect its overall performance and are focused on quality customer service and long-term financial stability rather than short-term*

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<sup>3</sup> [European Parliament resolution of 3 July 2013 on reforming the structure of the EU banking sector \(2013/2021\(INI\)\)](#)

*profits(...)*. Proportionality should also be taken into account by competent authorities in line with the guidelines. In order to ensure an appropriate implementation of remuneration policies which is appropriate for the specific institution, an ongoing and open dialogue between institutions and competent authorities is necessary to facilitate the implementation of remuneration policies and practices.

Disclosures should take into account the size of the institution and the nature, scope and complexity of its activities as provided by Article 450 of the CRR. Small and non-complex institutions should comply with the disclosure requirements by providing information commensurate to their internal organisation and applied remuneration policy.

### **Identification of staff**

The guidelines aim also at ensuring that the identification process of staff whose professional activities have a material impact on the institutions' risk profile is consistently applied by all institutions. The CRD requires identifying staff in any case before the requirements are applied in a proportionate way to the different categories of identified staff.

All institutions have to identify the staff whose professional activities have a material impact on the individual institutions' risk profile. In line with Articles 92(2) and 109(1) of the CRD the identification has also to be performed at a consolidated and sub-consolidated level and within subsidiaries which are not themselves subject to the CRD. The primary responsibility for the identification process for the consolidated and sub-consolidated level and in subsidiaries, which are not themselves subject to the CRD, lies with the consolidating institution. To ensure that the identification can be performed at these levels it is appropriate to require that subsidiaries should actively participate in the identification process by providing the necessary information to assess the impact of staff at a consolidated level. To ensure a complete and harmonised identification of staff, the guidelines set out how institutions should apply the criteria set out in the Commission Delegated Regulation (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile ('RTS on identified staff') within their self-assessment process, the relevant governance arrangements and how the criteria set in the RTS are applied on a consolidated and sub-consolidated level and in subsidiaries which are not themselves subject to the CRD.

While the criteria contained in the RTS on identified staff have to be applied in any case, institutions are obliged under the CRD to identify all identified staff and therefore institutions should consider the application of additional internal criteria which ensure that the specific risk profile and internal organisation of the institution is taken into account.

The guidelines specify the requirements of the RTS on identified staff with regard to the necessary notifications and prior approvals, when staff identified only under the criteria within Article 4(1) of the RTS would be excluded from the scope of identified staff and the supervisory review regarding the identification of staff.

## Capital base

Institutions must have a sound capital basis. Remuneration represents an important cost factor for institutions and remuneration payments influence directly the institution's capital base and liquidity. There is also an indirect influence on the capital base (i.e. the impact of the remuneration policy on the risks taken for which capital is required). If an institution falls short of its capital targets, priority is to be given to building up the necessary capital or solvency buffer, and a conservative remuneration policy needs to be pursued, particularly regarding variable remuneration. To ensure that remuneration does not endanger the financial stability of the institution, remuneration must also be taken into account for capital and liquidity planning purposes. Article 104 of CRD empowers supervisors to require institutions to limit variable remuneration as a percentage of net revenues where it is inconsistent with the maintenance of a sound capital base.'

## Categories of remuneration

According to Article 94 of the CRD, the fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion. Remuneration is either fixed or variable; there is no third category of remuneration. The guidelines set out criteria for the allocation of remuneration to its fixed and variable component, taking into account the EBA opinion and annexed report on the use of allowances published on 15 October 2014. The correct mapping into these two categories is crucial for the calculation of the ratio between the variable and the fixed component and to safeguard that the limitation of this ratio is complied with.

Variable remuneration should provide incentives for prudent risk taking in the long term and for sound risk management. Fixed remuneration should primarily reflect the relevant professional experience and organisational responsibility of staff and provide for a stable source of income. In any case, according to the CRD, variable remuneration must not be paid through vehicles or methods that facilitate the non-compliance with the CRD or CRR.

Following the adoption of the CRD and the introduction of the bonus cap, some institutions have introduced 'allowances'. Allowances may differ regarding the situations where they are awarded and their exact features. They can belong to routine remuneration packages; recital 64 of the CRD names some routine elements such as healthcare, child care facilities or proportionate and regular pension contributions on top of the mandatory regime that are not considered as variable remuneration. However, where regular pension benefits would be subject to performance adjustments or claw back, they would be counted as discretionary pension benefits as their amount is not predetermined, but conditional. The guidelines specify under which conditions allowances count as fixed remuneration taking into account the EBA opinion and annexed report on the use of allowances.

The criteria for the allocation of remuneration to the fixed or variable component are not limited to the awarding of remuneration or the contractual conditions, but also the way how remuneration is paid should be taken into account. It should be noted that the pay out of

remuneration which would per se be fixed in instruments may be understood as performance related depending on the features of the instrument awarded and on the application of some conditions (e.g. malus and clawback would contradict the criterion that fixed remuneration is predetermined).

### **Requirements for variable remuneration**

Variable remuneration provides an incentive for staff members to pursue the goals and interests of the institutions and enables them to share in its success. It is also an important element of cost flexibility for institutions. Provided that the interests of the institution owners are taken into account and there is no incentive to assume inappropriate or excessive risks, variable remuneration can benefit all stakeholders of an institution. A variable component linked to performance and the award of variable remuneration in shares, share-linked or equivalent instruments or in bail in able other instruments issued by the institution, which reflect the credit quality of the institution as a going concern, can have a positive effect on “risk-sharing” and incentivising prudent behaviour to ensure a safe and sound performance.

The CRD requires that for identified staff the variable component must be appropriately balanced by the fixed component, is partly deferred and partly paid out in instruments. The CRD introduced a maximum ratio between the variable and the fixed remuneration components.

### **Risk alignment**

It is necessary to counterbalance the incentives of variable remuneration for risk taking with measures to incentivise sound risk management. Variable remuneration needs to be aligned with the risk related performance over time, in particular for identified staff. Otherwise such arrangements can create a “heads I win, tails I still win” approach to risk, which encourages more risk-taking than would likely be preferred by the institution’s shareholders or creditors. To ensure a sound risk alignment of variable remuneration staff members should also not be able to transfer the downside risks to another party, e.g. through hedging or insurance.

Any form of variable remuneration should always be consistent with and promote sound and effective risk management. The effectiveness of risk alignment would be significantly weakened if institutions made excessive use of allowances, retention bonus or guaranteed variable remuneration. Therefore institutions need to be able to justify the use of any variable remuneration element, including allowances, retention bonus, guaranteed variable remuneration, severance payments.

Remuneration has a direct or indirect influence on staff’s behaviour. Variable remuneration may encourage staff to take undesirable, irresponsible and excessive risks or to sell non-suitable products in the hope of generating more turnover or making more profit in the short run and thus increasing staffs’ variable remuneration. Furthermore, staff members may be tempted to game with or manipulate information with a view to making their (measured) performance look better. E.g. if the variable part of the remuneration consists predominantly of remuneration instruments that are paid out immediately, without any deferral or ex post risk adjustment mechanisms

(*malus* or claw back), or are based on a formula that links variable remuneration to current year revenues rather than risk-adjusted profit, there are strong incentives for managers to shy away from conservative valuation policies, strong incentives to ignore concentration risks, strong incentives to rig the internal transfer pricing system in their favour and strong incentives to ignore risk factors, such as liquidity risk and concentration risk, that could place the institution under stress in the future. By connecting risk management elements to the remuneration policy, the aforementioned risks can be counterbalanced.

The guidelines on risk alignment contain the general requirements, that should apply to institutions and their staff as a whole and the specific requirements that institutions have to apply at least to the individual remuneration packages of identified staff under Articles 92 and 94 of the CRD. Institutions can also apply these more specific requirements to additional categories of staff.

The risk alignment process and the award process should be transparent to ensure that they have an impact on staffs' behaviour as intended.

Ex ante risk adjustments are applied when the remuneration is awarded to consider current and future risks and have an immediate effect on the variable remuneration awarded and on staffs' risk taking behaviour.

Ex-post risk adjustment should ensure that staff is rewarded in line with the sustainability of the performance in the long term, which is the result of decisions taken in the past. Ex post risk adjustment is always necessary, also in case of multi-year accrual periods, because at the time remuneration is awarded the ultimate performance cannot be assessed without uncertainty. Ex post risk adjustments are achieved by different means, including the pay out in suitable instruments and the application of deferral, *malus* and clawback.

In order to ensure that the risk adjusted performance is appropriately reflected in the variable remuneration, institutions need to measure risks and performance and use a mix of different qualitative and quantitative criteria for their measurement to ensure that overall the assessment outcome is appropriate and weaknesses of single criteria are counterbalanced. This applies at all stages, the setting of the bonus pool, the actual award of remuneration and the application of ex-post risk adjustments. There are different categories of performance criteria: relative, absolute, internal and external.

Absolute performance measures are measures set by the institution on the basis of its own strategy, including its risk profile and risk appetite. Relative performance measures are measures that compare performance with peers, either 'internal' peers (i.e. within the organisation) or 'external' (i.e. similar institutions). The advantage of absolute measures is that they are easier to set and monitor. Relative measures could encourage excessive risk taking and therefore need always to be supplemented by other metrics and controls, including the use of prudent judgmental analysis during the award process.

In a period of sector wide positive financial performances, external relative measures could lead to increased risk taking and a herd mentality, with a potential negative impact on the financial

stability of the financial sector. In a downturn economic cycle where most institutions perform poorly, relative external measures may lead to positive measurements of a per se negative outcome (and thus to an insufficient contraction of the institution's total variable remuneration).

Similarly, internal (e.g. profits) and external (e.g. share price) variables come with both, advantages and disadvantages that should be balanced carefully. Internal performance measures are able to generate more involvement of the staff members if they can influence the outcome by their own behaviour. On the other hand, such measures can be manipulated and can create distorted outcomes on a short-term basis. External performance measures are less subject to the risk of manipulation, although e.g. attempts to artificially increase the stock price can still occur.

Every criteria used has its risks, limitation and advantage. Institutions need to take these into account and weight them carefully when determining the performance and risk criteria at every level and use an appropriate mix as to minimise the risks and assess the performance as objective as possible.

### **Pay out process**

The CRD requires that at least 50% of variable remuneration comprise a balance of shares, equivalent ownership rights, share linked or equivalent non-cash instruments, in the case of a non-listed institutions and, where possible, certain eligible other instruments defined within the RTS on instruments. The awarded instruments are subject to retention periods. At least 40 % of variable remuneration is subject to deferral arrangements.

The above requirements regarding the pay out of variable remuneration should ensure that the variable remuneration is aligned with the risks of the institution in the long term and that ex post risk adjustments can be applied as appropriate.

A deferral schedule is key to improving risk alignment effects in a remuneration package, since it allows for part of the remuneration to be adjusted for risk outcomes over time through ex-post risk adjustments. The ratio of deferred remuneration and the deferral period needs to be tailored to the long term impact of the category of identified staff throughout the business cycle and therefore arrangements may differ between different categories of identified staff and will also depend on the institutions business model.

Although variable remuneration is aligned through ex-ante risk adjustments, due to uncertainty about the assessment and future development of risks, ex-post risk adjustments are needed to keep incentives fully aligned over an appropriate time period. This can only be achieved where an appropriate part of the variable remuneration has been deferred. In particular in Member States where the application of malus or clawback may not be in line with the general principles of national contract and labour law, institutions should carefully design the instruments used for the award and the deferral and retention scheme in order to ensure that needed ex-post risk adjustments are reflected, e.g. in price changes of the instruments.

It is important to highlight that the upfront payment of instruments as variable remuneration, even if the retention period equals the applied deferral period, is not equivalent to the deferral of instruments.

Retention periods affect the risk-taking incentives of staff members only by extending the period during which implicit adjustments can take place. Instruments paid upfront belong to the staff member (they are vested rights) which imply that no malus clauses (i.e. no reduction of the number of instruments that will be received) can be applied to them. Even though clawback may be applicable, the ability to apply ex-post risk adjustment will be weakened and is without prejudice to the national labour and contract laws.

Different from retained instruments, deferred instruments allow for the application of explicit ex-post risk adjustments via malus arrangements, e.g. determined by the back-testing of the underlying performance, possibly leading to a reduction of the number of instruments that will eventually be paid out.

Ex-post risk adjustments should not lead to an increase of the variable remuneration as they would expose the staff member to both, the positive and the negative part of the outcomes providing incentives to take more risk than that which can be considered prudent from a supervisory point of view to recover parts of variable remuneration in case they were reduced following the application of ex-post risk adjustments.

When the variable remuneration takes the form of instruments, the final monetary value received by staff depends also on the market prices of these instruments. This implicit adjustment of remuneration due to changes of the market price of listed instruments or the fair value of non-listed instruments is not related to any explicit decision of the institution, but inherent to the instruments used for the award. Market prices respond to many factors and are without additional ex-post risk adjustments not sufficient to align the variable remuneration with the risks taken in the long term. The same is true for the fair value, which in addition is less objective than an observed market price.

### **State aid and government support**

Institutions receiving state aid are often obliged to return the funds received and also to increase their capital base in line with recovery plans. Remuneration policies must be aligned to these circumstances. This may include that the award and pay out of variable remuneration is limited; where variable remuneration is awarded an even stronger risk alignment seems to be appropriate contributing to the protection of the capital base and aiding the recovery of the institution.

### **Disclosure**

The role of transparency and disclosure of remuneration policies is particularly crucial in the case of financial institutions, due to the impact that remuneration schemes can have on the level of risk-taking of the institutions. A high level of transparency supported by more consistent and meaningful disclosure regarding remuneration policies, the associated risks and the procedure

through which remuneration is determined for the management body and other identified staff can help stakeholders to assess the remuneration policy and how it is aligned to the risk of the institutions. This market discipline in turn facilitates the implementation of an appropriate incentive structure and prudent and long term oriented risk-taking.

### **Supervisory review by competent authorities**

The CRD requires competent authorities to ensure that institutions comply with the requirements under Articles 92 and 94 of the CRD. As part of this, competent authorities need to review the institutions remuneration policies and practices and their compliance with the CRD provisions and these guidelines.

Competent authorities should apply risk-based supervision; resources should be directed primarily to those institutions and areas that pose most risks, taking into account their size and the nature, scope and complexity of their activities. These guidelines provide for specific areas which should be reviewed as part of the supervisory activities of competent authorities in addition to the reviews required by the EBA guidelines on the supervisory review process.<sup>4</sup>

The assessment methodologies of competent authorities may include both, on-site and off-site controls, including the examination of information and data and dedicated meetings as appropriate with the institutions' management body, senior management and other relevant staff, in order to collect additional information and data on remuneration policies, remuneration structures and governance arrangements. The review should identify the potential implementation gaps and non-compliant practices. All findings need to be appropriately addressed to ensure that institutions remuneration policies and practices comply with the respective requirements in the CRD, CRR and these guidelines.

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<sup>4</sup> <https://www.eba.europa.eu/-/eba-publishes-final-guidelines-on-srep-methodologies-and-processes>

## 5. Draft EBA Guidelines on sound remuneration policies under Article 74(3) and Article 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013

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In between the text of the draft Guidelines that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box. Where the EBA has only reformulated or restructure the guidelines without material changes to the guidelines issued by the Committee of European Banking Supervisors, those questions refer to the clarity of the reformulated guidelines. In these cases the substance of the guidelines is not subject to consultation.

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# EBA Guidelines on sound remuneration policies under Article 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013

## Title I - Subject matter, scope and definitions

### 1. Subject matter

1. These Guidelines fulfil the mandate given to the EBA under Article 74(3) and Article 75(2) of Directive 2013/36/EU (Capital Requirements Directive or 'CRD') to issue guidelines on sound remuneration policies for all staff and for staff whose professional activities have a material impact on the institutions' risk profile which comply with the requirements set out in Article 92 to 95 of the CRD, and provide guidance on disclosures under Article 96 of CRD and Article 450 of Regulation (EU) No 575/2013 (Capital Requirements Regulation or 'CRR').

The EBA might, for consumer protection reasons, in due course consult separately on remuneration requirements applicable to those staff whose conduct could affect, directly or indirectly, consumers. Any such consultation would necessarily have to consider which consumers should fall within the scope of the requirements. The requirements will be applicable without prejudice to the requirements for identified staff and the requirements established in the respective EBA guidelines. .

### 2. Scope

2. These Guidelines are addressed to competent authorities as defined in Article 4(1)(40) of CRR and Article 9(1) of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and to institutions as defined in point 3 of Article 4(1) of CRR, including branches of credit institutions having their head office in a third country.
3. The Guidelines laid down in Title VI on disclosure requirements are only applicable to those institutions which must comply, according to Article 6 and 13 of the CRR, with the obligations laid down in Part Eight of the CRR.

4. Institutions should comply and competent authorities should ensure that institutions comply with these guidelines on an individual, sub-consolidated and consolidated basis, including their subsidiaries not subject to the CRD, in accordance with Articles 92(1) and 109 of CRD.
5. These Guidelines set out requirements applicable to all staff of institutions and specific requirements that institutions have to apply to the remuneration policies and variable elements of remuneration of identified staff. Institutions may also apply these specific requirements to additional categories of staff or to all staff. Annex 1 to these guidelines indicates the requirements for which an institution-wide application to all staff in line with the additional guidelines provided is required, recommended or voluntary.

### 3. Definitions

6. The definitions laid down in Article 3 of CRD and Article 4 of CRR apply. For the purpose of these Guidelines the following definitions should apply:
  - a. 'Remuneration' consists of all forms of fixed and variable remuneration and includes payments made or benefits, monetary or non-monetary, awarded directly by or on behalf of institutions in exchange for professional services rendered by staff, carried interest payments within the meaning of Article 4(1)(d) of the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulation (EC) No 1060/2009 and (EU) No 1095/2010 (AIFMD), and other payments made via methods and vehicles which, if they were not considered as remuneration, would lead to a circumvention<sup>5</sup> of remuneration requirements.
  - b. 'Fixed remuneration' are non-discretionary payments or benefits which do not depend on performance or other contractual criteria, unless they form part of routine employment packages for staff,<sup>6</sup> and which comply with all the requirements of paragraph 117 or the requirements of paragraphs 118 or 119.
  - c. 'Variable remuneration' is all remuneration which is not fixed.
  - d. 'Routine employment packages are ancillary components of fixed remuneration that are obtainable for a wide population of staff or staff in specified functions based on predetermined selection criteria, including e.g. healthcare, child care facilities or proportionate regular pension contributions.<sup>7</sup>

<sup>5</sup> Regarding circumvention please refer to section 13.4 of these guidelines.

<sup>6</sup> Criteria for the allocation of remuneration to either the fixed or variable part and are contained in section 11

<sup>7</sup> Guidelines on routine employment packages are provided under section 11

- e. 'Long term incentive plans' are variable remuneration components, where a part of the remuneration is awarded at one point of time and under the same plan additional awards are made at future points in time subject to conditions, including e.g. the retention of staff within the institution.
- f. A retention bonus is variable remuneration awarded on the condition that staff stays in the institution for a pre-defined period of time.
- g. 'Staff' are all employees of an institution and its subsidiaries, including subsidiaries not subject to the CRD, all members of the management bodies within that scope and any other person acting on behalf of the institution and its subsidiaries.
- h. 'Identified staff' are staff whose professional activities have a material impact on the institutions risk profile.
- i. 'Consolidating institution' means the institution which is responsible for the prudential consolidation or sub-consolidation under Article 18 of CRR.
- j. A 'bonus pool' is the maximum amount of variable remuneration which can be awarded in the award process set at the level of the institution or the business unit.
- k. The 'accrual period' is the period of time for which the performance of the staff member is assessed and measured for the purposes of determining an award of variable remuneration.
- l. The 'award' of variable remuneration means the granting of the amount of the variable remuneration for a specific accrual period, independently of the actual point in time where the amount is paid.
- m. An amount of remuneration 'vests' when the staff member becomes the legal owner of the remuneration awarded, independent of the instrument which is used for the payment or if the payment is subject to additional retention periods or clawback arrangements.
- n. 'Upfront payments' are payments which are made immediately after the accrual period and which are not deferred.
- o. The 'deferral period' is the period after the award of the variable remuneration and before the vesting of the variable remuneration during which staff is not the legal owner of the remuneration awarded.
- p. 'Instruments' are those financial instruments or contracts that fall within one of the two categories defined in Art 94(1)(l) of CRD.
- q. A 'retention period' is a period of time during which instruments which have been awarded and vested as variable remuneration cannot be sold or accessed.

- r. 'Malus' is an arrangement that permits the institution to prevent the vesting of all or part of deferred variable remuneration based on ex-post risk adjustments.
- s. 'Clawback' is an arrangement under which the staff member has to return ownership of an amount of variable remuneration paid in the past or which has already vested to the institution under certain conditions.
- t. 'Significant institutions' are institutions referred to in Article 131 of CRD (global systemically important institutions or 'G-SIIs', and other systemically important institutions or 'O-SIIs'), and, as appropriate, other institutions determined by the competent authority, based on an assessment of the institutions' size, internal organisation and the nature, the scope and the complexity of their activities.
- u. 'Share-linked instruments' are those financial instruments or contracts whose value is based on the market value appreciation of the stock and that have the share price as a reference point, e.g. stock appreciation rights, types of synthetic shares.
- v. 'Shareholders' includes, depending on the legal form of an institution, other owners or members of the institution.

#### 4. Currency conversion

- 7. Institutions which award remuneration in a currency other than euro should convert the thresholds within Article 4 of the RTS on identified staff and within these guidelines based on the exchange rate used by the Commission for financial programming and the budget for December of the previous year.<sup>8</sup>

Q 1: Are the definitions provided sufficiently clear; are additional definitions needed?

### Title II- Requirements regarding remuneration policies

#### 5. Remuneration policies for all staff, including identified staff

- 8. Institutions should differentiate within their remuneration policy between identified staff and other staff and ensure that remuneration policies comply with the respective CRD requirements and these guidelines. With regard to different categories of identified staff, institutions should implement specific remuneration policies and risk alignment mechanisms as appropriate to ensure that the impact of the staff on the institutions risk profile is appropriately aligned with their remuneration.

<sup>8</sup> The exchange rates can be found on the website of the European Commission under: [http://ec.europa.eu/budget/contracts\\_grants/info\\_contracts/infoeuro/infoeuro\\_en.cfm](http://ec.europa.eu/budget/contracts_grants/info_contracts/infoeuro/infoeuro_en.cfm)

9. The remuneration policy should specify all components of remuneration and include also the pension policy.
10. All institutions should comply with regard to the remuneration policy for all staff with the principles set out in Article 92 of CRD for remuneration policies and consider which elements of the remuneration policy on the variable remuneration of identified staff under Articles 94 of CRD should be included in the remuneration policy for all staff. Annex 1 to these guidelines indicates the requirements for which an institution-wide application to all staff in line with the additional guidelines provided is required, recommended or voluntary.
11. The institution's remuneration policy for all staff should be consistent with the objectives of the institution's business and risk strategy, corporate culture and values, long-term interests of the institution and the measures used to avoid conflicts of interest. Changes of such objectives and measures should be taken into account when updating the remuneration policy. Institutions should ensure that remuneration practices are aligned with the institutions' overall risk appetite, taking into account all risks, including reputational risks and risks resulting from the misselling of products. Institutions should also take into account the long-term interests of shareholders.
12. The remuneration policy for all staff should provide for incentives that staffs' behavior is in line with the long term interests of the institution and should not encourage excessive risk taking. Where variable remuneration is awarded such awards should be based on the institutions, business units and staffs performance and take into account the risks taken. The remuneration policy should make a clear distinction with regard to the variable remuneration and the performance assessment between the operating business units, corporate and control functions.
13. The remuneration policy should support the institution in achieving and maintaining a sound capital base in line with section 10 of these guidelines. The remuneration policy should also take into account, where applicable, the restrictions on distributions under Article 141 of CRD.
14. The remuneration policy for all staff should contain:
  - a. the performance objectives,
  - b. the methods for the measurement of performance, including the performance criteria;
  - c. the structure of variable remuneration, including the instruments in which parts of the variable remuneration are awarded;

d. where appropriate, the ex ante and ex post risk-adjustment measures of the variable remuneration<sup>9</sup>.

15. The pay out of instruments as part of the variable or fixed remuneration should not create any conflict of interest regarding the compliance with insider trading rules or any incentive to take specific measures that can have a short term impact on the share price.

16. Where remuneration policies or group remuneration policies are implemented in institutions, including in their subsidiaries, where the staff of the institution are also the majority owners of the institution or the subsidiary, the remuneration policy should be adjusted to the specific situation of these institutions or subsidiaries. Dividends paid on vested shares or equivalent ownership interests that staff receive as shareholders or owners of an institution, are not part of remuneration for the purpose of these guidelines. However, such payments must not be used as a payment method for variable remuneration which would lead to a circumvention of the remuneration requirements established by the CRD.

Q 2: Are the guidelines in chapter 5 (remuneration policies for all staff, including identified staff) appropriate and sufficiently clear?

## 6. Governance of remuneration

### 6.1. Responsibilities, design, approval and oversight of the remuneration policy

17. The management body in its supervisory function (hereafter ‘supervisory function’) should be responsible for adopting and maintaining the remuneration policy of the institution, and overseeing its implementation to ensure it is fully operating as intended. The supervisory function should also approve any subsequent material exemptions made for single staff members and changes to the remuneration policy and carefully consider and monitor their effects.

18. The supervisory function should collectively have adequate knowledge, skills and experience with regard to remuneration policies and practices as well as of incentives and risks that can arise therefrom. This should include knowledge, skills and experience with regard to the mechanisms for aligning the remuneration structure to institutions’ risk profiles and capital structure.

19. The supervisory function should ensure that institution’s remuneration policies and practices are appropriately aligned with the institution’s overall corporate governance framework, corporate culture, risk appetite and the related governance processes.

<sup>9</sup> Specific requirements for the remuneration of identified staff and its risk alignment are contained in Titles III and IV of these guidelines

20. The remuneration policy should ensure that conflicts of interests with regard to the remuneration policy and remuneration awarded are identified and appropriately mitigated, including by establishing objective award criteria based on the internal reporting system, appropriate controls and the four eyes principle.
21. The remuneration policy and practices and the procedures to determine them should be clear, well-documented and transparent. Proper documentation on the decision making process (e.g. minutes of relevant meetings, relevant reports, other relevant documents) and the reasoning behind the remuneration policy should be maintained.
22. The supervisory and management functions and where established the remuneration and the risk committees should work closely together and ensure that the remuneration policy is consistent with and promotes sound and effective risk management.
23. The remuneration policy should provide for an effective framework for determining role descriptions, performance measurement, risk adjustment and the linkages to reward.
24. Risk and compliance functions should have significant input into the setting of bonus pools, performance criteria and remuneration awards where those functions have concerns regarding the impact on staffs' behavior, and the riskiness of the business undertaken. The remuneration policy should ensure that no material conflicts of interest arise for staff in control functions.
25. The supervisory function should determine and oversee the remuneration of the members of the management function and, if the remuneration committee referred to in section 6.4 has not been established, oversee directly the remuneration of the senior officers in the independent control functions, including the risk management and compliance functions.
26. The supervisory function should take into account the input provided by all competent corporate functions and bodies (e.g. committees, control functions<sup>10</sup>, human resources, legal, strategic planning, etc.) and business units about the design, implementation and within the oversight of the institution's remuneration policies.
27. The human resources function should participate in and inform on the drawing up and the evaluation of the remuneration policy for the institution, including the remuneration structure, remuneration levels and incentive schemes in a way that would not only attract and retain the staff the institution needs but also assure that the remuneration policy is aligned with the institution's risk profile.

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<sup>10</sup> Independent control function comprises organisational units, independent of the business and corporate functions that are responsible for controlling and monitoring the operations and risks arising from those operations, ensuring compliance with all applicable laws, rules and regulations and advising the management functions on the matters within their area of expertise. Independent control functions typically comprise risk management, compliance and internal audit functions. Further details on control functions, can be found in the EBA Guidelines on Internal Governance (GL44), points 27 to 29.

28. The risk management function should assist in and inform on the definition of suitable risk-adjusted performance measures (including ex-post adjustments), as well as in assessing how the variable remuneration structure affects the risk profile and culture of the institution. The risk management function should validate and assess risk adjustment data as well as attend the meetings of the remuneration committee on this matter.
29. The compliance function should analyse how the remuneration policy affects the institution's compliance with legislation, regulations, internal policies and risk culture and should report all identified compliance risks and issues of non-compliance to the management body, both in its management and supervisory functions. The findings of the compliance function should be taken into account by the supervisory function during the approval and review procedures and oversight of the remuneration policy.
30. The internal audit function should carry out an independent review of the design, implementation and effects of the institution's remuneration policies, on its risk profile and the way these effects are managed in line with the guidelines provided in section 6.5.
31. Within a group context the competent functions within the consolidating institution and subsidiaries should interact and exchange information as appropriate.

## 6.2. Shareholders' involvement

32. Depending on the institution's legal form and on the applicable national law, the approval of an institution's remuneration policy and, where appropriate, decisions relating to the remuneration of members of the management body (or other identified staff), may be also assigned to the shareholders' meeting. The shareholders' vote may be either consultative or binding.
33. If the approval of the remuneration of individual members of the management body or other identified staff is assigned to shareholders, shareholders should also explicitly approve the payments that can be awarded to those persons at the termination of their contracts. In this context, shareholders should expressly approve ex-ante the maximum amount of payments that can be awarded in case of an early termination of a contract, without prejudice to any applicable national labour law.
34. In order that shareholders can make informed decisions, the supervisory function should ensure that the institution provides them with adequate information regarding the remuneration policy designed to help them to assess the incentive structure and the extent to which risk-taking is being incentivised and controlled as well as the overall cost of the remuneration structure. Such information should be provided well in advance of the relevant shareholders' meeting. Detailed information on remuneration policies and on their modifications, on procedures and decision-making process to set a remuneration package should be provided and include the following:

- a. the remuneration components;
  - b. main characteristics and objectives of the remuneration packages and their alignment with the business and risk strategy, including the risk appetite and corporate values of the institution;
  - c. How the points under (b) are taken into account in ex-ante/ex-post adjustments in particular for identified staff.
35. The supervisory function remains responsible for the proposals submitted to the shareholders' meeting, as well as for the actual implementation and oversight of any changes to the remuneration policies and practices.
36. Where shareholders are requested to approve a higher maximum level of the ratio between the variable and fixed component of remuneration of up to 200 %, the following should apply:
- a. Shareholders who have the right to vote on a proposed higher maximum level of the ratio between the variable and the fixed components of remuneration are those of the institution where the identified staff concerned by the higher maximum levels of variable remuneration, operates. For subsidiaries, the subsidiary's general assembly of shareholders is competent to decide and not the general assembly of the consolidating institution.
  - b. Where an institution exercises its voting rights as a shareholder of its subsidiary with regard to the approval of a higher maximum level of the ratio between variable and fixed remuneration within a subsidiary, one of the following conditions should be met:
    - i. the supervisory function of the institution holding the shares has beforehand called for a vote of its shareholders' meeting on how to exercise the voting rights regarding the increase of such level in its subsidiaries;
    - ii. the shareholders' meeting of the consolidating institution has decided, as part of the group remuneration policy, that subsidiaries may introduce a higher maximum level of such ratio.
  - c. In accordance with the first indent of Article 94(1)(g)(ii) of CRD, when approving a higher maximum level of the ratio between the fixed and variable components of remuneration, the shareholders' meeting shall act upon a detailed recommendation which provides in particular the reasons, the number of identified staff concerned and their functions within the institution as well as the explanation of how such higher maximum level of the ratio may affect the requirement to maintain a sound capital base. This information should be provided to shareholders well in advance of the shareholder's meeting.

- d. Any approval of a higher maximum level of the ratio must be carried out in accordance with the provisions of Article 94 (1) (g) (ii) of CRD; the 50% threshold for the quorum, and the 66% and 75% majority thresholds required for the vote, as mentioned in that Article, should all be calculated taking into account the voting rights attached to the shares or other equivalent ownership rights in the institution.
- e. The 75% threshold, which applies when fewer than 50% of ownership rights are represented in the shareholders' meeting and the 66% threshold, which applies when at least 50% of ownership rights are represented, should be calculated in relation to the shareholders' voting rights that are represented, and not the number of natural or legal persons who are shareholders.
- f. In accordance with the last indent of Article 94(1)(g)(ii) of CRD, staff who are directly concerned by the higher maximum levels of variable remuneration must not be allowed to exercise, directly or indirectly, any voting rights they may have. Accordingly, their voting rights shall be disregarded when calculating the percentages, both in the nominator and the denominator.
- g. Shares are "represented" where the shareholder is legally able to vote on the proposed higher maximum level of the ratio, regardless of how such a vote is taken. In line with this principle and taking into account national company law, institutions should set their internal policies regarding "representation" for the purpose of this vote.

### 6.3. Information to competent authorities

37. When informing the competent authority about the recommendation addressed to the shareholders' meeting, in accordance with the fourth indent of Article 94(1)(g)(ii) of CRD, the institution should report to the competent authority all the information submitted to the shareholders, including the proposed higher maximum ratio and the reasons therefore, at the latest five working days after having notified to the shareholders that an approval of the higher ratio will be sought.
38. When informing the competent authority about the decision taken by shareholders, in accordance with the fifth indent of Article 94(1)(g)(ii) of CRD, the institution should provide the following information:
- a. the result of the decision and the approved maximum ratio, including, where the ratios differ between business areas and functions, the respective ratio for each business area or function mapped to the business areas and functions set out in the EBA guidelines on the data collection exercise regarding High Earners and the EBA guidelines on the remuneration benchmarking exercise both published on 16 July 2014<sup>11</sup>;

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<sup>11</sup> Both Guidelines can be accessed under the following link: <http://www.eba.europa.eu/regulation-and-policy/remuneration>

- b. the number of identified staff affected by the higher maximum ratios and, where the ratios differ between business areas and functions, the respective level of the ratio for each business area and function;
- c. an analysis that the proposed higher ratio does not conflict with the obligations under the CRD and CRR, having regard in particular to the institution's own funds obligations;
- d. the information included in Annex 2, using the template provided;
- e. other information that may be requested by the competent authority.

Q 3: Are the guidelines regarding the shareholders' involvement in setting higher ratios for variable remuneration sufficiently clear?

## 6.4. Setting up a remuneration committee

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39. In accordance with Article 92(1), in conjunction with Article 95(1) CRD, all significant institutions at individual, parent company and group level must establish a remuneration committee. Subsidiaries, which are regulated by specific sectoral legislation (e.g. AIFMs or UCITS managers) should follow the rules set out in the specific sectoral legislation applying to them in order to determine whether or not they are required to establish a remuneration committee. The consolidating institution should ensure that a remuneration committee is established when legally required.

40. Where a remuneration committee is established in a non-significant institution, the institution should comply with the requirements of these guidelines concerning the remuneration committee, but may combine the tasks of the remuneration committee with other tasks as long as they do not create conflicts of interest.

41. Where no remuneration committee is established, the requirements of these guidelines concerning the remuneration committee should be construed as applying to the supervisory function.

### 6.4.1. Composition of the remuneration committee

42. The remuneration committee should be composed of members of the supervisory function<sup>12</sup> who do not perform executive functions. The chair and the majority of members of the

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<sup>12</sup> Different management body structures can be observed in European countries. In some countries a unitary structure is common, i.e. supervisory and management functions of the board are exercised by only one body. In other countries a dual structure is common where two independent bodies are established, one for the management function and the other for the supervision of the management function. In these cases, the remuneration committee should be comprised by members of the supervisory body.

remuneration committee should qualify as independent<sup>13</sup>. If employee representation on the management body is provided for by national law, it must include one or more employee representatives. Where there are not a sufficient number of qualified independent members the institutions should implement other measures within the remuneration policy to limit conflicts of interest in decisions on remuneration issues.

43. Members of the remuneration committee should have collectively appropriate knowledge, expertise and professional experience concerning remuneration policies and practices, risk management and control activities, namely with regard to the mechanism for aligning the remuneration structure to institutions' risk and capital profiles.

### 6.4.2. Role of the remuneration committee

44. The remuneration committee should:

- a. be responsible for the preparation of decisions on remuneration to be taken by the supervisory function, in particular regarding the remuneration of the members of the management body in its management function as well as of other identified staff;
- b. provide its support and advice to the supervisory function on the design of the institution's remuneration policy;
- c. support the supervisory function in overseeing the remuneration policies, practices and processes and the compliance with the remuneration policy;
- d. check whether the existing remuneration policy is still up to date and, if necessary, make proposals for changes;
- e. review the appointment of external remuneration consultants that the supervisory function, may decide to engage for advice or support;
- f. ensure the adequacy of the information provided to shareholders on remuneration policies and practices, in particular on proposed higher maximum level of the ratio between fixed and variable remuneration;
- g. assess the mechanisms and systems adopted to ensure that the remuneration system properly takes into account all types of risks, liquidity and capital levels and that the overall remuneration policy is consistent with and promotes sound and effective risk management and is in line with the business strategy, objectives, corporate culture and values and the long-term interest of the institution;
- h. assess the achievement of performance targets and the need for ex-post risk adjustment, including the application of malus and claw backs arrangements;

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<sup>13</sup> Independence as set out in the EBA guidelines on internal governance point 5.6

- i. review a number of possible scenarios to test how the remuneration policies and practices react to external and internal events, and back test the criteria used for determining the award and the ex-ante risk adjustment based on the actual risk outcomes.

45. Where the institution has established a remuneration committee, the remuneration of the senior officers in the independent control functions, including the risk management and compliance functions, should be directly overseen by the remuneration committee. The remuneration committee should make recommendations to the supervisory function on the design of the remuneration package and amounts of remuneration to be paid to the senior staff members in the control functions..

### 6.4.3. Process and reporting lines

46. The remuneration committee should:

- a. have access to all data and information concerning the decision-making process of the supervisory function on the remuneration policies and practices design and implementation, oversight and review;
- b. have adequate financial resources and unfettered access to all information and data from independent control functions, including risk management;
- c. ensure the proper involvement of the independent control and other competent functions (e.g. human resources, legal and strategic planning), within the respective areas of expertise and where necessary seek external advice.

47. The remuneration committee should collaborate with other committees of the supervisory function whose activities may have an impact on the design and proper functioning of remuneration policies and practices (e.g. risk, audit and nomination committees); and provide adequate information to the supervisory function, and, where appropriate, to the shareholders' meeting about the activities performed.

48. When established, the risk committee should, without prejudice to the tasks of the remuneration committee, examine whether incentives provided by the remuneration policies and practices take into consideration the institution's risk, capital, liquidity and the likelihood and timing of earnings.

49. A member of the risk committee should participate in the meetings of the remuneration committee, where both committees are established and vice versa.

## 6.5. Review of the remuneration policy

50. The supervisory function or, where established, the remuneration committee, should ensure that the remuneration policy and practices of the institution are subject to a central and independent review at least annually.
51. A central review of the compliance with the regulation, group policies, procedures and internal rules should be performed by the internal audit function of the consolidating institution.
52. Institutions should perform an independent review at least annually on the individual basis. In a group, non-significant institutions which are subsidiaries may rely on the review performed by the consolidating institution, where the review performed on the consolidated level included the institution and where the results are available to the supervisory function of that institution.
53. The periodic independent review of remuneration policies may be, partially or totally, externally outsourced by small and less complex institutions. Larger and more complex institutions should have sufficient resources to conduct the review internally. Qualified and independent external consultants<sup>14</sup> may complement and support the institution in carrying out such tasks. The supervisory function is responsible for the review.
54. Within the independent review institutions should assess whether the overall remuneration policies, practices and processes:
- a. operate as intended (in particular, that approved policies, procedures and internal rules are being complied with; that the remuneration payouts are appropriate, in line with the business strategy; and that the risk profile, long-term objectives and other goals of the institution are adequately reflected);
  - b. are compliant with national and international regulations, principles and standards; and
  - c. are consistently implemented across the group.
55. The other relevant internal corporate functions (i.e.: human resources, legal, strategic planning, etc.), as well as other key supervisory function committees (i.e. audit, risk, and nominations committees) should be closely involved in reviewing the remuneration policies of the institution in order to assure the alignment with the institutions' risk management strategy and framework.
56. Where periodic reviews reveal that the remuneration policies do not operate as intended or prescribed or where recommendations are made, the remuneration committee, where

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<sup>14</sup> For further details on outsourcing, refer to EBA Guidelines on Internal Governance (GL44).

established, or the supervisory function, should ensure that a remedial action plan is proposed, approved and timely implemented.

57. The results of the performed internal and external reviews and actions taken to remedy any findings should be documented, either through written reports or through the minutes of the meeting of the relevant committees, and made available to the management body, committees and functions.

## 6.6. Control functions

58. The internal control functions should be independent and have sufficient resources, knowledge and experience to perform their tasks with regard to the institutions' remuneration policy. The independent control functions should cooperate actively and regularly with each other and other relevant functions and committees with regard to the remuneration policy and risks which may arise from remuneration policies.

59. The remuneration policy should provide incentives for staff in control functions to deliver the best performance in their role. The remuneration policy should ensure that no material conflicts of interest arise for staff in control functions.

## 7. Remuneration policies and group context

60. In accordance with Article 92(1) of the CRD, institutions must comply with all requirements of Articles 92(2), 93, 94 and 95 of CRD and the applicable Regulatory Technical Standards regarding remuneration at the consolidated, sub-consolidated (including subsidiaries and branches in third countries) and individual level. With regard to the individual level competent authorities may make use of the derogation provided for in Article 7 of the CRR in accordance with Article 109 (1) of CRD. It is the institutions' responsibility that the internal remuneration policies comply with any specific requirements regarding activities performed in any relevant jurisdiction.

61. At the highest consolidated level, the consolidating institution and competent authorities should ensure that a group-wide remuneration policy is implemented and complied with for:

- a. all staff in all institutions and other entities within the scope of consolidation, including all branches; and
- b. all identified staff<sup>15</sup> in all institutions and other entities within the scope of consolidation, including all branches.

62. Regarding institutions and entities within a group located in more than one Member State, the group wide remuneration policy should specify how its implementation should deal with

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<sup>15</sup> Regarding the identification process in a group context please refer to section 9.3

differences between national implementations of CRD remuneration requirements, in particular regarding the application of the limitation of the ratio between the variable components of remuneration and the fixed remuneration to 100 % (if applicable, up to 200% with shareholders' approval)<sup>16</sup>, the possibility to apply the notional discount rate<sup>17</sup> and any restrictions regarding the use of instruments<sup>18</sup>.

63. In accordance with Articles 92(1) and 109 of CRD the consolidating institution must ensure that subsidiaries within the group which are not themselves subject to the CRD, apply the group-wide remuneration policies to all staff and the requirements of Article 92(2), 93 and 94 of CRD at least to those staff members whose professional activities have a material impact on the group's risk profile. This also applies to specific requirements of CRD, which have not been included in other sectoral legislation (e.g. staff within entities that fall within the scope of the AIFMD<sup>19</sup> and UCITS Directive<sup>20</sup> and are part of a group have to comply with the limitation of the variable components of remuneration to 100 % (if applicable, up to 200 % with shareholders' approval) of the fixed components of remuneration if their professional activities have a material impact on the group's risk profile on a consolidated basis.<sup>21</sup> Where specific CRD requirements conflict with the sectoral requirements (e.g. under the AIFMD or UCITS Directive), the remuneration policy should set out for the concerned identified staff which requirements should apply within the entity on an individual basis, taking into account the specific sectoral legislation (e.g. entities subject to the AIFMD or the UCITS Directive should pay the variable remuneration in the alternative investment funds instruments or UCITS instruments (Annex II (1) (m) of AIFMD and Article 14(b)(m) of UCITS V).

64. Staff seconded from a parent undertaking in a third country to an EU subsidiary or branch who, were they employed directly by the EU subsidiary or branch, would fall into the scope of identified staff and therefore should also be subject to the provisions of Articles 92, 93 and 94 of CRD and applicable Regulatory Technical Standards as they are implemented in the Member State where the subsidiary or branch is established. For the purposes of short term secondments, for example where a person is only residing in a Member State for a few weeks to carry out project work, that person should be subject to such provisions only if the person would be identifiable under the applicable RTS, taking into account the remuneration awarded for the time period of and the role and responsibilities during the secondment.

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<sup>16</sup> Article 94(1)(g)(i) and (ii) of the CRD

<sup>17</sup> Article 94(1)(g)(iii) of the CRD

<sup>18</sup> Article 94(1)(l) of the CRD

<sup>19</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

<sup>20</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>21</sup> Further details on how to identify these staff members are set out under Section 9.3 'Identification process on solo and consolidated level' below.

65. Short-term contracts or secondments must not be used as a means of circumventing CRD requirements and any related standards or guidelines.
66. Regarding subsidiaries established in third countries belonging to a group established in a Member State, the group wide remuneration policies and practices should set the maximum level of the ratio between the variable component of remuneration and the fixed component not higher than 100 % (if applicable, up to 200 % with shareholders' approval) specify whether the notional discount rate is applied and ensure that for the award of variable remuneration, instruments are used in line with these guidelines and the Commission Delegated Regulation (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration (RTS on instruments)<sup>22</sup>.
67. Where a subsidiary established in a third country belonging to a group established in a Member State wants to implement a ratio between the variable and fixed components of remuneration higher than 100 %, the consolidating institution should be able to demonstrate to the competent authority that the shareholders of the subsidiary in the third country have approved the higher ratio in line with the procedure under Article 94(1)(g) of CRD.
68. Competent authorities should ensure that branches of credit institutions having their head office in a third country are subject to the same requirements as applicable to institutions within Member States. Where these branches want to implement a ratio between the variable and fixed components of remuneration higher than 100 %, they should demonstrate to the competent authority that the shareholders of the institution in the third country have approved the higher ratio.
69. Where an institution established in a Member State is a subsidiary of a parent institution in a third country, the CRD requirements apply to that institution. This includes, where applicable, the application on a sub-consolidated or consolidated level and to subsidiaries, but does not include the level of the parent institution located in a third country and other subsidiaries of that parent institution located in third countries. The consolidating institution should ensure that the group-wide remuneration policies of the parent institution in a third country are taken into consideration within its own remuneration policies as far as this is not contrary to the requirements set out in CRD, CRR, national law and applicable guidelines.

Q 4: Are the guidelines regarding remuneration policies and group context appropriate and sufficiently clear?

<sup>22</sup> The RTS on instruments is published under: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL\\_2014\\_148\\_R\\_0006](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_148_R_0006)

## 8. Proportionality

70. The proportionality principle aims to match remuneration policies and practices consistently with the individual risk profile, risk appetite and strategy of an institution, so that the objectives of the obligations are effectively achieved. The obligation to have sound remuneration policies and practices applies to all institutions and with respect to all staff, regardless of the institutions different characteristics.
71. Before remuneration requirements are applied in a proportionate way, the identification of staff, based on the criteria provided in the RTS on identified staff<sup>23</sup> and additional internal criteria, should be performed<sup>24</sup>. Only afterwards, the institution applies the provisions in a manner and to the extent that is appropriate, taking into account the institutions size, internal organisation and the nature, scope and complexity of the activities. When applying requirements in a proportionate way to different categories of staff, the institutions should take into account the nature, scope and complexity of the activities of these categories of staff.
72. In any case, the limitation of the ratio between the variable components of remuneration and the fixed components to 100 % (200 % with shareholders' approval) is not subject to proportionality principle. It should be applied to all identified staff in the institution and its subsidiaries, even if they are not themselves subject to the CRD, in line with the guidelines in section 7.
73. Where the CRD sets some specific requirements with numerical criteria (e.g. the minimum deferral period of three to five years; the minimum portion of 40 to 60 % of variable remuneration that should be deferred, the minimum portion of 50 % of variable remuneration that should be paid in instruments), institutions should apply the criteria based on proportionality, considering that in particular for significant institutions and their senior management and members of the management body more strict criteria should be set, and in any case apply at least the minima criteria set out in the CRD.
74. Where an institution is a subsidiary of a significant institution, all requirements are applied to these subsidiaries on solo level as they apply on the consolidated level.
75. With regard to different categories of identified staff, institutions should implement specific remuneration policies and risk alignment mechanisms as appropriate to ensure that the impact of the staff on the institutions risk profile is appropriately aligned with its remuneration.

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<sup>23</sup> Commission Delegated Regulation (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile

<sup>24</sup> Please refer to guidelines for the identification process outlined in section 9

76. The application of proportionality to categories of identified staff should take into account the impact on the risk profile of that category of staff.
77. When applying requirements in a proportionate way, institutions are responsible to consider their risk profile, risk appetite and other characteristics and to develop and implement remuneration policies and practices which are appropriately aligned to the business strategy, objectives, values and long-term interest of the institution.
78. Institutions should be able to demonstrate to the competent authorities that the remuneration policy and practices are consistent with and promote sound risk management.
79. Competent authorities should ensure that institutions comply with the remuneration requirements in an appropriate manner that provides for an equivalent level of conditions for competition between the same categories of institutions.
80. According to the above, large (including significant), and more complex institutions should have more sophisticated remuneration policies and risk measurement approaches, while small and less complex institutions may implement simpler remuneration policies and approaches.
81. In assessing the application of the requirements in a proportionate manner, institutions and competent authorities should consider a combination of all the following criteria: the size, the internal organisation and the nature, scope and complexity of the institution's activities.
82. Thus, at least the following criteria should be taken into account by institutions and competent authorities:
- a. the balance sheet total or the quantity of assets held by the institution and significant entities consolidated for regulatory and where relevant accounting purposes;
  - b. the geographical presence of the institution and the size of the operations in each jurisdiction;
  - c. the legal form and the available equity and debt instruments;
  - d. the authorisation to use internal methods for the measurement of capital requirements (e.g. IRB, AMA);
  - e. whether the institution is part of a group and, if so, the proportionality assessment done for the group;
  - f. the type of authorised activity and services (e.g. loans and deposits, investment banking);
  - g. the underlying business strategy;

- h. the structure of the business activities and the time horizon, measurability and predictability of the risks of the business activities;
- i. the funding structure of the institution;
- j. the structure of profits and losses of the institution;
- k. the type of clients (e.g. retail, corporate, small businesses, public entity);
- l. the complexity of the products or contracts.

Q 5: All respondents are welcome to provide their comments on the chapter on proportionality, with particular reference to the change of the approach on 'neutralisations' that was required following the interpretation of the wording of the CRD. In particular institutions that used 'neutralisations' under the previous guidelines for the whole institution or identified staff receiving only a low amount of variable remuneration are asked to provide an estimate of the implementation costs in absolute and relative terms and to point to impediments resulting from their nature, including their legal form, if they were required to apply, for the variable remuneration of identified staff: a) deferral arrangements, b) the pay out in instruments and, c) malus (with respect to the deferred variable remuneration). In addition those institutions are welcome to explain the anticipated changes to the remuneration policy which will need to be made to comply with all requirements. Wherever possible the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately for the three listed aspects.

## 9. The identification process

83. It is the responsibility of institutions to identify the members of staff whose professional activities have a material impact on the institution's risk profile. All institutions should conduct annually a self-assessment in order to identify all staff whose professional activities have or may have a material impact on the institution's risk profile. The identification process should be part of the overall remuneration policy of the institution.
84. Institutions should carry out the above mentioned self-assessment regardless of the fact that some of the requirements may be applied in a proportionate way.
85. The self-assessment should be based on the qualitative and quantitative criteria provided for in the RTS on identified staff and should include, where needed to ensure a complete identification of all staff whose professional activities have a material impact on the institutions risk profile, additional criteria set forth by the institution that reflect the levels of risk of different activities within the institution and the impact of staff members on the risk profile.

86. When applying the quantitative criteria of the RTS on identified staff, institutions should take into account all monetary or non-monetary fixed components of remuneration awarded for professional services of the preceding financial year and all monetary and non-monetary variable components awarded for the preceding financial year. Where institutions use multi-year accrual periods, they should consider the variable remuneration accrued for the preceding period, even if the award will be made only at the end of the performance period.
87. Where the quantitative criteria are met, staff is identified staff, unless the institution applies Article 4(2) of the RTS on identified staff. In relation to the criteria (a), in respect of staff who was awarded total remuneration of EUR 750 000 or more in the preceding financial year, or (b) of Article (4)(1) of the RTS, the application of paragraph (2) of Article 4 of the RTS is subject to the prior approval of the competent authority.
88. The self-assessment should be clear, consistent, properly documented and periodically updated. The assessment results should be kept updated at all times during the year at least with regard to the criteria under Article 3 of the RTS on identified staff. The following information should at least be included in the self-assessment:
- a. the rationale underlying the self-assessment and its coherence with the governance and organisational mechanisms of the institutions, its risk alignment, its business strategy and models, and geographical location;
  - b. the role and responsibilities of the different corporate bodies and internal functions involved in the design, oversight, review and application of the identification process;
  - c. how persons working in institutions and other entities within the scope of consolidation, subsidiaries and branches, including such located in third countries, are assessed;
  - d. the requirements regarding the documentation of the identification outcome;
  - e. the rationale underlying the use of exclusions from the quantitative criteria allowed by the RTS on identified staff.
89. Institutions should keep record of the identification process and its results and should be able to demonstrate to their competent supervisory authority how staff have been identified according to both the qualitative and quantitative criteria provided for in the RTS on identified staff and any additional criteria used by the institutions.
90. The documentation should at least include the number of identified staff including the number of staff identified for the first time, the job responsibilities and activities, the names or another unique identifier and the allocation within the institution of the identified staff to business areas and a comparison with the results of the previous year's self-assessment.
91. The documentation should also include staff members who have been identified under quantitative criteria, but for whom the professional activities are assessed as not having a material impact on the institution's risk profile, according to the RTS on identified staff (Article 4). Those assessments should be properly documented. Institutions should maintain the

documentation for an appropriate time period to enable the review by the competent authorities.

## 9.1. Notification and prior approval of exclusions

92. Where the institution determines according to Article 4(2) of the RTS on identified staff that the professional activities of the staff member do not have a material impact on the institution's risk profile and notifies the competent authority or applies for a prior approval, the following should apply:

- a. the management body should decide based on the performed analysis within the annual identification process if the staff has in fact no material impact on the institutions risk profile, and the supervisory function should review the decision taken ;
- b. any notification should be made without delay, but at the latest within six months after the end of the preceding financial year as to ensure that the competent authority has sufficient time for analysing the exclusions made and that the institution can take into account any objections raised by the competent authority and adjust the identification outcome accordingly;
- c. any application for prior approval should be made without delay, but at the latest within six months after the end of the preceding financial year. The competent authority should assess the application and approve or reject the application, to the extent possible, within a three-month period after receiving the complete documentation;
- d. where the staff member was awarded total remuneration of 1 000 000 euro or more in the preceding financial year the competent authority should immediately inform the European Banking Authority about the application received and provide their initial assessment. On request the competent authority should immediately submit all information received by the institution to the EBA. The EBA will liaise with the competent authority to ensure that the criteria of the RTS are applied in a consistent way before the decision regarding the approval or rejection of the application is taken by the competent authority.

93. The prior approval under Article 4(5) of the RTS on identified staff regarding exclusions of staff identified in relation to the criterion in point (b) of Article 4(1) of this RTS should be granted only for a limited time period. The request for prior approval under Article 4(5) of the RTS on identified staff should be made each year. With respect to staff for whom a decision on the application is taken for the first time, the prior approval should only concern the financial year in which the prior approval was requested and the following financial year. For staff where the application of Article 4(2) of the RTS has already been approved for the ongoing financial year, the prior approval should only concern the following financial year.

94. The notification of the application of exclusions under Article 4(4) of the RTS on identified staff, for staff identified in relation to the criterion in point (a) of Article 4(1) of this RTS should be made annually, differentiating between exclusions in relation to the criterion in point a) and b) of Article 4(2) of this RTS, but limited to staff who was not notified as being excluded in the previous accrual period in relation to the same criterion (e.g. where staff was excluded as the business unit is not material no notification is needed when the same staff member would still be active in the same business unit and the business unit is still not material).
95. Where identified staff would be excluded in subsidiaries which are not themselves subject to the CRD, the competent authority is the competent authority of the parent institution. For branches of credit institutions where the head office is located in a third country the competent authority is the competent authority responsible for the supervision of institutions in the Member State where the branch is located.
96. Notifications and requests for prior approval should include all names or another unique identifiers for identified staff for which an exclusion should apply, the percentage of internal capital allocated according to Article 73 of CRD to the business unit where the staff member is active in and where required under the RTS on identified staff the analysis of the impact of staff on the institutions risk profile for each identified staff member. Where identified staff is active in the same business unit and have the same function a joint assessment should be made.

## 9.2. Governance of the identification process

97. The management body has the ultimate responsibility for the identification process and the respective policy. The management body in its supervisory function should:
- a. approve the identification process policy as part of the remuneration policy;
  - b. be involved in the design of the self-assessment;
  - c. ensure that the assessment for the identification of staff is properly made in accordance with the CRD, the RTS on identified staff and these guidelines;
  - d. oversee the identification process on an on-going basis;
  - e. approve any material exemptions from or changes to the adopted policy and carefully consider and monitor their effect;
  - f. approve or oversee any exclusion of staff in accordance with Article 4(2) of the RTS on identified staff where the institutions deems that the qualitative criteria defined in the RTS on identified staff are not met by the staff as they in fact do not have a material impact on the institutions' risk profile;
  - g. periodically review the approved policy and, if needed, amend it.

98. Where a remuneration committee is established, it should be actively involved in the identification process in line with its responsibilities for the preparation of decisions regarding remuneration. Where no remuneration committee is appointed, the non-executive and where possible the independent members of the management body in its supervisory function should execute the respective tasks.

99. The internal control functions (i.e., internal audit, independent risk management and independent compliance functions), the business support functions (e.g. legal, human resources) and the relevant committees of the management body (i.e., risk, nomination and audit committees) should be properly involved in the identification process, also on an ongoing basis. In particular where a risk committee is established, it should be involved in the identification process without prejudice to the tasks of the remuneration committee. Institutions should ensure a proper exchange of information among all internal bodies and functions involved in the identification process.

### 9.3. Identification process on solo and consolidated level

100. The criteria included in the RTS on identified staff and those additionally set by the institutions should be applied both by institutions on a solo basis, using the figures and considering the situation of the individual institution, and in addition by the consolidating institution on a consolidated basis, including also all subsidiaries not subject to CRD, using the consolidated figures and considering the consolidated situation and the impact on the institutions' risk profile on a consolidated basis. The same applies for the sub-consolidated level.

101. When applying the qualitative criteria in Article 3 of the RTS on identified staff at consolidated or sub-consolidated level, staff members in a subsidiary are only captured if they are responsible for the functions referred in these criteria on a consolidated or sub-consolidated basis. E.g. a staff member in a subsidiary who is a member of the management body of such subsidiary should be captured by the criterion set out in Article 3(1) of the RTS on identified staff (*'the staff member is a member of the management body in its management function'*) only if he or she is also a member of the management body of the EU parent institution.

102. The quantitative criteria within Article 4 of the RTS on identified staff apply to all staff on a consolidated basis, including all subsidiaries. E.g. staff in a subsidiary earning 500 000 euro or more is therefore considered identified staff, unless staff would be excluded under Article 4 (paragraphs 2 to 5) of this RTS.

103. When applying the qualitative criteria in Article 3 of the RTS on identified staff on the solo level, institutions should identify the staff responsible for the function named in the respective qualitative criteria; the main criterion for the identification is not the name of the function but the authority and responsibility conferred on the function.

## 9.4. Role of the consolidating institution

104. The consolidating institution should ensure the overall consistency of the group remuneration policies including the identification processes and the correct implementation on a consolidated, sub-consolidated and solo basis.

## 9.5. Role of subsidiaries

105. Institutions that are a subsidiary of a consolidating institution should implement within their remuneration policy, the policy issued by the consolidating parent institution and process for the identification of staff. All subsidiaries should actively participate in the identification process carried out by the consolidating parent institution. In particular, each subsidiary, including the ones not falling within the scope of CRD, should provide the consolidating institution with all information necessary to properly identify all staff who have a material impact on the institutions' risk profile on the consolidated level.

106. Subsidiaries that are not themselves subject to the CRD are not required to perform an identification process on the solo level. For those subsidiaries the assessment should be performed by the consolidating institution, based on information provided by the subsidiary. Institutions falling within the scope of the CRD (credit institutions and investment firms) should conduct their own self-assessment for the identification of staff on the solo level. Small and less complex institutions which are included in an identification process on a consolidated basis may delegate the practical application of the identification process on a solo level to the consolidating institution.

107. Branches of credit institutions located in third countries and institutions which are subsidiaries of parent institutions in third countries should conduct the identification process and inform their parent institution of its results. Institutions should also include their subsidiaries and branches in third countries in their assessment. For branches, the criteria for the identification should be applied in the same way to the functions, business activities and staff located in a Member State as they would be for an institution on an individual level.

Q 6: Are the guidelines on the identification of staff appropriate and sufficiently clear?
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## 10. Capital base

108. Institutions and competent authorities should ensure that the award, pay out and vesting of variable remuneration, including the application of malus and clawback arrangements, under the institutions' remuneration policy is not detrimental to maintaining a sound capital base.

109. When assessing if the capital basis is sound, the institution should take into account its overall own funds and in particular the Common Equity Tier 1 capital, the combined capital buffer requirement as defined in Article 128 (6) of CRD and the restrictions on distributions

defined in Article 141 of CRD as well as the result of the internal capital adequacy assessment process. Additionally, competent authorities should take into account the results of the supervisory review and evaluation process in line with the respective EBA guidelines.

110. Institutions should include the impact of variable remuneration - both upfront and deferred amounts - in their capital and liquidity planning and in their overall internal capital adequacy assessment process.
111. The total variable remuneration awarded by an institution must not limit the ability of the institution to maintain or restore a sound capital base in the long term and should consider the interests of shareholders and owners, depositors, investors and other stakeholders. Variable remuneration should not be awarded or paid out when the effect would be that the capital base of the institution would no longer be sound. In addition to the restrictions on distributions defined in Article 141 of CRD, the institution should consider these requirements when determining:
- a. the overall pool of variable remuneration that can be awarded for that year; and
  - b. the amount of variable remuneration that will be paid out or will be vesting in that year.
112. Institutions which do not have a sound capital basis or where the soundness of the capital base is at risk should take the following measures with regard to variable remuneration:
- a. reducing the variable bonus pool, including the possibility to reduce it down to zero;
  - b. apply the necessary performance adjustment measures (i.e. *malus* or clawback arrangements);
  - c. use the net profit of the institution for that year and potentially for subsequent years to strengthen the capital base.
113. The institution should not compensate for any reduction of the variable compensation made in order to ensure a sound capital basis in later years or by other payments, vehicles or methods which lead to a circumvention of this provision.
114. Competent authorities should intervene where the awarding of variable remuneration is detrimental to the maintenance of a sound capital base by requiring the institution to:
- a. reduce or apply a cap to the overall pool of variable remuneration determined until the capital adequacy situation improves; and if necessary apply *malus* and clawback arrangements;
  - b. require institutions to use net profits to strengthen own funds.

Q 7: Are the guidelines regarding the capital base appropriate and sufficiently clear?

## Title III - Requirements regarding remuneration

### 11. Categories of remuneration

115. Under the CRD, remuneration is either fixed or variable remuneration; there is no third category of remuneration. Where remuneration is variable and is paid to identified staff, all requirements of Article 94 of CRD have also to be met in addition to the general requirements contained in Article 92 thereof. For that purpose, institutions should map correctly the components of remuneration into either fixed or variable remuneration and their remuneration policies should set out clear, objectively predetermined and transparent criteria to assign all remuneration components to either the fixed or variable categories in line with the definitions provided in Article 92(2)(g) of the CRD.
116. Where the clear allocation of a component to the fixed remuneration is not possible based on the criteria provided in these guidelines it should be considered as variable remuneration.
117. Remuneration is fixed where the conditions for its award and its amount:
- a. are predetermined;
  - b. are non-discretionary;
  - c. are transparent to staff;
  - d. are permanent i.e. maintained over a period tied to the specific role and organisational responsibilities;
  - e. are non-revocable; the permanent amount is only changed via collective bargaining or following renegotiation in line with national criteria on wage setting;
  - f. the payments cannot be reduced, suspended or cancelled by the institution;
  - g. do not provide incentives for risk assumption; and
  - h. do not depend on performance.
118. Remuneration components that are either part of a general, institution-wide policy where they are awarded in a non-discretionary way to staff, do not depend on performance and do not pose incentive effects in terms of risk assumption, or payments based on legal obligations, i.e. mandatory under national law, are considered as fixed remuneration. This includes payments which form part of routine employment packages, as mentioned by recital 64 of CRD, and which are solely linked to the family or personal situation like childcare, proportionate regular pension contributions on top of the mandatory regime, travel allowance, and health insurance.

119. The following remuneration components should also be considered as fixed:
- a. Remuneration paid to expatriated staff considering the cost of living in a different state, where all similar situations are treated in a consistent way;
  - b. Allowances used to increase the basic fixed salary in situations where staff work abroad and receive less remuneration than would be paid on the local employment market for this position where all of the following conditions are met:
    - i. the allowance is paid on a non-discriminatory basis to all staff;
    - ii. the allowance is awarded because staff works temporarily abroad or in a different position with a remuneration level requiring adjustment from the contractual one to reflect pay levels in the relevant market;
    - iii. the level of additional payments is based on predetermined criteria;
    - iv. the duration of the allowance is tied to the duration of the situation.
120. Remuneration awarded under long term incentive plans, where parts of the remuneration are awarded at a certain point of time based on the discretion of the institution and other parts are awarded at a later stage, based on the condition that staff remains with the institution or other conditions, is variable remuneration. For the calculation of the ratio between the variable and the fixed component of remuneration the following should apply:
- a. the parts of long term incentive plans that are awarded at a later staged and are only awarded if the underlying conditions are met should be taken into account in the accrual period when the remuneration is awarded;
  - b. all upfront parts and parts to which no condition applies should be taken into account in the performance year where the long term incentive plan is awarded.
121. ‘Carried interest’ payments within the meaning of Article 4(1)(d) of the AIFMD are subject to the remuneration provisions of the AIFMD; paragraph 2 of Annex I of the AIFMD specifically includes carried interest in the definition of remuneration<sup>25</sup>. The ESMA Guidelines on sound remuneration policies under the AIFMD apply<sup>26</sup>. For the purposes of these EBA guidelines and in particular of calculating the ratio between the variable and fixed components of

<sup>25</sup> Annex I, paragraph 2 of the AIFMD states that “The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage” (emphasis added).

<sup>26</sup> ESMA/2013/232, available at [http://www.esma.europa.eu/system/files/2013-232\\_aifmd\\_guidelines\\_on\\_remuneration\\_-\\_en.pdf](http://www.esma.europa.eu/system/files/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf). On the specific treatment of carried interest under the AIFMD, see, in particular, paragraphs 10, 13 and 16 and 159 of the ESMA Guidelines.

remuneration for staff identified under section 9 of these Guidelines, the following should apply:

- a. all payments made by the alternative investment funds to the staff members through carried interest vehicles which are not representing a pro-rata return on the investment made by staff should be considered as variable remuneration;
- b. all payments made by the alternative investment funds to the staff members through these carried interest vehicles which represent a pro-rata return on any investment by staff (through the carried interest vehicle) into the alternative investment fund, should not be included in the calculation.

Q 8: Are the requirements regarding categories of remuneration appropriate and sufficiently clear?

## 12. Particular cases of remuneration components

### 12.1. Allowances

122. The variable and fixed remuneration of institutions may consist of different elements, including additional or ancillary payments or benefits. Institutions should analyse allowances<sup>27</sup> and allocate them to the variable or fixed component of remuneration. The allocation should be based on the criteria in section 11.

123. In particular where allowances are considered as fixed remuneration, but show any of the following features, the reasons for their mapping to the fixed component of remuneration should be duly documented:

- a. they are paid only to identified staff members<sup>28</sup>;
- b. they are limited to cases where the ratio between the variable and the fixed components of remuneration would exceed otherwise 100 % (if applicable, up to 200% where approved by shareholders);
- c. the allowances are linked to indicators that could possibly be understood as proxies for performance. In that case the institution should be able to demonstrate that these indicators are not linked to the performance of the institution, e.g. by analysing the correlation to the performance indicators used.

<sup>27</sup> The label may differ according to the institution: 'role based pay, staff allowance, adjustable role allowance, fixed pay allowance' etc.

<sup>28</sup> Being an Identified Staff member should not be considered as a role or function.

124. Where allowances are based on the role, function or organisational responsibility of staff, in order to be correctly mapped to the fixed component of remuneration they should meet the criteria set out in paragraph 117 taking into account all of the following particulars:
- the allowance is tied to a role or organisational responsibility and awarded as long as no material changes happen regarding the responsibilities and authorities of the role so that in fact the staff would have a different role or organisational responsibility;
  - the amount does not depend on any other factors than fulfilling a certain role or having a certain organisational responsibility;
  - any other staff member fulfilling the same role or having the same organisational responsibility and who is in a comparable situation would be entitled to a comparable allowance.
125. Competent authorities should ensure that allowances are not a vehicle or method that facilitates the non-compliance of institutions with the CRD.

Q 9: Are the requirements regarding allowances appropriate and sufficiently clear?

## 12.2. Retention bonuses

126. A retention bonus should be taken into account within the calculation of the ratio between the variable and the fixed remuneration as variable remuneration consistent over time with its actuarial value in line with the applied accounting standards or on a linear pro rata basis.
127. Where a retention bonus is paid to identified staff all requirements regarding the pay out and ex post risk alignment of variable remuneration should be complied with, including e.g. payment in instruments, deferral, retention, malus, clawback in line with the respective guidelines.
128. Institutions should be able to substantiate their legitimate interest in awarding higher amounts of retention bonuses. For example, retention bonuses may be used under restructurings, in wind down or after a change of control, but also in other situations where the institution can provide a rationale for its legitimate interest in retaining a relevant staff member.
129. A retention bonus would not comply with the requirements on variable remuneration where they were awarded to merely compensate for performance related remuneration not paid due to insufficient performance or the institution's financial situation.

Q 10: Are the requirements on the retention bonus appropriate a sufficiently clear?

### 12.3. Discretionary pension benefits

130. Discretionary pension benefits are a form of variable remuneration.
131. The institution should ensure that where staff leaves the institution or retires discretionary pension benefits are not paid without the consideration of the economic situation of the institution or risks that have been taken by the staff member which can affect the institution in the long term.
132. The full amount of discretionary pension benefits must be awarded, in accordance with Article 94(1)(o) of CRD, in instruments referred to in point (l) of this Article and:
- a. where identified staff leaves the institution before retirement, the institution must hold the full amount of discretionary pension benefits in instruments at least for a period of five years without the application of pro rata vesting;
  - b. where identified staff reaches retirement, a five-year retention period must be applied to the full amount paid in instruments.
133. Institutions should ensure that malus and clawback arrangements are applied in the same way to discretionary pension benefits as to other elements of variable remuneration.

## 13. Exceptional remuneration elements and prohibitions

### 13.1. Guaranteed variable remuneration

134. Guaranteed variable remuneration can take several forms such as a "guaranteed bonus", "welcome bonus", "sign-on bonus", "minimum bonus", etc. and can be awarded either in cash or in instruments.
135. When awarding guaranteed variable remuneration in accordance with Article 94(1)(d) and (e) of CRD in the first year of employment when hiring new staff, institutions are not permitted to guarantee variable remuneration for longer than one year. Guaranteed variable remuneration is exceptional and can only occur where the institution has a sound and strong capital base, in accordance with article 94 (1) (e) of CRD and section 10 of these guidelines.
136. Institutions should only award once to the same single staff member guaranteed variable remuneration. This requirement should apply in the scope of consolidation and includes situations where staff receives a new contract from the same institution or another institution within the scope of consolidation.
137. Institutions and competent authorities should not include the amount of guaranteed variable remuneration in the calculation of the ratio between variable and fixed remuneration for the first performance period, where the guaranteed variable remuneration is awarded when hiring new staff before the first performance period starts.

138. As part of the arrangements guaranteeing this part of variable remuneration, institutions may not apply the requirements on malus and clawback arrangements to guaranteed variable remuneration and may pay out the full amount in non-deferred cash where the remuneration package is not awarded for the compensation of the buy out of a previous employment.

139. For remuneration packages to compensate the beneficiary or buy the beneficiary out from a contract in previous employment, all requirements for variable remuneration apply, including deferral, retention, pay out in instruments and clawback arrangements.

## 13.2. Severance pay

140. Institutions' remuneration policies should specify the possible use of severance payments relating to the early termination of a contract, including the maximum amount that can be awarded as severance pay to categories of identified staff.

141. Institutions should have a framework in which severance pay is determined and approved, including a clear allocation of the respective responsibilities and decision making powers and the procedural involvement of the control functions.

142. Severance payments should not provide for a disproportionate reward, but for an appropriate compensation of the staff member in cases of early termination of the contract, must reflect performance achieved over time and must not reward failure or misconduct. The amount of severance pay awarded should be risk-adjusted.

143. Severance pay should not be awarded in each of the following situations:

- a. where there is an obvious failure which allows for the immediate cancellation of the contract or the dismissal of staff;
- b. where a staff member resigns voluntarily in order to take up a position in a different legal entity, unless a severance payment is required by national labour law.

144. Severance payments may include redundancy remuneration for loss of office, and may be subject to a non-competition clause in the contract.

145. Payments related to the duration of a notice period should not be considered as severance payments.

146. In particular in the following situations additional payments made, because of the early termination of a contract, should be considered as severance payment:

- a. the institution terminates the contract of staff because of a failure of the institution;
- b. the institution wants to terminate the contract following a material reduction of the institution's activities where the staff member was active in or where business areas are

acquired by other institutions without the option for staff to stay employed in the acquiring institution;

- c. the institution and a staff member agree on a settlement in case of a potential or actual labour dispute, to avoid a decision on a settlement by the competent court.

147. Where institutions award severance pay as part of a settlement with staff under point (c) of paragraph 146, they should be able to demonstrate the prudential reasons for the settlement, the appropriateness of the amount of severance pay awarded and that it does not reward failure or misconduct.

148. Institutions should, in any case, be able to explain to competent authorities the criteria used to determine the amount of severance pay.

149. When determining the amount of severance payments to be made, the institution should take into account the performance achieved over time and assess where relevant the severity of any failure. Identified failures should be distinguished between failures of the institution and failures of the identified staff as follows:

- a. Failures of the institution should be considered when the total amount of the severance payments for staff is determined, taking into account the capital base of the institution; such severance payments should not be higher than the reduction of costs achieved by the early termination of contracts;
- b. Failures of identified staff should lead to a downward adjustment of the amount of severance pay which would otherwise be awarded when only the performance over time would be considered in the estimation of the severance pay, including the possibility for a reduction of the amount down to zero.

150. Failure of institution includes the following situations:

- a. Where the institution benefits from government intervention or is subject to early intervention or resolution measures in accordance with the Directive 2014/59/EC of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms ('BRRD');
- b. Where the opening of normal insolvency proceedings of the institution, as defined in the BRRD, has been filed;
- c. Where significant losses lead to a situation where the institution has not any longer a sound capital basis and following this the business area is sold or the business activity reduced.

151. Failure of the identified staff should be assessed on a case-by-case basis, and includes the following situations:

- a. Where a member of the management body is no longer considered as of good repute or as sufficiently experienced and knowledgeable;
- b. Where the identified staff participated or is responsible for conduct which resulted in significant losses for the institution, as defined in the institutions' remuneration policy;
- c. Where a member of staff acts contrary to internal rules, values or procedures based on intent or gross negligence.

152. When calculating the ratio between the variable and the fixed remuneration the following amounts should not be taken into account for the purpose of the calculation of the ratio between the variable and fixed components of remuneration for the last performance period:

- a. Severance payments mandatory under national labour law, mandatory following a decision of a court or calculated through a predefined generic formula set within the remuneration policy in the cases referred to above;
- b. Settlements made for the loss of office where they are subject to a non-competition clause ('gardening leave') in the contract and paid out in future periods up to the amount of the annual fixed salary which would have been paid for the respective non-competition period, if staff were still employed;
- c. Severance payments under paragraph 146.

153. When calculating the ratio between the variable and the fixed remuneration the following amounts of severance pay should be taken into account as variable remuneration for the purpose of the calculation of the ratio between the variable and fixed components of remuneration for the last performance period:

- a. The sum of any higher amounts than the basic salary for the future periods under point (b) of paragraph 152;
- b. Any other severance pay not contained in paragraph 152.

Q 11: Are the provisions regarding severance payments appropriate and sufficiently clear?
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### 13.3. Personal hedging

154. Where an appropriate remuneration policy is aligned with risks it should be sufficiently effective and able to result in practice in a downward adjustment to the amount of variable remuneration awarded to staff and the application of malus and clawback arrangements.

155. Institutions should ensure that staff members are not able to transfer the downside risks of variable remuneration to another party through hedging or certain types of insurance, e.g. by implementing policies for dealing in financial instruments and disclosure requirements.

156. Staff should be considered to have hedged the risk of a downward adjustment in remuneration, if the staff member enters into a contract with a third party or the institution and one of the following is met:
- a. the contract requires the third party or the institution to make payments directly or indirectly to the staff member that are linked to or commensurate with the amounts by which the staff member's variable remuneration has been reduced;
  - b. the staff member purchases or holds derivatives that are intended to hedge losses associated with financial instruments received as part of the variable remuneration.
157. Staff should be considered to have insured the risk of a downward adjustment where staff takes out an insurance contract with a stipulation to compensate them in the event of a downward adjustment in remuneration. This should in general not prohibit taking out insurance to cover personal payments such as healthcare and mortgage instalments.
158. The requirement to not use personal hedging strategies or insurance to undermine the risk alignment effects embedded in their remuneration arrangements should apply to deferred and retained variable remuneration.
159. Institutions should maintain effective arrangements to ensure that the staff member complies with the requirements of this chapter. A mere declaration of self-commitment by the staff member that he or she will refrain from concluding personal hedging strategies or insurances for the purpose of undermining the risk alignment effects is not sufficient to comply with the hedging prohibition. Institutions human resources or internal control functions should perform at least spot-check inspections of the compliance with this declaration. Random checks should, in all cases, include the internal custodianship accounts of identified staff. Furthermore, notification of any custodial accounts outside the institution should also be made mandatory.

#### 13.4. Circumvention

160. Institutions should ensure that variable remuneration is not paid through vehicles or methods which aim at or effectively lead to non-compliance with remuneration requirements for identified staff or, where such requirements are applied to all staff, with remuneration requirements for all staff. This includes arrangements between the institution and third parties where the staff member has a financial or personal interest in.
161. "Circumvention" is the non-compliance with remuneration requirements and takes place if an institution is actually not meeting the objective and purpose of requirements when considered together, while formally the institution complies with the wording of the single remuneration requirements.
162. Circumvention takes place among other:

- a. where variable remuneration is considered as fixed remuneration in line with the wording of these guidelines, but not with its objectives;
- b. where variable remuneration is awarded or vests although effectively:
  - i. there is no positive performance by the staff member, business unit or institution;
  - ii. there is no effective risk alignment (i.e. ex-ante or ex-post risk adjustment); or
  - iii. the variable remuneration is not sustainable according to the institution's financial situation;
- c. where staff receives payments from the institution or an entity within the scope of consolidation which do not fall under the definition of remuneration, but are vehicles or methods of pay that contain an incentive for risk assumption or provide disproportionate returns on investments on instruments of the firm that are significantly different from conditions for other investors who would invest in such a vehicle;
- d. where fixed remuneration components are awarded as a fixed number of instruments and not as a fixed amount;
- e. where staff is awarded remuneration in instruments or is able to buy instruments which are not priced at the market value or the fair value in the case of non-listed instruments and the additional value received is not taken into account in the variable remuneration;
- f. where adjustments to fixed remuneration components are frequently negotiated and adjustments are in fact made to align the remuneration with the performance of staff;
- g. where allowances are awarded at an excessive amount that is not justified for the underlying reason.

163. Institutions should ensure that the method for measuring the performance has appropriate checks and balances to ensure that the award criteria cannot be manipulated. Where such controls are not in place the variable remuneration is not appropriately linked to performance and the remuneration policy is not appropriately implemented and any payment of variable remuneration can lead to a violation of regulatory requirements. Possible manipulations include, for instance, courtesy decisions in the bilateral performance measurement process, e.g. where no objective standards exist for the decision making process regarding staff members' goal attainment.

164. Institutions should not create group structures or offshore entities in order to manipulate the outcome of the identification process and to circumvent the application of the remuneration requirements to staff to which these requirements should otherwise apply.

165. Where short term contracts (e.g. one-year) were used and renewed on a regular basis by institutions, competent authorities should review if such contracts form a vehicle or method of circumvention of the CRD requirements, e.g. as they would in fact create variable

remuneration, and take appropriate measures to ensure that institutions comply with the requirements of Article 92 and 94 of the CRD.

166. Where remuneration is fixed remuneration according to the guidelines in section 11, but is paid out in instruments, institutions and competent authorities should consider if the instruments used renders the fixed component of remuneration to a variable component of remuneration as a link to the performance of the institution is established. Institutions should not use financial instruments as part of the fixed remuneration to circumvent variable remuneration requirements and the instruments used should not provide for incentives for excessive risk taking.

Q 12: Are the provisions on personal hedging and circumvention appropriate and sufficiently clear?

## 14. Remuneration of specific functions

### 14.1. Remuneration of members of the management and supervisory function of the management body

167. The remuneration of the members of the management body in its management function (hereafter 'management function') should be consistent with their powers, tasks, expertise and responsibilities.

168. In order to properly address conflicts of interest members of the supervisory function should be compensated only with fixed remuneration. Incentive-based mechanisms based on the performance of the institution should be excluded. The reimbursement of costs to members of the supervisory function and the payment of a fixed amount for working hour or day, even if the time to be reimbursed is not predefined, are considered as fixed remuneration.

169. Where the supervisory function in exceptional cases is awarded variable remuneration, the variable remuneration and risk alignment should be strictly tailored to the assigned oversight, monitoring and control tasks, reflecting the individual's authorities and responsibilities and the achievement of objectives linked to their functions.

170. Where variable remuneration is awarded in instruments, appropriate measures should be taken to preserve the independence of judgment of those members of the management body, including the setting of retention periods until the end of the mandate.

### 14.2. Remuneration of control functions

171. The remuneration of staff in the independent control functions should allow the institution to employ qualified and experienced personnel in these functions. The remuneration of independent control functions should be predominantly fixed as to reflect the nature of their responsibilities.

172. The methods used for determining the variable remuneration of control functions, i.e. risk management, compliance and internal audit function, staff should not compromise their objectivity and independence and consider their advisory role to the remuneration committee.

## Title IV – Remuneration policy, award and pay out of variable remuneration for identified staff

### 15. Remuneration policy

173. Institutions should ensure that the remuneration policy for identified staff is consistent with all requirements set out by Articles 92 and 94 of the CRD and in line with the guidelines provided in this title.

174. Where institutions consider paying out less than 100 % of the fixed component in cash, this decision should be well reasoned and approved as part of the remuneration policy.

175. Where an institution in the legal form of a stock corporation and in particular a listed institution applies a shareholding requirement to some categories of identified staff, in order to achieve a better alignment of the incentives provided to staff with the risk profile of the institution in the long term, the amount should be clearly documented in the institutions' policies. When a shareholding requirement is applied, staff should have to hold a certain number of shares or nominal amount of shares as long as they are employed in the same position or a position of similar or higher seniority.

#### 15.1. Fully flexible policy on variable remuneration

176. Institutions must have a fully-flexible policy on variable remuneration, in accordance with Article 94(1)(f) of CRD for identified staff. The amount of variable remuneration awarded should appropriately react to changes of the performance of the staff member, the business unit and the institution. The institution should specify how the variable remuneration reacts to performance changes and the performance levels where variable remuneration decreases down to zero. Unethical or non-compliant behaviour should lead to a significant reduction of staff member's variable remuneration.

177. The fixed remuneration of identified staff should reflect the professional experience and organisational responsibility taking into account the level of education, the degree of seniority, the level of expertise and skills, the constraints (e.g. social, economic, cultural or other relevant factors) and job experience, the relevant business activity and remuneration level of the geographical location.

178. The amount of fixed remuneration should be sufficiently high in order to ensure that the reduction of the variable remuneration down to zero would be possible. Staff should not be dependent on the award of variable remuneration as this might otherwise create incentives for excessive risk taking or the mis-selling of products where without such short term

measures the performance of the institution or staff would not allow for the award of variable remuneration.

179. The pay out of fixed remuneration in instruments, if any, should not impair the ability of the institution to apply a fully flexible policy on variable remuneration.

## 15.2. Ratio between fixed and variable remuneration

180. Institution should set in advance in their remuneration policy the appropriate level of the ratio between the variable and fixed components of remuneration for identified staff, in line with the limits and procedures provided in Article 94(1)(g) of the CRD and national law, taking into account the business activities, risks and the impact on the risk that different categories of staff have on the risk profile. Institutions may set different ratios for different jurisdictions, geographical locations, business units, corporate and internal control functions and different categories of identified staff. The ratio set is the ratio between the variable remuneration that could be awarded as a maximum for the following performance period and the fixed remuneration of the following performance period.

181. Institutions should set the ratio between variable and fixed components of remuneration for categories of identified staff in a sufficiently granular way. In exceptional and duly justified cases, the remuneration policy may provide for single identified staff members belonging to a certain category of staff for a different ratio compared to other staff members included in the same category of staff.

182. The ratios set between the variable and fixed remuneration components for categories of staff or single staff members should be approved by the management body in its supervisory function or, where required, by the shareholders' meeting. The ratio between the variable and fixed remuneration components should be set independent of any potential future ex post risk adjustments or fluctuation in the price of instruments.

183. The effective ratio between variable remuneration awarded and fixed remuneration should increase with the performance achieved and include levels of awards that would only be achieved for performance which is 'above target' or 'exceptional'.

184. When calculating the ratio institutions should apply the EBA Guidelines on the applicable notional discount rate for variable remuneration under Article 94 (1)(g)(iii) of CRD, only when Member States have implemented Article 94(1)(g)(iii) of CRD or when the institution is a subsidiary in a third country.

185. The ratio should be calculated as the sum of all variable components of remuneration that could be awarded as a maximum in a given performance year, including the amount to be taken into account for the retention bonus, divided by the sum of all fixed elements of remuneration to be awarded in the same performance year. All remuneration components

should be correctly allocated to either variable or fixed remuneration in line with these guidelines. Institutions may omit some of the fixed remuneration components, where they are not material, e.g. where proportionate non-monetary benefits are awarded.

Q 13: Are the requirements on remuneration policies in section 15 appropriate and sufficiently clear?

## 16. Risk alignment process

186. The risk alignment process includes the performance and risk measurement process (section 16.1); the award process (section 16.2); and the pay-out process (section 17). At each stage of the risk alignment process the variable remuneration should be adjusted for all current and future risks taken. An institution should ensure that incentives to take risks are balanced by incentives to manage risk.

187. Institution should align the time horizon of the risk and performance measurement with the business cycle of the institution in a multi-year framework. Institutions should set the accrual period and the pay-out periods for remuneration at an appropriate length, differentiating between remuneration which should be paid upfront and remuneration that should be paid after deferral and retention periods. The accrual and pay-out periods should take into account the business activity and position of the category of identified staff or in exceptional cases of a single identified staff member.

188. Within the risk alignment process an appropriate combination of quantitative and qualitative criteria in the form of absolute and relative criteria should be used at all stages to ensure that all risks, performance and necessary risk adjustments are reflected. Absolute performance measures should be set by the institution on the basis of its own strategy, including its risk profile and risk appetite. Relative performance measures should be set to compare performance with peers, either 'internal' peers (i.e. within the organisation) or 'external' (i.e. similar institutions). Quantitative and qualitative criteria and the applied processes should be transparent and as much as possible pre-defined. Both quantitative and qualitative criteria may partly rely on judgment.

189. Where judgmental approaches are used, institutions should ensure a sufficient level of transparency and objectivity when judgements are made by:

- a. setting a clear written policy outlining parameters and key considerations on which the judgment will be based;
- b. providing clear and complete documentation of the final decision regarding the risk and performance measurement or applied risk adjustments;
- c. involving relevant control functions;

- d. considering the personal incentives of the staff making the judgement and any conflicts of interest;
- e. implementing appropriate checks and balances, including e.g. making such adjustments within a panel involving staff from business units, corporate and control functions, etc.;
- f. approving the assessment made by a control function or at an appropriate hierarchical level above the function making the assessment, e.g. at the management body in its management or supervisory function or at the remuneration committee.

190. Institutions should make the risk alignment process transparent to staff, including any judgmental elements.

191. Institutions should provide detailed information to the remuneration committee or to the supervisory function if the final outcome after applying judgmental measures is significantly different from the initial outcome using pre-defined measures.

## 16.1. Performance and risk measurement process

192. The variable remuneration should be aligned to all risks and the performance of the institution, the business unit and the individual. The relative importance of each level of the performance criteria should be determined beforehand in the remuneration policies and adequately balanced to take into account the objectives at each level, the position or responsibilities held by the staff member, the business unit he or she is active in and current and future risks.

### 16.1.1. Risk assessments

193. The institution should define the objectives of the institution, business units and staff. These objectives should be derived from its business and risk strategy and corporate values, the risk appetite and long-term interests and consider also the cost of capital and the liquidity of the institution. The institutions should assess the institution's business units' and staff members' achievements during the accrual period against their objectives.

194. Institutions should take into account all current and future risks, whether on or off balance sheet, differentiating amongst risks relevant for institution, business units and individuals. Though institutions usually bear all types of risk at institution-wide level, at the level of individual staff members or business units only some types of risk may be relevant.

195. Institutions should also use measures for risk alignment of remuneration where an exact quantification of the risk exposure is difficult, such as reputational and operational risk. In such cases the risk assessment should be based on suitable proxies, including risk indicators, capital requirements or scenario analysis.

196. In order to conservatively take into account all material risks at the institution and business unit level, institutions should use the same risk measurement methods as used for internal risk measurement purposes, e.g. within the Internal Capital Adequacy Assessment Process ('ICAAP') and in the institution's individual liquidity adequacy assessment. Institutions should take into account expected and unexpected losses and stressed conditions. For example, if an institution uses an Advanced Measurement Approach (AMA) to calculate its operational capital requirements, this methodology will already include high severity losses and scenario analysis. Similarly, institutions' credit risk and market risk or economic capital models will also be incorporating stressed conditions.

197. The institutions should be able to demonstrate to the competent authority how the risk calculations are broken down by business units and different types of risks. The extent and quality of methods and models used within the ICAAP should be reflected by the institution in a proportionate way in the remuneration policy. More sophisticated ICAAP methods should lead to a more sophisticated variable remuneration policy, including risk sensitive adjustment techniques.

### 16.1.2. Risk sensitive performance criteria

198. Institutions should set and document both, quantitative and qualitative, including financial and non-financial performance criteria for individuals, business units and the institution. The performance criteria should not incentivise excessive risk taking or mis-selling of products.

199. Institutions should use an appropriate balance between quantitative and qualitative as well as absolute and relative criteria.

200. The criteria used to measure risk and performance should be linked as closely as possible to the decisions made by the staff member and the category of staff members that is subject to the performance measurement and should ensure that the award process has an appropriate impact on staffs' behaviour.

201. Performance criteria should include achievable objectives and measures on which the staff member has some direct influence. For example, variables at individual level for a lending officer could be the performance of loans originated or monitored by that person, while for the manager of a business unit it could be the performance of the management team of that unit. When assessing performance the effectively realised results and outcomes should be measured.

202. Quantitative criteria should cover a period which is long enough to properly capture the risk taken by staff members, business units and the institution and should be risk adjusted and include economic efficiency measures. Examples of performance criteria are risk-adjusted return on capital (RAROC), return on risk-adjusted capital (RORAC), economic profit, internal economic risk capital, net economic contribution, risk-adjusted cost of funding, risk figures derived from the internal capital adequacy assessment process or financial figures which relate

to the budget of functions (e.g. for corporate function, including legal and human resources) or to their operational risk profile, or pure accounting adjustments.

203. Operating efficiency indicators (e.g. profits, revenues, productivity, costs, and volume metrics) or some market criteria (e.g. share price and total shareholder's return) do not incorporate explicit risk adjustment and are very short term and therefore not sufficient to capture all risks of the staff member's activities. Such performance criteria require additional risk adjustments.

204. Qualitative criteria (such as the achievement of results, compliance with strategy within the risk appetite and compliance track record) should be relevant at an institution, business unit or individual level. Examples of qualitative criteria are the achievement of strategic targets, customer satisfaction, adherence to risk management policy, compliance with internal and external rules, leadership, team work, creativity, motivation and cooperation with others business units, internal control and corporate functions.

### 16.1.3. Specific criteria for control functions

205. Where control functions' staff receive variable remuneration, it should be appraised and the variable part of remuneration determined separately from the business units they control, including the performance which results from business decisions (e.g. new product approval) where the control function is involved.

206. The criteria used for assessing the performance and risks should be exclusively based on the internal control functions' objectives. Variable remuneration for control functions should exclusively follow from control objectives, e.g. the Tier 1 ratio, the non-performing loan ratio, the non-performing loan recovery rate, or audit findings. Their variable remuneration should not be based on market-oriented business objectives, e.g. earnings, return on equity, loan or balance sheet growth. The institution should consider to set a significant lower ratio between the variable and the fixed components of remuneration for control functions compared to the business units they control.

207. In case that the head of the risk management function is also a member of the management body the above principles should also apply to his remuneration.

## 16.2. Award process

208. Institutions should set a bonus pool.

209. Variable remuneration should be awarded after the end of the accrual period unless payments during the accrual period are required by national law.

210. When determining bonus pools or individual awards, institutions should consider all current risks, expected losses, estimated unexpected losses and stressed conditions associated with the institution's activities.
211. The variable remuneration awarded to control functions staff should be based on performance criteria that are independent from the performance of the business areas and the institutions they control. The bonus pool allocated to the control function should take into account the institution's ability to pay out variable remuneration to staff.
212. The accrual period should be at least one year. Where longer periods are used different accrual periods may overlap.
213. After the accrual period, the institution should determine the individual staff members' variable remuneration by translating the performance criteria and risk adjustments into actual remuneration awards. During this award process the institution should adjust remuneration for potential adverse developments in the future ("ex-ante risk adjustment").

### 16.2.1. Setting of bonus pools

214. Institutions should define one or more bonus pools for the period for which variable remuneration is awarded and calculate the overall institution wide bonus pool as a sum of these bonus pools.
215. When setting the bonus pools institutions should take into account the ratio between the variable and the fixed components of remuneration applicable to categories of identified staff, performance and risk criteria defined for the overall institution, control objectives, the financial situation of the institution, including its capital base and liquidity. The performance indicators used to calculate the bonus pool should include long term performance indicators and take into account the realised financial results. A prudent use of accounting and valuation methods should be in place which ensures a true and fair evaluation of the financial results and its capital base and liquidity.
216. The bonus pool should not be set at a certain level to meet remuneration demands.
217. Institutions should have appropriate processes and controls in place when determining the overall bonus pool.
218. Where institutions use a top-down approach, they should set the amount of the bonus pool at the level of the institution, which is then fully or partially distributed among the business units and control functions after the evaluation of their performance. The individual awards should subsequently be based on the assessment of the individual's performance.
219. Where institutions set the bonus pool in a bottom-up approach the process should start at the level of the individual staff member. Depending on the performance criteria by which the staff are assessed, a bonus pool allocation should be made for the staff member; the bonus

pool of the business unit and the institution equals the sums of potential awards allocated to the respective subordinated levels. The institution should ensure that the institution's overall performance is appropriately taken into account.

220. When distributing the bonus pool to the level of the business unit or individual staff member, the allocation should be based as appropriate on pre-defined formulae and judgmental approaches. Institutions may use scorecards or other appropriate methods to combine different approaches.
221. When choosing the approach institutions should take into account the following: formulae are more transparent and, therefore, lead to clear incentives, as the staff member knows all factors determining his or her variable remuneration. However, formulae may not capture all objectives, especially the qualitative ones which can be better captured by judgmental approaches. The judgmental approach gives more flexibility to management and can, therefore, weaken the risk-based incentive effect of the performance-based variable remuneration. It should, therefore, be applied with appropriate controls and in a well-documented and transparent process.
222. Factors such as budgets constraints, retention of staff and recruiting considerations, subsidisation among business units etc. should not dominate the distribution of the bonus pool as they can weaken the relationship between performance, risk and remuneration.
223. Institutions should maintain records on how the bonus pool and the staffs' remuneration were determined, including how estimates based on different approaches were combined.

### 16.2.2. The ex-ante risk adjustment in the award process

224. Institutions should determine the bonus pool and variable remuneration to be awarded based on performance and risk indicators and apply ex-ante adjustments to ensure that the variable remuneration awarded is fully aligned with the risks taken. The criteria used for the ex-ante risk adjustment should be sufficiently granular as to reflect all relevant risks.
225. Depending on the availability of risk adjustment criteria, institutions should determine at what level they apply risk adjustments to the calculation of the bonus pool. This should be at the level of the business unit or at the level of organisational substructures thereof, e.g. at trading desk or the individual staff member.
226. Risk alignment should be achieved by either using risk adjusted performance criteria or by adjusting performance measures for risk, based on separate risk indicators. Quantitative and qualitative criteria should be used.
227. The ex-ante risk adjustments made by institutions, where based on quantitative criteria, should largely rely on existing measures within the institutions, used for other risk management purposes. Where adjustments to such measures are made within risk

management processes, institutions should also make consistent changes in the remuneration framework. Quantitative criteria include:

- a. economic capital, economic profit, return on risk weighted assets and return on allocated equity;
- b. the cost and quantity of the capital required for the risks of its activities, whereas the distribution of capital costs should reflect the risk profile of the institution and the whole of the institution's equity should be fully allocated and charged;
- c. the cost and quantity of liquidity risk assumed in the course of business;
- d. indirect liquidity costs should also be considered (i.e. mismatch liquidity costs, cost of contingent liquidity risk and other liquidity risk exposures that an institution may have).

228. When measuring the profitability of the institution and its business units, the measurement should be based on the net revenue where all direct and indirect costs related to the activity are included. Institutions should not exclude costs of corporate functions, e.g. IT costs, group overheads or discontinued businesses.

229. Institutions should make qualitative ex-ante risk adjustments when determining the bonus pool and staffs' remuneration through e.g. the use of balanced scorecards that explicitly include risk and control considerations such as compliance breaches, risk limit breaches and internal control indicators (e.g. based on internal audit results) or other similar methods.

Q 13: Are the requirements on the risk alignment process appropriate and sufficiently clear?

## 17. Pay out process for variable remuneration

230. The institution should pay the variable remuneration partly upfront and partly deferred and in an appropriate balance between equity, equity-linked and other eligible instruments and cash. Before paying out the deferred part of cash or the vesting of deferred instruments, a reassessment of the performance and, if necessary, a risk adjustment should be applied to align variable remuneration to additional risks that have been identified or materialised after the award. This applies also where multi-year accrual periods are used.

### 17.1. Non-deferred and deferred remuneration

231. Institutions should implement a deferral schedule that appropriately aligns the remuneration of staff with the institution's activities, business cycle and risk profile and the activities of the staff member, so that a sufficient part of the variable remuneration can be adjusted for risk outcomes over time through ex-post risk adjustments.

232. A deferral schedule is defined by different components:

- a. the proportion of the variable remuneration that is being deferred (section 17.1);
- b. the time horizon of the deferral (section 17.2);
- c. the speed at which the deferred remuneration vests, including the time span from accrual until the vesting of the first deferred amount (section 17.3).

233. Institutions should take into account within the deferral schedule the form in which the deferred variable remuneration is awarded (section 17.4) and should, where appropriate, differentiate their deferral schedules by varying these components for different categories of staff. The combination of these components should lead to an effective deferral schedule, in which clear incentives for long-term oriented risk taking are provided by transparent risk alignment procedures.

## 17.2. Deferral period and proportion of deferred remuneration

234. When setting the actual deferral period and proportion to be deferred in line with the minimum requirements under Article 94(1)(m) of CRD institutions should consider:

- a. the responsibilities and authorities and the tasks performed by staff;
- b. the business cycle and nature of the institution's activities;
- c. expected fluctuations in the economic activity and performance and risks of the institution and business unit and the impact of staff on these fluctuations;
- d. the ratio between variable and fixed remuneration components and the absolute amount of variable remuneration.

235. Institutions should determine for which categories of identified staff deferral periods longer than the required minimum period of at least three to five years should be applied to ensure that the variable remuneration is aligned with the risk profile in the long term. Where longer multi-year accrual periods are used and where the longer accrual period provides more certainty about the risks that have materialised since the beginning of the accrual period, institutions should consider this fact when setting deferral and retention periods and may, where appropriate, introduce deferral periods that are shorter compared to the deferral periods which would be appropriate when a one year accrual period would be used. The minimum requirement of a three years deferral period applies in any case.

236. Significant institutions should in any case apply, at least for members of the management body in its management function and senior management, deferral periods of at least five years or longer.

237. Institutions should set an appropriate portion of remuneration that should be deferred for a category of identified staff or a staff member at or above the minimum proportion of 40% or respectively 60% for particular high amounts.

238. Institutions should define what level of variable remuneration constitutes a particular high amount, taking into account the average remuneration paid within the institution, the EBA remuneration benchmarking report and where available, national and other remuneration benchmarking results and the thresholds set by competent authorities. When implementing the guidelines, the competent authority should set an absolute or relative threshold, considering the above criteria. Remuneration at or above that threshold should always be considered as being of a particular high amount.

239. Where institutions determine the proportion that is deferred by a cascade of absolute amounts (e.g. part between 0 and 100: 100% upfront, part between 100 and 200: 50% upfront and rest is deferred and part above 200: 25% upfront and rest is deferred), institutions should be able to demonstrate to the competent authority that on an average weighted basis for each staff member the institution respects the 40 to 60 % minimum deferral threshold and that the deferred portion is appropriate and correctly aligned with the nature of the business, its risks and the activities of the member of staff in question.

240. Where the general principles of national contract and labour law prevent that variable remuneration can be considerably contracted where subdued or negative financial performance of the institution occurs, institutions should apply a deferral scheme and use instruments for the award of variable remuneration that ensures that ex post risk adjustments are as far as possible applied. This may include either of the following:

- a. the setting of longer deferral periods;
- b. avoiding the use of pro rata vesting where malus can be applied, but clawback cannot be applied;
- c. awarding a high portion of variable remuneration in instruments that are aligned to the performance of the institution and subject to sufficiently long deferral and retention periods.

### 17.3. Vesting of deferred remuneration

241. The deferral period starts at the moment the upfront part of the variable remuneration is paid out. Deferral can be applied to both types of variable remuneration, cash and instruments.

242. The first deferred portion should not vest sooner than 12 months after the accrual. The deferral period ends when the awarded variable remuneration has vested or where the amount was reduced to zero as malus was applied.

243. Deferred remuneration should vest either fully at the end of the deferral period or be spread out over several payments in the course of the deferral period in line with Article 94(1)(m) of the CRD.

244. Pro rata vesting means for e.g. a deferral period of three years that at the end of years  $n+1$ ,  $n+2$  and  $n+3$ ,  $1/3$  of the deferred remuneration vests, with  $n$  being the moment at which the upfront part of awarded variable remuneration is paid.

245. In any case, vesting should not take place more frequently than on a yearly basis to ensure a proper assessment of risks before the application of ex-post adjustments.

Q 15: Are the provisions on deferral appropriate and sufficiently clear?

## 17.4. Award of variable remuneration in instruments

246. The instruments used for the award of variable remuneration should contribute to the alignment of variable remuneration with the performance and risks of the institution.

247. Where instruments issued by an institution in the scope of consolidation under point (i) and (ii) of Article 94(1)(l) of CRD are available, the variable remuneration should consist of a balance of different types of instruments. Institutions should, where such instruments are available, prioritise the use of instruments subject to bail-in, in line with the instruments set out in the RTS on instruments, and shares, rather than the use of value-based items like share-linked instruments.

248. The availability of instruments under Art 94(l)(i) of the CRD depends on the legal form of an institution:

- a. Shares, for institutions in the legal form of a stock corporation; for non-listed stock corporations, in addition share-linked instruments are available; listed stock corporations must not use share linked instruments in line with the above mentioned article.
- b. For institutions which are non-stock corporations, ownership rights which are equivalent to shares, depending of the legal form of the institution, or non-cash instruments that are equivalent to share-linked instruments are available for the award of variable remuneration in instruments.

249. Share linked or other equivalent non-cash instruments (e.g. stock appreciation rights, types of synthetic shares) are those instruments or contractual obligations, including instruments based on cash, whose value is based on the market price or where a market price is not available the fair value of the stock or equivalent ownership right and track the market price or fair value. All such instruments should have the same effect in terms of loss absorbency as shares or equivalent ownership rights.

250. The availability of other instruments under Art 94(l)(ii) of the CRD depends on the fact if an institution or an institution in the scope of consolidation has already issued such instruments and that sufficient amounts of such instruments are available. Where institutions are primarily wholesale funded, or rely to a large extent, on additional Tier 1, Tier 2 or bail-in able debt to meet its capital requirements, such instruments should be available for the purposes of variable remuneration, where these other instruments comply with the RTS on instruments.
251. Where there are no specific factors or national laws that prevent the use of other instruments, or factors that prevent institutions from issuing instruments that comply with the RTS on instruments, then such instruments should be used for the award of variable remuneration, where they are available.
252. Where both, equity or equity linked and other eligible instruments defined under the RTS on instruments are available, it is possible to pay variable remuneration as a balance of different instruments. In that case institutions should ensure that the portion of variable remuneration that is paid in instruments comprises an appropriate balance of instruments under point (i) and point (ii) of Article 94(1)(l) of the CRD. Institutions should be able to demonstrate that they have taken into account the interests of shareholders, creditors, bondholders and other stakeholders when setting the balance between different instruments.
253. Instruments should be priced at the market price or their fair value on the date of the award of these instruments. This price is the basis for the determination of the initial number of instruments and for later ex-post adjustments to the number of instruments or their value. Such valuations should also be done before the vesting and before the retention period ends respectively to ensure that ex post risk adjustments are applied correctly. Small and non-complex institutions that are not listed may establish the value of the ownership rights and ownership right linked instruments based on the last annual financial results.
254. Institutions may award a fixed number or nominal amount of deferred instruments using different techniques, including trustee depot facilities and contracts, provided that in every case the number or nominal amount of the instrument awarded is provided to staff at vesting, unless the number or nominal amount is reduced by the application of malus.
255. Institutions should not pay any interest or dividend on instruments which have been awarded as variable remuneration under deferral arrangements to staff, this includes that interest and dividends payable during the deferral period are not paid to staff after the deferral period ended. Such payments should be treated as received and owned by the institution.
256. Competent authorities should not limit the possibility to use instruments under Article 94(1)(l) to such an extent that institutions cannot establish an appropriate balance between instruments under point (i) and point (ii) of Article 94(1)(l) of CRD.

Q 16: Are the provisions on the award of variable remuneration in instruments appropriate and sufficiently clear? Listed institutions are asked to provide an estimate of the impact and costs that would be created due to the requirement that under Article 94(1)(l)(i) CRD only shares (and no share linked instruments) should be used in parallel, where possible, to instruments as set out in the RTS on instruments. Wherever possible the estimated impact and costs should be quantified and supported by a short explanation of the methodology applied for their estimation.

## 17.5. Minimum portion of instruments and their distribution over time

257. In line with Article 94(1)(l) of CRD the requirement to pay at a minimum 50 % of any variable remuneration in instruments must be applied equally to the non-deferred and the deferred part and both parts should consist of a balance of instruments in line with the guidelines in section 17.4.

258. Institutions should prioritise the use of instruments rather than award variable remuneration in cash. Institutions should set the percentage which should be paid in a balance of instruments in line with Article 94(1)(l) of CRD at or above 50 % separately for the deferred and non-deferred part of variable remuneration. Where institutions pay out a higher portion than 50 % of the variable remuneration in instruments, they should prioritise a higher share of instruments within the deferred portion of the variable remuneration component.

## 17.6. Retention policy

259. The retention period applied to variable remuneration paid in instruments should be set at an appropriate length in order to align incentives with the longer-term interests of the institution.

260. The institution should be able to explain how the retention policy relates to other risk alignment measures and how they differentiate between instruments paid upfront and deferred instruments.

261. When setting the retention period institutions should consider the overall length of the deferral and retention period and the impact of the category of staff on the institutions' risk profile and the length of the business cycle relevant for the category of staff.

262. A longer retention period as applied in general to all identified staff should be considered in cases where the risks underlying the performance can materialise beyond the end of the deferral and standard retention period, at least for the staff with the highest impact on the institutions' risk profile.

263. For awarded instruments a retention period of at least one year should be set. Longer periods should be set in particular where ex post risk adjustments mainly rely on changes of

the value of instruments which have been awarded. Where the deferral period is at least five years, a retention period of at least six month should be imposed for identified staff other than members of the management body and senior management.

264. Large (including significant) and complex institutions should at least for the management body and senior management consider at least one of the following in order to align the variable remuneration to the risk taken:

- a. setting for the upfront awarded instruments a retention period at the length of the combined deferral and retention period for deferred instruments;
- b. defer a significant higher portion of the variable remuneration paid in instruments for these staff members.

Q 17: Are the requirements regarding the retention policy appropriate and sufficiently clear?

## 17.7. Ex post risk adjustment; malus and clawback

### 17.7.1. Malus and clawback

265. Malus or clawback arrangements are explicit ex-post risk adjustment mechanisms where the institution itself adjusts remuneration of the staff member based on such mechanisms (e.g. by lowering awarded cash remuneration or by reducing the number or value of instruments awarded).

266. Without prejudice to the general principles of national contract or labour law, malus and clawback arrangements should be applied up to 100 % of the total variable remuneration in line with Article 94(1)(n) of CRD independent of the method used for the payment, including deferral or retention arrangements.

267. Ex-post risk adjustment should always be performance or risk related, they should respond to the actual risk outcomes or changes to persisting risks of the institutions, business line or staff's activities. They should not be based on the amount of dividends paid or the evolution of the share price.

268. Institutions should analyse whether its initial ex-ante risk adjustment was sufficient, e.g. whether risks have been omitted or underestimated or new risks were identified or unexpected losses occurred. The extent to which an ex-post risk adjustment is needed depends on the accuracy of the ex-ante risk adjustment and should be established by the institution based on back testing.

269. When setting criteria for the application of malus and clawback in line with Article 94(1)(n) of the CRD, institutions should also set a period during which malus or clawback will be applied. This period should at least cover deferral and retention periods. Institutions may differentiate between criteria for the application of malus and claw back. Clawback should in particular be

applied when there was a severe contribution of the staff member to the situation that the financial performance is subdued or negative and in cases of fraud or other conduct with intent or severe negligence which lead to significant losses.

270. Institutions should use at least the initially used performance and risk criteria to ensure a link between the initial performance measurement and its back testing. Institutions should in addition to the criteria in Article 94(1)(n)(i) and (ii) utilize specific criteria including:

- a. evidence of misconduct or serious error by the staff member (e.g. breach of code of conduct and other internal rules, especially concerning risks);
- b. whether the institution and/or the business unit subsequently suffers a significant downturn in its financial performance (e.g. specific business indicators);
- c. whether the institution and/or the business unit in which the staff member works suffers a significant failure of risk management;
- d. significant increases in the institution's or business units economic or regulatory capital base;
- e. any regulatory sanctions where the conduct of staff contributed to the sanction.

271. Where malus can only be applied at the moment of vesting of the deferred payment institutions may choose, where possible, to apply clawback after paying out or vesting of the variable remuneration.

272. Malus and clawback arrangements should lead to a reduction of the variable remuneration where appropriate. Under no circumstances should an explicit ex- post risk adjustment lead to an increase of the initially awarded variable remuneration or, where malus or clawback was already applied in the past, to an increase of the reduced variable remuneration.

### 17.7.2. Implicit adjustments

273. Institutions should use instruments for variable remuneration where the price reacts to changes of the institutions performance or risk. The evolution of the stock price or the price of other instruments should not be considered as a substitute for explicit ex-post risk adjustments.

274. Where instruments were awarded and staff, after deferral and retention periods, sells these instruments or the instrument is paid out in cash at their final maturity, staff should be able to receive the amount due. The amount can be higher than the initially awarded amount where market prices or the instruments fair value has increased.

Q 18: Are the requirements on the ex post risk adjustments appropriate and sufficiently clear?

## Title V – Institutions that benefit from government intervention

### 18. State support and remuneration

275. Where institutions benefit from exceptional government intervention, competent authorities and institutions should establish regular contacts with regard to the setting of the pool of possible variable remuneration and the award to variable remuneration to ensure compliance with Article 93 of CRD. Any payment of variable remuneration should not endanger compliance with the established recovery and exit plan from exceptional government intervention.

276. The Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013/C 216/01) should be applied within the remuneration policies. Any condition with regard to remuneration imposed on institutions when state aid has been approved by the Commission and granted and within any related acts should be reflected appropriately in the institutions' remuneration policy.

277. The variable remuneration of an institution's staff, including members of the management body, should not prevent an orderly and timely payback of the exceptional government intervention or the achievement of objectives set in the recovery or restructuring plan.

278. The institution should ensure that a bonus pool or the vesting and paying out of variable remuneration does not pose a detriment to the timely building up of its capital base and a decrease in its dependence on exceptional government intervention.

279. Without prejudice to any existing conditions imposed by the Member State or the Union with regard to remuneration, the relevant competent authority should set for institutions that have been given exceptional government support the percentage of the net revenue under point (a) of Article 93 of CRD that can be used for variable remuneration and assess if the variable remuneration is aligned with sound risk management and long-term growth and take measure to restructure the remuneration where necessary. .

280. Strict limits to the variable remuneration of members of the management body should be applied in the context of restructuring remuneration within the meaning of point (b) of Article 93 of CRD when:

- a. the relevant competent authority requires the institution not to pay out variable remuneration for members of the management body from the date on which the exceptional government intervention was received or to apply malus and clawback to variable remuneration taking into account potential failures of the management body;
- b. the relevant competent authority may require the institution not to award any variable remuneration to members of the management body as long as the exceptional

government support is not yet paid back, or until a restructuring plan for the institution is implemented or accomplished. Such measures should be limited in time. The period during which the limits apply or the criteria for the application of such limits should be clearly recorded and communicated to the institution when government support is given.

281. In order to restructure remuneration in line with Article 93(b) of CRD in a manner aligned with sound risk management and long-term growth, competent authorities should require:

- a. where appropriate, limiting variable remuneration for members of the management body to amounts up to zero so that the variable remuneration has no considerable impact on the recovery of the institution;
- b. to align performance measures used for determining variable remuneration with the recovery progress of the institution and the contribution of identified staff, including the management body in this regard;
- c. to apply clawback and malus for earlier award periods as appropriate, in particular to staff who significantly contributed to the situation under which that institution required state aid;
- d. to increase the percentage of variable remuneration which is deferred up to 100%;
- e. to align the accrual and deferral periods with the recovery phase and plans.

282. Institutions and competent authorities should take into account that there may be the need to foresee the possible award of variable remuneration to newly appointed members of the management body who are hired during the recovery or resolution phase of the institution to ensure that suitable members of the management body can be appointed during that phase.

Q 19: Are the requirements in Title V sufficiently clear and appropriate?

## Title VI – Disclosures by institutions and internal transparency

### 19. Requirements on disclosure

283. When disclosing information required by Article 450 of the CRR, institutions should comply with the general principles included in Title I of Part Eight of the CRR and the related 'EBA guidelines on materiality, proprietary and confidentiality and on disclosure frequency under Articles 432(1), 432(2) and 433 of CRR<sup>29</sup>.

<sup>29</sup> <http://www.eba.europa.eu/-/eba-publishes-final-guidelines-on-disclosure-requirements-for-the-eu-banking-sector>

<sup>30</sup> Published on the EBA website under: <http://www.eba.europa.eu/documents/10180/757286/EBA-GL-2014-08+%28GLs+on+remuneration+benchmarking+%29.pdf/9d87c18b-ed79-4ceb-a3f6-64928cc26065>

284. Article 432 (1) and (2) of CRR does not allow for omitting an item of information from Article 450 of the same Regulation for proprietary or confidentiality reasons. The disclosure requirements in Article 450 should nevertheless be complied with without prejudice to the requirements of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Where institutions omit in exceptional cases items of information to be reported based on Directive 95/46/EC, this fact should be duly documented and disclosed. Wherever personal data is not disclosed following this Directive, institutions should disclose wherever possible aggregated information.
285. Without prejudice to Article 96 of CRD, institutions shall make available the information on how it complies with the requirements of Articles 92 to 95 of CRD together with the disclosures required by Article 450 of CRR, and should ensure that the disclosure is easily accessible. .
286. Institutions should ensure that the disclosures on remuneration provide appropriate cross-references to other information and disclosures which may be of relevance, to provide a complete view on all disclosures on remuneration policy and practices.
287. In accordance with paragraph (3) of Article 6 and Article 13 (1) CRR, disclosures are to be made on an individual basis by institutions unless they are a parent undertaking, or a subsidiary or included in the consolidation pursuant to Article 19 CRR, and at consolidated level by the consolidating institution and by significant subsidiaries of EU parent institutions on an individual or sub-consolidated basis. Subject to the condition on Article 13(3) being met, EU parent entities consolidated by a third country parent may not have to provide disclosures required by Article 450 CRR.
288. Disclosures should take into account the size of the institution and the nature, scope and complexity of its activities. Small and non-complex institutions should comply with the disclosure requirements by providing information commensurate to their internal organisation and applied remuneration policy.
289. Information to be disclosed in accordance with Article 450 CRR and specified in these Guidelines should be provided on an annual basis in a qualitative section and a quantitative section, illustrated by tables and charts where relevant to ease the understanding of users.

## 19.1. Policy and practices

### Article 450 (1) remuneration policy

290. Institutions should disclose and make available to all members of the management body detailed information regarding their remuneration policies and practices for identified staff. Institutions should adequately disclose externally and make transparent internally the approach, principles, and objectives of compensation incentives. Institutions should also

provide sufficient general information about the basic characteristics of their institution-wide remuneration policies and practices.

291. Where relevant, institutions should disclose significant differences of the remuneration policy for different categories of identified staff and a description of the regional scope of the institution's remuneration policies and relevant differences between regions or between different institutions within the scope of consolidation.

292. Where applicable, institutions should disclose an explanation of the link between the remuneration policy at group level and the remuneration policies applied at parent institution and at the (EU and foreign) subsidiary and branch level, stating, where applicable, the differences between the remuneration policy applicable at group, parent and subsidiary level. These disclosures should include for instance differences related to the ratio between the variable components of remuneration and the fixed remuneration, the notional discount rate, remuneration plans and vehicles available or the remuneration instruments that can be awarded, and the reasons for those differences, as well as their impact on the determination of bonus pools for different business areas.

293. Institutions should outline any material change made in the remuneration policy, including when they came into effect, the impact on the composition of variable and fixed remuneration components and to the governance process used to determine the remuneration policy.

#### **Article 450 (1): identification of staff**

294. Institutions should disclose how they have applied the requirements on remuneration policies and variable remuneration, including the requirements within RTS on identified staff. Institutions should also disclose:

- a. The additional criteria used within the self-assessment process for the identification of identified staff;
- b. the number of identified staff broken down by business area, senior management and other identified staff and an explanation of significant changes;

#### **Article 450 (1) point (a): information about the decision-making process used for determining the remuneration policy**

295. Institutions should clearly set out the governance procedure relating to the development of the remuneration policy considering the specifications in Title II of these Guidelines and information about the involved bodies, including their composition and mandate, such as the remuneration committee, risk committee and independent control functions, which played a significant role in the development of the remuneration policy.

296. Information should also be provided on the role of external consultants and all other relevant stakeholders, including shareholders, involved in the determination or the periodic review of the remuneration policy or whose advice has been sought.

**Article 450 point (b): information on link between pay and performance**

297. The information that institutions must disclose on how pay and performance are linked should include:

- a. main performance objectives;
- b. the scope of staff for which variable remuneration is foreseen in the remuneration policy;
- c. how variable remuneration reacts to performance changes of the institution.

**Article 450 point (c): most important design characteristics of the remuneration system**

298. The information that institutions must disclose on the design and structure of their remuneration system should include:

- a. the key features and objectives of the remuneration policy and processes and how it promotes sound and effective risk management;
- b. a description of the main quantitative and qualitative performance and risk metrics used for the assessment of performance of the institution, the business unit and for individuals, how different metrics were combined and how current and future risks are taken into account;
- c. information on the criteria used to apply ex-ante and ex post-risk adjustment;
- d. a description of the different forms in which variable and fixed remuneration are paid, the respective amounts (i.e. cash, equity, other capital instruments, short-term and long-term incentive plans), the rationale for using these different forms and for allocating them to different categories of identified staff, in particular for members of the management body in its management function and for staff in control functions;
- e. how the institution ensures that staff in control functions are remunerated independently of the business units they control;
- f. the categorisation of different remuneration components as variable or fixed remuneration, as well as the rationale for this classification in the case of fixed remuneration elements;
- g. the mechanisms used to adjust remuneration to take into account the long term performance, including:

- i. the parameters used to decide on the length and ratio of deferred and non-deferred remuneration, the vesting schedule and retention periods for different categories of identified staff, including the applied ratios and periods of deferral and retention, separate for different instruments awarded;
  - ii. the framework to apply ex-ante and ex-post performance adjustments, including the application of malus and claw back;
  - iii. shareholding requirements that may be imposed on identified staff;
- h. how proportionality is taken into account within the remuneration system and a reasoning outlining how remuneration policies are consistent with and promote sound and effective risk management;
- i. policies and criteria applied for the award of guaranteed remuneration and severance payments.

**Article 450 point (d): the ratios between fixed and variable remuneration set in accordance with Article 94(1)(g) of CRD**

299. Institutions should provide a tabular disclosure of the different ratios between the variable and fixed remuneration implemented at the consolidated level, separate for the management body and where relevant by business area, corporate and internal control functions, with at least a breakdown between senior management and other identified staff, entities and geographical locations taking into account the business areas defined within the EBA Guidelines on the Remuneration Benchmarking Exercise.

300. Where the decision has been made to apply a higher ratio than 100 % between the variable and fixed component of remuneration of up to 200 %, institutions should disclose:

- a. the percentage of voting rights represented and of shareholders' voting rights in favour of increasing the ratio or, depending on the applicable company law, the number and percentage of persons who are in favour of increasing the ratio instead of the voting rights where each person has one vote;
- b. the approved ratios, including, where the ratios differ between business areas, the respective ratio for each business area;
- c. the date of the decision.

301. In addition to information on ratios, institutions should disclose the following information on the application of the discount rate on a country-by-country basis:

- a. the extent to which the discount rate is used (the maximum being its application to 25% of the total variable remuneration or a lower percentage prescribed by the Member State); and

- b. the number of identified staff for which the discount rate has been applied to their variable remuneration.

**Article 450 point (e): information on the performance criteria on which the entitlement to shares, options or variable components of remuneration is based**

302. Where not covered by the previous disclosure requirements, institutions must disclose information on the specific performance indicators used to determine the variable components of remuneration and criteria used to determine the balance between different types of instruments awarded, including shares, equivalent ownership rights, share-linked instrument, equivalent non cash-instruments, options, and other instruments under the RTS on instruments.

**Article 450 point (f): the main parameters and rationale for any variable component scheme and any other non-cash benefits**

303. When not covered by previous disclosure requirements, the information that institutions must disclose on the main parameters and rationale for any variable component scheme and any other non-cash benefits, should include long-term incentive plans and the details of any remuneration element which is considered to be a non-routine remuneration practice, including for instance the use of role or position based allowances and discretionary fringe benefits, as well as the conditions under which such allowances can be withdrawn or changed in value.

## 19.2. Aggregate quantitative information

304. When providing quantitative information on remuneration as required by points (g) to (j) of Article 450(1) CRR and paragraph (2) of this Article by business area institutions should report the information separately for each of their major business areas, including investment banking, retail banking, asset management, and aggregated for all other business areas and for the management body in its management and supervisory function, internal control functions and corporate functions.

305. The above information should be broken down by senior management and other identified staff, institutions should disclose these figures separately.

306. Institutions should also disclose the aggregate figures on the total number of staff and their total remuneration broken down into the fixed and variable remuneration components.

307. Significant institutions should disclose the quantitative information required in Article 450(1)(h) of the CRR on the level of members of the management body as separate aggregated figures for the members of the management body in its management function and for the members of the management body in its supervisory function.

308. When publishing quantitative information as required by points (g), (h) and (i) of Article 450 (1) of the CRR institutions should take into account the information to be collected by competent authorities under the EBA guidelines on the remuneration benchmarking exercise<sup>30</sup>.

### 19.3. Internal transparency

309. The remuneration policy of an institution should be internally disclosed to all staff and accessible for all staff at all times. In addition institutions should ensure that information regarding the remuneration policy which is disclosed is available internally. Confidential non-public quantitative aspects of the remuneration of single staff members are not subject to internal disclosure.

310. Staff should be informed about the characteristics of their variable remuneration, as well as the process and criteria that will be used to assess the impact of their activities on the risk profile of the institution and their variable remuneration. In particular the appraisal process with regard to the individual's performance should be properly documented and should be transparent to the staff concerned.

Q 20: Are the requirements in Title VI appropriate and sufficiently clear?
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## Title VII- Requirements for competent authorities

### 20. Remuneration policies

311. Competent authorities should ensure, taking into account these guidelines, the EBA guidelines on the applicable notional discount rate and the EBA guidelines on the supervisory review process, that institutions comply with the CRD and CRR requirements on remuneration policies, the RTS on identified staff, the RTS on instruments which can be used for the purpose of variable remuneration, including that they have appropriate remuneration policies for all staff and for identified staff. Competent authorities should apply a risk based approach when supervising the remuneration policies of institutions.

312. Without prejudice to other supervisory, disciplinary measures and sanctions competent authorities should require institutions to take adequate actions in order to remedy any identified deficiencies. Where institutions do not comply with such request, appropriate actions, in accordance with applicable laws and regulations should be taken.

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<sup>30</sup> Published on the EBA website under: <http://www.eba.europa.eu/documents/10180/757286/EBA-GL-2014-08+%28GLs+on+remuneration+benchmarking+%29.pdf/9d87c18b-ed79-4ceb-a3f6-64928cc26065>

313. Competent authorities should ensure that institutions align their remuneration policy and practices to the business strategy and the long term interest of the institution taking into account its business and risk strategy, corporate culture and values and risk profile.
314. Competent authorities should ensure that institutions remuneration policies, practices and processes are appropriate and review in particular in addition to the reviews required under the EBA guidelines on the supervisory review process:
- a. the governance arrangements and processes for designing and monitoring the remuneration policy;
  - b. the appropriate exchange of information among all internal bodies and functions, including within the group, involved in designing, executing and monitoring the remuneration policy is carried out;
  - c. the process developed for conducting the annual review of the remuneration policies and practices and assess its main results;
  - d. that a remuneration committee with sufficient powers and resources to perform its functions is established where required;
  - e. the impact of the remuneration policy and practices on the conduct of business, including advising and selling of products to different customer groups in line with the guidelines;
  - f. that remuneration policies are taken into account within the internal capital adequacy assessment process and the liquidity planning and vice versa.
315. As part of the above reviews competent authorities should use beside others:
- a. the minutes of the deliberation of the supervisory function on remuneration policies, in particular with respect to the results of the oversight over the institution's remuneration systems design and processes and the tasks conducted by the remuneration committee;
  - b. the minutes of the remuneration committee and other committees, including the risk committee, involved in the oversight of the remuneration system's design and operation;
  - c. meetings with institution's members of the management body and other relevant functions.
316. Competent authorities should ensure that institutions supervised on a consolidated basis and sub-consolidated basis have implemented a remuneration policy at the group level, including subsidiaries which are not themselves subject to the CRD on an individual level, that

is consistent within the group, including for the purposes of the determination of identified staff.

317. Competent authorities should ensure that the institutions' identification process includes the qualitative and quantitative criteria set out in the RTS on identified staff and that they are applied appropriate on a solo level, sub-consolidated and on a consolidated level, including all subsidiaries and that notifications and requests for prior approval are processed in line with these guidelines. Competent authorities should be satisfied with the overall outcome of the identification process and should assess if all staff members whose activities have or may have a material impact on the institution's risk-profile have been identified and that any exclusions of staff from the category of identified staff, where staff was only identified by the quantitative criteria under Article 4 of the RTS on identified staff, are well-reasoned and that the respective processes set out in these guidelines and requirements of the RTS on identified staff, including notifications and necessary prior approvals, have been complied with.

## 21. Specific forms of remuneration

318. With regard to specific forms of remuneration under sections 13 and 14 of these guidelines, competent authorities should, without prejudice to section 20:
- a. review any guaranteed variable remuneration arrangements (amount, duration, conditions, etc.);
  - b. check whether an institution has a framework in place to determine and approve severance payments;
  - c. assess whether the objectives for control function staff are function-specific;
  - d. review the remuneration of members of the management and supervisory function of the management body.

## 22. Variable Remuneration

319. Competent authorities should review:
- a. The performance and risk assessment and alignment process and the appropriateness of its time horizon;
  - b. the appropriate combination of quantitative and qualitative criteria used to measure performance and risk and determine whether:
    - i. the criteria are aligned with the institution's objectives;
    - ii. they are realistic compared to individual, business units and the institutions objectives;

- iii. staff can influence the individual criteria by their actions;
- c. whether internal control functions, in particular the internal risk management function are appropriately involved in the determination of ex ante risk adjustments;
- d. the appropriateness of the top down and bottom up approaches used to calculate the bonus pool;
- e. whether the institution is capping their overall bonus pool to the limits set by the CRD or lower limits;
- f. the time horizon of the applicable deferral and retention schedules and how it relates to the business cycle of an institution;
- g. the combination of shares or equivalent ownership rights or share-linked and equivalent non-cash instruments that the institution uses to meet the 50% threshold referred to in Article 94(1)(l) of CRD to ensure that it adequately reflects the long term interests of the institution;
- h. whether explicit ex-post risk adjustments are based on the performance assessment of the staff member, business unit and institution and the criteria used to measure the performance of the staff member;
- i. whether malus and clawback have been appropriately applied to both the cash and equity part of the deferred and non deferred variable remuneration and the criteria on which malus and clawback rely;
- j. that variable remuneration is not paid through vehicles or methods which aim at or effectively lead to non-compliance with remuneration requirements for identified staff or where such requirements are applied to all staff.

## 23. Disclosure

320. Competent authorities should review the public disclosures on remuneration made by institutions in line with Article 96 of CRD and Article 450 of CRR and should establish for which institutions a regular review of disclosures should be performed.

321. In addition to the benchmarking of remuneration practices required under Article 75(1) of CRD and the exercise on data collection regarding high earners under Article 75(3) of CRD, competent authorities should require periodic (or ad hoc) supervisory reporting on remuneration disclosure as appropriate in order to monitor the development of remuneration practices within institutions and in particular within significant institutions.

## 24. Colleges of Supervisors

322. Colleges of supervisors established pursuant to the Article 116 of CRD should discuss remuneration issues in line with the supervisory review process, taking into account the additional areas of supervisory review required under the guidelines on remuneration policies.

## Title VIII- Final Provisions and Implementation

### 25. Repeal

323. The CEBS Guidelines on remuneration policies and practices published on 10 December 2010 are repealed with effect from 31 December 2015.

### 26. Date of application

324. These guidelines apply from 1 January 2016.

## Annex 1 -.MAPPING OF THE REMUNERATION REQUIREMENTS INCLUDED IN THE CRD AND COVERED IN THESE GUIDELINES

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b>
		<ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
Art. 74 (1)	Institutions shall have robust governance arrangements, which include a clear organisational structure with well- defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.	<b>Institution-wide</b>
Art. 74 (1)	The arrangements, processes and mechanisms referred to in paragraph 1 shall be comprehensive and proportionate to the nature, scale and complexity of the risks inherent in the business model and the institution's activities. The technical criteria established in Articles 76 to 95 shall be taken into account.	<b>Institution-wide</b>
Art.92 (1)	The application of paragraph 2 of this Article and of Articles 93, 94 and 95 shall be ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres.	<b>Institution-wide</b>
Art.92 (2)	Competent authorities shall ensure that, when establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile, institutions comply with the following principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:	<b>Institution-wide</b>
Art.92 (2) (a)	the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking that exceeds the level of tolerated risk of the institution;	<b>Institution-wide</b>
Art.92 (2)	the remuneration policy is in line with the business strategy, objectives, values and long-	<b>Institution-wide</b>

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
(b)	term interests of the institution, and incorporates measures to avoid conflicts of interest;	
Art.92 (2) (c)	the institution' s management body in its supervisory function adopts and periodically reviews the general principles of the remuneration policy and is responsible for overseeing its implementation;	<b>Institution-wide</b>
Art.92 (2) (d)	the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;	<b>Institution-wide</b>
Art.92 (2) (e)	staff engaged in control functions are independent from the business units they oversee, have appropriate authority, and are remunerated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;	<b>Institution-wide</b>
Art.92 (2) (f)	the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee referred to in Article 95 or, if such a committee has not been established, by the management body in its supervisory function	<b>Institution-wide</b>
Art.92 (2) (g)	the remuneration policy, taking into account national criteria on wage setting, makes a clear distinction between criteria for setting: <ul style="list-style-type: none"> <li>• basic fixed remuneration, which should primarily reflect relevant professional experience and organisational responsibility as set out in an employee's job description as part of the terms of employment; and</li> <li>• variable remuneration which should reflect a sustainable and risk adjusted performance as well as performance in excess of that required to fulfil the employee's job description as part of the terms of employment.</li> </ul>	<b>Institution-wide</b>
Art.93 (a)	In the case of institutions that benefit from exceptional government intervention, the following principles shall apply in addition to those set out in Article 92(2):  variable remuneration is strictly limited as a percentage of net revenue where it is inconsistent with the maintenance of a sound capital base and timely exit from government support;	<b>Institution wide</b>

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
Art.93 (b)	the relevant competent authorities require institutions to restructure remuneration in a manner aligned with sound risk management and long-term growth, including, where appropriate, establishing limits to the remuneration of the members of the management body of the institution;	<b>Institution-wide</b>
Art.93 (c)	no variable remuneration is paid to members of the management body of the institution unless justified.	<b>applies only to members of the management body</b>
Art.94 (1) (a)	For variable elements of remuneration, the following principles shall apply in addition to, and under the same conditions as, those set out in Article 92(2): where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit concerned and of the overall results of the institution and when assessing individual performance, financial and non-financial criteria are taken into account;	<b>Identified Staff, all staff recommended</b>
Art.94 (1) (b)	the assessment of the performance is set in a multi-year framework in order to ensure that the assessment process is based on longer-term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the underlying business cycle of the credit institution and its business risks;	<b>Identified Staff, all staff recommended</b>
Art.94 (1) (c)	the total variable remuneration does not limit the ability of the institution to strengthen its capital base;	<b>institution-wide</b>
Art.94 (1) (d)	guaranteed variable remuneration is not consistent with sound risk management or the pay-for-performance principle and shall not be a part of prospective remuneration plans;	<b>Institution-wide</b>
Art.94 (1) (e)	guaranteed variable remuneration is exceptional, occurs only when hiring new staff and where the institution has a sound and strong capital base and is limited to the first year of employment;	<b>Institution-wide</b>
Art.94 (1) (f)	fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;	<b>Identified Staff (institution-wide voluntary)</b>
Art.94 (1) (g)	institutions shall set the appropriate ratios between the fixed and the variable component of the total remuneration, whereby the following principles shall apply:	<b>Identified Staff (institution-wide voluntary)</b>

	<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>	<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
	(i) the variable component shall not exceed 100 % of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage;	
Art.94 (1) (g)	<p>(ii) Members States may allow shareholders or owners or members of the institution to approve a higher maximum level of the ratio between the fixed and variable components of remuneration provided the overall level of the variable component shall not exceed 200 % of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage.</p> <p>Any approval of a higher ratio in accordance with the first subparagraph of this point shall be carried out in accordance with the following procedure:</p> <ul style="list-style-type: none"> <li>— the shareholders or owners or members of the institution shall act upon a detailed recommendation by the institution giving the reasons for, and the scope of, an approval sought, including the number of staff affected, their functions and the expected impact on the requirement to maintain a sound capital base;</li> <li>— shareholders or owners or members of the institution shall act by a majority of at least 66 % provided that at least 50 % of the shares or equivalent ownership rights are represented or, failing that, shall act by a majority of 75 % of the ownership rights represented;</li> <li>— the institution shall notify all shareholders or owners or members of the institution, providing a reasonable notice period in advance, that an approval under the first subparagraph of this point will be sought;</li> <li>— the institution shall, without delay, inform the competent authority of the recommendation to its shareholders or owners or members, including the proposed higher maximum ratio and the reasons therefore and shall be able to demonstrate to the competent authority that the proposed higher ratio does not conflict with the institution's obligations under this Directive and under Regulation (EU) No 575/2013, having regard in particular to the institution's own funds obligations;</li> <li>— the institution shall, without delay, inform the competent authority of the decisions taken by its shareholders or owners or members, including any approved higher</li> </ul>	<b>Identified Staff (institution-wide voluntary)</b>

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
	<p>maximum ratio pursuant to the first subparagraph of this point, and the competent authorities shall use the information received to benchmark the practices of institutions in that regard. The competent authorities shall provide EBA with that information and EBA shall publish it on an aggregate home Member State basis in a common reporting format. EBA may elaborate guidelines to facilitate the implementation of this indent and to ensure the consistency of the information collected;</p> <p>- staff who are directly concerned by the higher maximum levels of variable remuneration referred to in this point shall not, where applicable, be allowed to exercise, directly or indirectly, any voting rights they may have as shareholders or owners or members of the institution</p>	
Art.94 (g)	(1) Member States may allow institutions to apply the discount rate referred to in the second subparagraph of this point to a maximum of 25 % of total variable remuneration provided it is paid in instruments that are deferred for a period of not less than five years. Member States may set a lower maximum percentage.	<b>Identified Staff (institution-wide voluntary) – Application is not mandatory</b>
Art.94 (h)	(1) payments relating to the early termination of a contract reflect performance achieved over time and do not reward failure or misconduct;	<b>institution-wide</b>
Art.94 (i)	(1) remuneration packages relating to compensation or buy out from contracts in previous employment must align with the long-term interests of the institution including retention, deferral, performance and clawback arrangements;	<b>Identified Staff (institution-wide voluntary)</b>
Art.94 (j)	(1) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes an adjustment for all types of current and future risks and takes into account the cost of the capital and the liquidity required;	<b>institution-wide</b>
Art.94 (k)	(1) the allocation of the variable remuneration components within the institution shall also take into account all types of current and future risks;	<b>institution-wide</b>
Art.94 (l)	(1) a substantial portion, and in any event at least 50 %, of any variable remuneration shall consist of a balance of the following:	<b>Identified Staff (institution-wide voluntary)</b>

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
	<p>(i) shares or equivalent ownership interests, subject to the legal structure of the institution concerned or share-linked instruments or equivalent non-cash instruments, in the case of a non-listed institution;</p> <p>(ii) where possible, other instruments within the meaning of Article 52 or 63 of Regulation (EU) No 575/2013 or other instruments which can be fully converted to Common Equity Tier 1 instruments or written down, that in each case adequately reflect the credit quality of the institution as a going concern and are appropriate to be used for the purposes of variable remuneration.</p> <p>The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the longer-term interests of the institution. Member States or their competent authorities may place restrictions on the types and designs of those instruments or prohibit certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in accordance with point (m) and the portion of the variable remuneration component not deferred;</p>	
Art.94 (1) (m)	<p>a substantial portion, and in any event at least 40 %, of the variable remuneration component is deferred over a period which is not less than three to five years and is correctly aligned with the nature of the business, its risks and the activities of the member of staff in question.</p> <p>Remuneration payable under deferral arrangements shall vest no faster than on a pro-rata basis. In the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount shall be deferred. The length of the deferral period shall be established in accordance with the business cycle, the nature of the business, its risks and the activities of the member of staff in question;</p>	<b>Identified Staff (institution-wide voluntary)</b>
Art.94 (1) (n)	<p>the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the institution as a whole, and justified on the basis of the performance of the institution, the business unit and the individual concerned.</p> <p>Without prejudice to the general principles of national contract and labour law, the total</p>	<b>Identified Staff (institution-wide voluntary)</b>

<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>		<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
	<p>variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the institution occurs, taking into account both current remuneration and reductions in payouts of amounts previously earned, including through malus or clawback arrangements.</p> <p>Up to 100 % of the total variable remuneration shall be subject to malus or clawback arrangements. Institutions shall set specific criteria for the application of malus and clawback. Such criteria shall in particular cover situations where the staff member:</p> <p>(i) participated in or was responsible for conduct which resulted in significant losses to the institution;</p> <p>(ii) failed to meet appropriate standards of fitness and propriety;</p>	
Art.94 (1) (o)	<p>the pension policy is in line with the business strategy, objectives, values and long-term interests of the institution.</p> <p>If the employee leaves the institution before retirement, discretionary pension benefits shall be held by the institution for a period of five years in the form of instruments referred to in point (l). Where an employee reaches retirement, discretionary pension benefits shall be paid to the employee in the form of instruments referred to in point (l) subject to a five-year retention period;</p>	<b>Identified Staff, all staff recommended</b>
Art.94 (1) (p)	<p>staff members are required to undertake not to use personal hedging strategies or remuneration- and liability- related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;</p>	<b>Identified Staff, all staff recommended</b>
Art.94 (1) (q)	<p>variable remuneration is not paid through vehicles or methods that facilitate the non-compliance with this Directive or Regulation (EU) No 575/2013.</p>	<b>Identified staff, should be applied also to all staff institution wide regarding elements which are applied institution wide</b>
Art.95 (1)	<p>Competent authorities shall ensure that institutions that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities establish a remuneration committee. The remuneration committee shall be constituted in such a way as to enable it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk, capital and liquidity.</p>	<b>Obligatory for significant institutions, other institutions should establish such a committee where this is appropriate</b>
Art.95 (2)	<p>Competent authorities shall ensure that the remuneration committee is responsible for the</p>	<b>Obligatory for significant institutions, other</b>

	<b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b>	<b>Applicability:</b> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
	preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the institution concerned and which are to be taken by the management body. The Chair and the members of the remuneration committee shall be members of the management body who do not perform any executive function in the institution concerned. If employee representation on the management body is provided for by national law, the remuneration committee shall include one or more employee representatives. When preparing such decisions, the remuneration committee shall take into account the long-term interests of shareholders, investors and other stakeholders in the institution and the public interest.	<b>institutions should establish such a committee where this is appropriate</b>
Art.96	Institutions that maintain a website shall explain there how they comply with the requirements of Articles 88 to 95.	<b>Institution-wide</b>
Art. 450 CRR	<p>Institutions shall disclose at least the following information, regarding the remuneration policy and practices of the institution for those categories of staff whose professional activities have a material impact on its risk profile:</p> <p>(a) information concerning the decision-making process used for determining the remuneration policy, as well as the number of meetings held by the main body overseeing remuneration during the financial year, including, if applicable, information about the composition and the mandate of a remuneration committee, the external consultant whose services have been used for the determination of the remuneration policy and the role of the relevant stakeholders;</p> <p>(b) information on link between pay and performance;</p> <p>(c) the most important design characteristics of the remuneration system, including information on the criteria used for performance measurement and risk adjustment, deferral policy and vesting criteria;</p> <p>(d) the ratios between fixed and variable remuneration set in accordance with Article 94(1)(g) of Directive 2013/36/EU;</p> <p>(e) information on the performance criteria on which the entitlement to shares, options or variable components of remuneration is based;</p> <p>(f) the main parameters and rationale for any variable component scheme and any other non-cash benefits;</p>	<b>Identified Staff</b>

<p><b>CRD Remuneration requirements: Articles 74 and 92 to 96 and Article 450 CRR</b></p>	<p><b>Applicability:</b></p> <ul style="list-style-type: none"> <li>• <b>Identified Staff; voluntary institution wide to all staff</b></li> <li>• <b>Identified Staff, institution wide to all staff recommended</b></li> <li>• <b>Institution-wide</b></li> </ul>
<p>(g) aggregate quantitative information on remuneration, broken down by business area;</p> <p>(h) aggregate quantitative information on remuneration, broken down by senior management and members of staff whose actions have a material impact on the risk profile of the institution, indicating the following:</p> <p>(i) the amounts of remuneration for the financial year, split into fixed and variable remuneration, and the number of beneficiaries;</p> <p>(ii) the amounts and forms of variable remuneration, split into cash, shares, share-linked instruments and other types;</p> <p>(iii) the amounts of outstanding deferred remuneration, split into vested and unvested portions;</p> <p>(iv) the amounts of deferred remuneration awarded during the financial year, paid out and reduced through performance adjustments;</p> <p>(v) new sign-on and severance payments made during the financial year, and the number of beneficiaries of such payments;</p> <p>(vi) the amounts of severance payments awarded during the financial year, number of beneficiaries and highest such award to a single person;</p> <p>(i) the number of individuals being remunerated EUR 1 million or more per financial year, for remuneration between EUR 1 million and EUR 5 million broken down into pay bands of EUR 500 000 and for remuneration of EUR 5 million and above broken down into pay bands of EUR 1 million;</p> <p>(j) upon demand from the Member State or competent authority, the total remuneration for each member of the management body or senior management.</p> <p>2. For institutions that are significant in terms of their size, internal organisation and the nature, scope and the complexity of their activities, the quantitative information referred to in this Article shall also be made available to the public at the level of members of the management body of the institution.</p> <p>Institutions shall comply with the requirements set out in this Article in a manner that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities and without prejudice to Directive 95/46/EC.</p>	

## Annex 2 – Information with regard to the approval of higher ratios

Institution name	<i>text</i>
Legal Entity Identifier	<i>text</i>
number of staff (end of the last financial year)	<i>number</i>
number of identified staff (outcome of the last identification process)	<i>number</i>
balance sheet total (end of the last financial year)	<i>number</i>
decision taken	<i>dd/mm/yyyy</i>
decided ratio	<i>number (percentage)</i>
Where different ratios within the institution were approved, please provide the business areas and approved percentages as free text and the maximum approved ratio above.	<i>text</i>

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## 6. Accompanying documents

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### 6.1 Draft Cost-Benefit Analysis / Impact Assessment

#### 6.1.1 Problem identification and baseline scenario

1. Article 16(2) of the EBA Regulation provides that, where appropriate, the EBA should analyse ‘the related potential costs and benefits’ of guidelines (GL) drawn up by the EBA. This analysis follows in the form of an impact assessment (IA) with an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.
2. The CRD contains requirements on remuneration and institutions’ internal governance, including sound remuneration policies. For both areas the CRD mandates the EBA explicitly (Articles 74 and 75 of the CRD) to issue GL. The CRD considered beside others the following which should be taken into account by EBA when issuing GL on remuneration policies:
3. Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of credit institutions and investment firms<sup>31</sup>. The run-up phase to the financial crisis which broke out in 2008 clearly demonstrates the significance of that risk. Therefore under the current market structure and regulatory framework, the promotion of sound remuneration policies is an important element and regulatory action in this area.
4. Remuneration policies and the application of proportionality differ significantly between Member States and institutions. The GL on remuneration policies and practices published by the Committee of European Banking Supervisors on 10 December 2010 (CEBS guidelines) lead to some harmonisation regarding remuneration policies, however the achieved level of harmonisation is not yet sufficient. In particular the identification of staff whose professional activities have a material impact on the institution’s risk profile, the ratio of variable to fixed remuneration and the application of deferral of pay-out of variable remuneration still show significant differences.<sup>32</sup>
5. The baseline scenario for the IA includes the CRD III, existing CEBS Guidelines and the changes introduced by CRD IV and CRR. Those changes include in particular:
  - a. definitions for the variable and fixed components of remuneration (Art. 92 (2) (g) of the CRD);

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<sup>31</sup> EBA: Report on Principles on Remuneration Policies and the Use of Allowances (2014)

<sup>32</sup> EBA: Report on Benchmarking of Remuneration Practices at Union Level (2014)

- b. stricter requirements on guaranteed variable remuneration and remuneration packages relating to compensation or buy out from contracts (Art. 94(1)(d) and (i) of the CRD);
  - c. the introduction of a limit on the ratio between the variable components of remuneration to the fixed components of remuneration at 100 % (200 % with shareholders' approval), including provisions on the approval process (Art. 94(1)(g) of the CRD);
  - d. the pay out of variable remuneration in a balance of equity and where possible other instruments (Art. 94(1)(l) of the CRD);
  - e. the introduction of stricter rules regarding the application of malus and clawback to up to 100 % of the total variable remuneration (last subparagraph of Art. 94(1)(n) of the CRD);
  - f. mandates to issue RTS with criteria for the identification of staff and the eligible instruments for the pay out or remuneration in other instruments, GL on the notional discount rate for variable remuneration for which a separate IA has been provided and GL on the notification of the approved higher ratio between variable and fixed remuneration (Art 94(1)(g)(ii) of CRD);
  - g. amended requirements regarding institutions which benefit from government support and the setting up of remuneration committees (Art. 93 and 95 of the CRD);
  - h. additional requirements for the disclosure of remuneration (Art. 450 of the CRR).
6. The issuance of these GL, mandated under Articles 74 and 75 of the CRD is necessary to provide further detail on these requirements.

### 6.1.2 Policy objectives<sup>3334</sup>

- 7. As mentioned above, the EBA is updating CEBS guidelines. The underlying reasons are mainly additions made in CRD and CRR to the existing regulatory framework. The GL were also restructured to increase their clarity and consistency with other work issued by the EBA in the meantime, in particular regarding the supervisory review process, internal governance and disclosures.
- 8. In order to protect and foster financial stability within the Union and to address any possible avoidance of the requirements laid down in the CRD, competent authorities should ensure

<sup>33</sup> Financial Stability Forum: Principles for Sound Compensation Practices (2009)

<sup>34</sup> Financial Stability Board: Principles for Sound Compensation Practices – Implementation Standards (2009)

compliance with the principles and rules on remuneration for institutions on a consolidated basis, that is at the level of the group, parent undertakings and subsidiaries, including the branches and subsidiaries established in third countries and subsidiaries to which the CRD does not directly apply on an individual level.

9. In order to ensure that institutions have in place sound remuneration policies, it is appropriate to specify clear principles on governance and on the structure of remuneration policies. In particular, remuneration policies should be aligned with the risk appetite, values and long-term interests of the credit institution or investment firm.
10. The provisions on remuneration should reflect differences between types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities.
11. In order to ensure a well-functioning internal market, transparent, predictable and harmonised supervisory practices and decisions are necessary for conducting business. The EBA should therefore enhance harmonisation of supervisory practices.
12. The EBA aims for the maximum possible harmonisation as a means to (a) reach a level playing field; (b) prevent regulatory arbitrage opportunities; (c) enhance supervisory convergence; and (d) achieve legal certainty. In addition, the development of common procedures and practices is expected to reduce the compliance burden on the institutions and contribute to efficient and effective cooperation among competent authorities.
13. The EBA is updating the aforementioned GL based on the experience gathered since the introduction of remuneration requirements within the CRD III, reinforced requirements within CRD IV (e.g. the bonus cap) and the findings within the remuneration benchmarking report in order to achieve a higher level of harmonisation, ensure that remuneration policies are consistent with and promote risk management, are aligned with the business cycle of the institution and do not contain incentives for excessive risk taking.
14. The variable remuneration should contain appropriate and balanced incentives for risk taking and management and be based on an ex ante risk adjustment which is followed by ex post risk adjustments to ensure that in the long run the remuneration policy is consistent with and promotes sound risk management. The application of the CRD IV provisions should be ensured, including that no circumvention of remuneration requirements takes place.
15. In particular the guidelines should:
  - a. specify how remuneration policies are applied in a group context in different entities which are or are not themselves subject to the CRD;
  - b. clarify how the principle of proportionality is applied;

- c. specify how the identification of staff, based on the RTS of the European Parliament and of the Council on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile (RTS on identified staff), should be implemented;
  - d. set clear criteria for the allocation of remuneration to the fixed or variable component to ensure that the ratio between them can be correctly calculated;
  - e. specify the involvement of shareholders in the setting of this ratio to ensure that the CRD provisions are effectively applied;
  - f. specify how specific remuneration elements should be taken into account when calculating the ratio, including specific elements such as guaranteed variable remuneration, retention bonus and severance payments and how the other requirements for variable remuneration are applied to these specific elements;
  - g. set out how variable remuneration is paid out and in particular where it is possible to use other instruments as part of such payments;
  - h. specify how deferral and retention periods are applied in line with the proportionality principle and in a more harmonised way;
  - i. specify how requirements for remuneration policies are applied in institutions who are under government support;
  - j. specify the disclosure provisions set out in the CRR in order to achieve a high level of transparency to inform shareholders and other stakeholders about institutions' remuneration policies for identified staff;
  - k. set out requirements for competent authorities that ensure a high level of harmonisation in the supervision of institutions remuneration policies and which ensure that institutions comply with the requirements.
16. The IA comprises GL developed on the above mentioned additional EU legislation and GL where the policy has changed. Areas which have not changed in substance and the underlying changes of the CRD and CRR have not been assessed. The IA considers in particular the relevant GL on the following areas where the GL were amended:
- a. the governance arrangements;
  - b. the approach to proportionality;
  - c. the application in a group context;

- d. the identification process taking into account the RTS on identified staff, including GL on notifications and prior approval of exclusions under the RTS on instruments;
- e. the definition of fixed and variable remuneration;
- f. allowances, including so called 'role or function based allowances';
- g. the pay out of fixed and variable remuneration;
- h. the application of deferral and retention.

### 6.1.3 Options considered and their assessment

#### Shareholders' involvement

17. The CRD IV introduced a limitation of the ratio between variable and fixed components of 100 %. The level of this ratio can be increased, subject to national law, by shareholders to up to 200 %. The CRD sets out the respective voting and involvement provisions. The GL clarify the shareholders' involvement, how the votes should be counted and when shareholders are represented. Information on the increase of the ratio should be submitted to the competent authority and subsequently to the EBA.
- a. Option A: no further guidelines to be provided as national company law is applicable;
  - b. Option B: guideline to clarify the shareholder involvement and the notion of represented shares or ownership rights, taking into account the existing processes around the shareholders' involvement;
  - c. Option C: requiring a dedicated process to involve shareholders or owners separate from the annual general meeting;
  - d. Option D: requiring an annual confirmation/review of approved rates by the shareholders or owners;
  - e. Option E: setting out information to be provided by institutions to competent authorities according to Article 94(1)(g)(ii) of the CRD in terms of the represented votes, the majority and the information provided to shareholders;
  - f. Option F: setting out guidelines for the benchmarking of approved higher ratios by competent authorities and the reporting of approved higher ratios to the European Banking Authority.
18. The guidelines should be consistent with the answer regarding the voting process provided in the QA process already published.

19. Option A would not be effective as the process needs further clarification.
20. Option C would be too burdensome, it is more cost efficient to use existing procedures.
21. An annual review (Option D) involving the shareholders or owners is efficient to ensure that the remuneration policy is and remains aligned with a sound capital basis; this is consistent with the requirement to review annually remuneration policies. In the draft Shareholders' Rights Directive it is proposed that listed companies will have to involve their shareholders annually in the remuneration process (say on pay). Such an involvement is considered as best practice also for other firms. The additional costs for an annual involvement of the shareholders or owners are low to medium as the process is integrated with the processes to be performed anyway under the applicable company law. However, additional costs evolve for the preparation of documents and additional voting procedures and the notification of voting results. Where the ratio is just to be confirmed an annual process might be received as increasing the uncertainty about the remuneration package paid to staff. However, shareholders and owners in any case have the right to put this topic on the agenda and to review their approval made. The approved higher ratios are anyway subject to disclosure. The costs and created uncertainties for staff outweigh the benefits of an increased oversight of remuneration policies.
22. Option E is efficient as it contains the information provided for the decision and its outcome, only very low cost for the reporting evolve as all this information is available.
23. Option F should be pursued outside of these guidelines, the benchmarking process itself pursues a different objective than these guidelines.
24. Options B and E are retained.

#### Remuneration committee

25. Significant institutions are required to establish a remuneration committee. With regard to the notion of "significant" the following options were considered:
  - a. Option A: Institutions referred to in Article 131 of the CRD (G-SIIs and O-SIIs) and other institutions considered by competent authorities as significant should establish a remuneration committee in line with Article 95 of the CRD;
  - b. Option B: setting one single threshold based on e.g. balance sheet total or number of staff as criterion to determine significant institutions;
  - c. Option C: leaving the assessment which institutions are significant solely to the competent authorities.

26. Option A is in line with definitions provided in the EBA GLs on the supervisory review process for the category 1 institutions, it comprises the institutions with the highest balance sheet total and with the highest impact on the financial markets, but leaves appropriate discretion to include other large and relevant institutions, where a remuneration committee is expected to contribute to the implementation of sound remuneration policies. As usually the largest firms have already established remuneration committees the expected additional costs are low and affect only firms which do not yet follow this practice.
27. It is not practical to provide one fixed threshold for significance as markets differ and the assessment would need to take into account not only the mere size, but also the importance of institutions for specific parts of the financial market as well as their complexity and risk profile. Given differences in the financial markets between Member States and the size of institutions within such markets and given that the risk profile of institutions of the same size could still differ, Option B is not effective. However, it would result in a high level of harmonisation.
28. Option C would not achieve the desired level of harmonisation and is therefore not effective.
29. Option A is retained.

#### Remuneration policies in a group context

30. The guidelines clarify how the CRD remuneration provisions under Articles 92 to 95 should be applied in a group context; however most of the content is a direct consequence of the CRD, the consolidation rules of CRR, the national discretion of Member States regarding the ratios and the requirement to implement equivalent requirements for branches of parent institutions in third countries.
31. With regard to the inclusion of firms in the group context which are themselves not subject to the CRD, the EBA consulted the European Commission; and it was confirmed that all subsidiaries are subject to the CRD provisions when applied on a group level, including the limitation of the variable remuneration to 100 % (200 % with shareholder's approval) of the fixed remuneration. The guideline clarifies how the CRD requirements and the guidelines are to be applied to subsidiaries and branches, including such in third countries. The following options were considered:
- a. Option A: the ratios applicable for the limitation of variable remuneration and the application of the discount rate should follow the group policy and no higher ratios can be applied in subsidiaries;
  - b. Option B: the ratios applicable under national law are applied to subsidiaries;
  - c. Options C: the ratios applicable under national law are applied to subsidiaries, where the group remuneration policy allows. The GL clarify how different ratios set in

different Member States should be applied by different group entities located in the respective Member States;

- d. Option D: for subsidiaries in third countries the maximum ratio set by the CRD, the notional discount rate and the available instruments as defined in the RTS on classes of instruments that are appropriate to be used for the purposes of variable remuneration should be applied;
  - e. Option E: for subsidiaries in third countries the maximum ratio, the notional discount rate and the available instruments as applicable for the parent institution should be applied.
32. The application of the requirements to branches of third country parent institutions and subsidiaries in third countries should follow the above principles as to ensure a level playing field between institutions active in Member States.
33. Option A would ensure consistent group remuneration policies, but would have a negative impact on the competition of firms within one Member State.
34. Option B is not efficient as it does not ensure that consistent group policies are applied, though it would level the playing field between institutions in one Member State.
35. Option C combines the advantages of Option A and B, without having necessarily a negative impact on competition as the institutions can adopt remuneration policies which are consistent in a group context, but where subsidiaries have leeway to set their own ratios.
36. Option D and E would ensure compliance with the CRD in a group context in jurisdictions where the CRD is not implemented. Option D implies a lower potential impact on the conditions for competition compared to option E.
37. Options C and D are retained.
38. For situations where the CRD requirements and requirements under other directives (e.g. UCITS and AIFMD) differ the following options were considered for subsidiaries who do not themselves fall under the scope of the CRD on an individual basis:
- a. Option A: where different requirements are not contradicting each other, but e.g. one requirement is more specific, both requirements should apply;
  - b. Option B: where different requirement are contradicting each other in a way that only one requirement can be applied, different options exist which regulation could be applied. Institutions could be asked to apply:

- i. the requirement under the CRD;
- ii. the requirement under the specific sectorial directive;
- iii. one of the requirements under (i) or (ii) above.

39. Option A, considering the content of both directives which include mostly consistent conditions is easy to apply and ensures that institutions have sound remuneration policies are in place. The costs are low as institutions have to implement existing group policies and potentially some sector specific requirements. However, the requirements have also to be implemented by competing firms. The application of the bonus cap in particular needs to be seen against the background that these subsidiaries form part of a banking group and have an impact on their risk profile. If Option A were not retained, this would allow firms to restructure their business activities in a way that excludes identified staff from this provision. In addition one needs to consider that the number of identified staff in such subsidiaries will be very low and hence the cost impact for such firm to apply group remuneration policies is low compared to the advantages they have over competitors for being part of a group of institutions which has benefits in terms of capital and liquidity and overhead costs.

40. Under Option B, the application of the CRD requirement (i) would not be costly, as it would follow the group policy; the benefit would be a consistent group policy, but the effect on the risk alignment of the remuneration to the institution's specific activities might not be efficient. Under (ii) the risk alignment of the remuneration policy should be achieved in the same way as for competing institutions. However, the group policy would not be consistent in this one specific point, but as a general principle of legislation the more specific legislation should be applied. Under (i) it would not be possible to structure the pay out in a way that takes into account the specific institution's situation, including the size and weight of the AIFMD or UCITS activities. Option B(iii) As both CRD and AIFMD or UCITS Directive have the aim to align the remuneration of staff to the risks of the institution, the fact that the group policy may not be consistent in therefore not important and does not provide a sufficient reason to deviate from the general principle that more specific legislation should prevail.

41. Option A and Option B(ii) are retained.

### Proportionality

42. Under the baseline scenario, the approach taken was not sufficiently effective and did not lead to an appropriate level of harmonisation in particular regarding the application of deferral, retention, pay out in instruments and the application of malus and claw back. For many institutions the respective requirements were 'neutralised' using thresholds that differ significantly and sometimes without performing specific risk assessments. The enacting provisions of the CRD do not provide for a specific waiver.

43. Article 92 has to be complied with by all institutions, including the identification of staff, as to ensure that the firm has an appropriate remuneration policy. Article 94 sets out specific requirements for identified staffs' variable remuneration.
44. The limitation of the ratio between variable remuneration and fixed remuneration at 100 % (200 % with shareholders' approval) has to be applied with in any case in line with the CRD recitals and the political intention to introduce such a limitation to avoid excessive risk taking within institutions.
45. Options for the approach to proportionality were:
- a. Option A: Requiring that all provisions have to be applied in any case in all institutions;
  - b. Option B: Retaining the approach of 'neutralisation' taken under the CEBS GL.
46. Option A would be effective regarding the application of CRD provisions, but would lead to significant costs (and possible unintended consequences on the structure of the remuneration schemes) for small institutions where normally not very sophisticated remuneration systems and risk management tools are used and the level of variable remuneration is low. In such institutions the previous CEBS Guidelines allowed for the neutralisation of these provisions. The EBA will assess the impact of the implementation of all these provisions by all institutions in more detail based on the responses received during the public consultation.
47. Option B would not be in line with the interpretation of the CRD provisions, supported by the European Commission, as no explicit waivers are granted. Where minimum thresholds are set, the co-legislators provided the minimum extent to which the principles should be applied.
48. Option A has been retained as the only viable option.

#### Identification process

49. The identification process has to be based on the RTS on criteria to identify categories of staff whose professional activities have a material impact on the institutions' risk profile. The approach of a self-assessment by institutions based on the criteria included in the RTS and additional internal criteria was maintained.
50. Additional guidelines were provided for the assessment process on the solo and the consolidated levels and in particular for the assessment within subsidiaries which are only covered by the CRD provisions in a group context. As the consolidating institution is responsible for the compliance on the group level and as the CRD does not apply to all

subsidiaries on an individual basis there is no other option than to require that the consolidating institution does the assessment. This must be based on the consolidated situation; hence it must be based on the consolidated figures, consolidated organisation and risk impact, but must consider all the subsidiaries (even if not included in the scope of prudential consolidation). The situation as if all the entities would form one institution has to be taken into account. For this purpose it is mandatory that all subsidiaries cooperate and provide the required information. Also here no alternative options exist.

51. The notification and prior approval processes regarding the exclusion of staff who was only identified by the quantitative criteria in the RTS is set out in the guidelines. Regarding the time periods for such ex ante notifications two options exist.
  - a. Option A: require an ex ante notification at a point in time which allows the assessment of the competent authority before the performance period starts for the prior approval of competent authorities without the specification of a period;
  - b. Option B: setting a period for such notifications of two months, which is deemed to be sufficient for both institutions and competent authorities and including the involvement of the EBA where exclusions would be asked for staff receiving one million euro or more.
52. Option A would not be efficient as it would not allow that competent authorities can object to exclusions before the next performance period starts.
53. Option B would allow in most cases that the competent authority could respond if needed to such notifications before the next performance period starts. A period of two month should be set, shorter periods would increase the cost for competent authorities, longer periods the uncertainty of institutions about the outcome. A two months period seemed to be appropriate.
54. Option B is retained.

#### Fixed and variable elements of remuneration

55. The guidelines clarify, in particular, how elements of remuneration should be mapped to either the variable or fixed component. The correct mapping is crucial for the calculation of the bonus cap and therefore guidelines on remuneration are only effective when they set clear enough guidance on the mapping criteria.
56. In any case the criteria have to ensure an unambiguous mapping of all remuneration elements. Two general approaches were considered:
  - a. Option A: providing mapping criteria and assigning all elements which cannot be mapped in line with the criteria to the fixed remuneration;

- b. Option B: providing mapping criteria and assigning all elements which cannot be mapped in line with the criteria to the variable remuneration.

57. In order to ensure compliance with the bonus cap and given that the criteria are not exhaustive, the approach of Option B is the only effective approach and is retained. Institutions have to map all elements to variable and fixed remuneration in any case. Providing for harmonised criteria does not create additional costs.

58. The guidelines contain clear criteria under which elements of remuneration have to be allocated to the variable component or to the fixed component. The criteria are based on the CRD, its recitals and the EBA opinion on the use of allowances. They aim to ensure that only amounts are treated as fixed remuneration where staff can, permanently assume that the remuneration is paid with the predetermined amount and that adjustments happen only in line with the national wage setting processes. Where fixed remuneration would depend on non-transparent conditions or the full discretion of the institution, the remuneration policy would not be consistent with and promote sound risk management and not compliant with the scope of fixed remuneration. Hence to ensure compliance with the CRD, the conditions were set in a way that only predetermined, permanent (i.e. maintained over time tied to a specific role or position) non-discretionary and non-revocable elements are considered as fixed remuneration

59. Where variable remuneration is awarded, the respective requirements apply. Already the CRD (recital 64) explains that routine remuneration elements (e.g. mobile phones, etc) do not form part of the variable remuneration, the guidelines provide additional clarity. Other options which are in line with the CRD requirements were not identified.

60. For some specific cases additional guidelines were set:

- a. Option A: additional payments for expatriated staff where all similar situations are treated in the same way;
- b. Option B: additional payments for staff who temporarily substitutes higher remunerated staff and where all similar situations are treated in the same way.

61. Options A and B do not create additional burden for institutions as they allow to consider remuneration elements as fixed remuneration. Where such elements are not used as method for circumvention they also do not create costs or disadvantages in terms of supervision or with regard to the appropriateness of remuneration policies.

62. Option A in particular may reduce costs for administrative procedures which could include the refund of travel expenses and similar costs where staff is temporarily active in other jurisdictions.

63. Option B balances the principle that staff should receive fixed remuneration that reflects their organisational responsibility with the need to respond to fill unplanned vacancies. This would be more difficult were such payments to be considered as variable remuneration. However, if such elements were discretionary they would not form part of standard remuneration packages and therefore would be variable remuneration.
64. Options A and B are retained.
65. The criteria for the mapping of variable and fixed remuneration components will lead to the need that institutions adjust their remuneration policy which may create one off costs. However, these adjustments ensure that the remuneration policies comply with the CRD provisions which should have been already the case. The detailed criteria lead to a higher level of harmonisation and avoid that institutions implement remuneration policies that later on have to be changed again as they would potentially not meet the expectations of competent authorities.
66. A higher fixed remuneration which cannot be adjusted may reduce the cost flexibility of institutions, but also provides when combined appropriately with variable remuneration for incentives to act in line with the risk strategy and to incentivise prudent risk taking, this should lead to more stable financial results. These benefits outweigh the costs. However, the aspect of cost flexibility is not further assessed as it directly results from the CRD provisions regarding the bonus cap.
67. To ensure that institutions map the components correctly to variable or fixed remuneration the following options were considered:
- a. Option A: rely on the review by competent authorities and require appropriate documentation by institutions for new remuneration components;
  - b. Option B: require institutions to notify to competent authorities new fixed remuneration components unless they are standard remuneration components as set out in the guidelines, including their analysis and perform respective timely reviews;
  - c. Option C: same as Option B, but competent authorities should inform the EBA about newly observed fixed remuneration component;
  - d. Option D: require institutions to explicitly disclose new remuneration elements introduced in their remuneration policy.
68. Option A would enable a supervisory review and be effective, but has limitations regarding the timeliness of such reviews. Options B and C would ensure a timely review, Option C allows also the timely development of further guidance as necessary by the EBA and ensures

a consistent application of the guidelines, but would require additional resources. The costs of options B and C are slightly higher for the supervisory review as more frequent reviews are necessary. Institutions anyway need to map all remuneration elements correctly; further marginal costs may emerge for the notification. The benefit is that the compliance with the provisions is better ensured.

69. Option D is effective to increase transparency on remuneration policies. The additional information to be disclosed are minor and therefore the costs are negligible; the benefit is that stakeholders are informed about relevant changes to the remuneration policy which should be the case anyway. As the disclosure takes place annually, the combination of options A and D ensures a sufficiently timely review of new developments while having the lowest cost impact compared to other options.

70. Options A and D are retained.

#### Allowances

71. The use of allowances and of so called 'role based allowances' requires particular attention as the valuation of allowances and their nature need to be reviewed to ensure compliance with the CRD provisions regarding the bonus cap. The provisions point to certain aspects which should be further analysed where observed. These guidelines ensure a harmonised treatment of these remuneration elements and that new remuneration elements are assessed based on the criteria provided for the mapping of remuneration components.

72. The guidelines also clarify which conditions need to be met so that allowances can be considered as fixed remuneration. There are no other options.

73. There are no additional costs for the respective review as competent authorities have under the CRD IV anyway the responsibility to ensure that institutions comply with the CRD provisions. The guidelines may even reduce the costs as they clarify this specific remuneration element and the actions which need to be taken. The benefits are a more efficient supervision of remuneration practices.

#### Retention Bonus

74. The guidelines were clarified regarding the award of retention bonus and how it is considered within the bonus cap. As all variable remuneration, including a retention bonus has to be taken into account there are only the following options:

- a. Option A: the retention bonus has to be considered in any case pro rata or taking into account the actuarial value in line with international accounting standards;
- b. Option B: the full amount is taken into account when the retention bonus is awarded.

75. Option A would effectively ensure that the limitation of the ratio is complied with, be in line with accounting standards and allow for the pay out of performance related variable remuneration.
76. Option B would not be effective as taking into account the full amount may lead to a situation where the ratio would not be complied with and would not promote sound risk management as only a relatively lower remaining performance related bonus could be awarded in the year where a retention bonus would be awarded. Option B would not be consistent with accounting standards.
77. Only Option A is effectively ensuring that the bonus cap is applied while Option B would not be effective as it would restrict the use of variable remuneration in years where a retention bonus is paid.
78. Option A is retained as this is the only effective option.

#### Guaranteed variable remuneration

79. The guidelines were clarified regarding the situations where guaranteed variable remuneration can be awarded and how it is considered within the bonus cap.
80. The following Options were considered:
- a. Option A: the guaranteed variable remuneration has to be considered in any case in the first year of employment;
  - b. Option B: the guaranteed variable remuneration should not be taken into account in the first performance year, when it is considered as awarded before the first performance period starts.
81. Option A would be effective to ensure that the limitation of the variable remuneration is observed in any case. However, it would lead to a situation where the variable remuneration for the first performance year would be limited or even no variable remuneration could be paid at all. Given that the guaranteed variable does not need to be subject to malus and clawback (as it is guaranteed and there is no risk assumed by the staff member when he or she is employed which could change over time) this would reduce the possibility to align the incentives for staff with the risk of the institution. It would also contradict the possibility provided by the CRD to pay such guaranteed amounts to attract staff as the employment conditions would have other restrictions or to buy out staff from other contracts.
82. Option B is effective and ensures compliance with the bonus cap starting from the beginning of first performance year and allows the institution to make use of such guaranteed variable remuneration when the contract with new staff is agreed at a point of time before the actual performance of that staff member is being measured. However, these may open room to

circumvent the CRD provisions and therefore the following options to ensure compliance were considered:

- a. Option B(i): Setting guidelines that staff can receive such a guaranteed variable remuneration only once in a group context, when already employed by another group company, and provide for additional clarification of the use of such remuneration components;
- b. Option B(ii): Requiring that competent authorities review situations where contracts are renewed on a regular basis to avoid circumvention.

83. Option B, B(i) and B(ii) are retained as all are effective and a consequence of the respective CRD requirements.

### Severance payments

84. The guidelines clarify how such payments are considered within the bonus cap.

85. The following Options were considered:

- a. Option A: the severance payment has to be considered as variable remuneration;
- b. Option B: the severance payment is not considered in the bonus cap where national labour or contract law makes such payments mandatory, the GL should the situations in which this is applied;
- c. Option C: the severance payment, when it is considered as mandatory or is in line with the fixed remuneration which would have been paid for future periods, should be considered to not fall into the last performance period and therefore not considered when the ratio is calculated for the former staff member. Other elements would be considered in the calculation. Variable elements of severance pay would be specified and be taken into account in the calculation of the ratio for the last performance period.

86. Option A would be effective as it ensures that the limitation of the variable remuneration is observed in any case, but may contradict labour law, it may also conflict with contractual obligations to pay out performance related variable remuneration where earned. It would also not cater for situations where institutions need to reduce fixed costs in the long run when business activities are sold or reduced.

87. Option B recognises national contract and labour law. In well-reasoned cases and specific situations set out in the guidelines the award of severance pay will help the institution to recover and maintain a sound capital basis. Option B would be effective where the amounts are not leading to any risk assumption.

88. Option C would be effective as it would specify the amounts that are considered as fixed severance pay and the amounts to be considered as variable severance pay. The option provides for sufficient flexibility of severance pay awards, while not increasing the amount of variable remuneration which could be awarded and ensuring that the bonus cap is applied. Such fixed mandatory payments have more the character of compensation than remuneration.

89. Option B and C were retained.

#### Ratio between variable and fixed remuneration

90. The limitation of the ratio between the variable remuneration and the fixed remuneration to a maximum of 100 % (200% with shareholders' approval) was introduced by CRD, including the underlying approval procedures. Institutions should set an amount up to the maximum percentage within their remuneration policies.

- a. Option A: Provide further detailed guidelines on how the percentage (potentially below the maximum ratio) should be set by institutions;
- b. Option B: Do not provide for detailed guidelines but general principles on how institutions can set a ratio within the regulatory limits based on their own considerations for categories of staff.

91. Given that the maximum ratios provided in the CRD set an effective limit which ensures that there are no incentives for excessive risk taking Options A and B are effective. Option A would create limitations and additional processes in institutions. Option B leaves the process to the discretion of the institution and is therefore less burdensome while ensuring that key aspects are considered.

92. Option B is retained.

93. The guidelines specify how the ratio should be calculated as a ratio between the variable remuneration in the denominator and the fixed remuneration in the nominator. The following options were considered:

- a. Option A: All remuneration components must be mapped to variable and fixed remuneration and used in the calculation;
- b. Option B: All remuneration components (excluding some specific elements like mandatory severance pay, severance pay made in other situations where it does not create incentives for risk assumption, guaranteed variable remuneration) must be mapped to variable and fixed remuneration and all variable remuneration elements must be used in the calculation, while some proportionate non-monetary fixed elements can be disregarded;

- c. Option C: As option B, but also non-monetary variable remuneration elements can be disregarded.
94. Option A and B are effective to ensure that institutions calculate the ratio in a way that ensures compliance with the bonus cap. The costs of Option A are higher than for Option B as they require the valuation of these instruments separate for each staff member.
95. Option C is not effective as it could lead to breaches of the limitation of the variable remuneration.
96. Option B is retained.

#### Pay out of fixed and variable remuneration

97. The guidelines introduce provisions to implement the requirement that remuneration policies can be fully flexible regarding the variable remuneration.
- a. Option A: beside the requirement that institutions need to be able to apply a fully flexible remuneration policy on variable remuneration and therefore the fixed part needs to be paid in a way that does not impair the possibility to apply a fully flexible policy on variable remuneration;
  - b. Option B: further guidelines on the pay out of fixed remuneration and restrictions regarding the pay out in certain instruments should be set, ensuring that a 50% cash part is paid out at least.
98. Option A was implemented under the CEBS guidelines and CRD III, leading to different instruments paid out as fixed remuneration and not leading to a sufficient level of harmonisation. Some instruments could be understood to align the fixed remuneration to the performance of institutions, vary over time and can therefore not be part of fixed remuneration. Staff cannot always sell instruments due to insider rules and market liquidity. However, together with a clear definition of fixed remuneration and clearer provisions regarding methods which lead to a circumvention of the requirements, including measures that are directed to the pay out of fixed remuneration, this approach will be effective, even if no minimum cash amount is defined.
99. Option B would be effective, but would restrict the flexibility of firms in particular in situations where very high amounts of remuneration would be awarded. A set percentage might not be appropriate for each and every situation.
100. Regarding the costs the options have no significant differences, both will lead to minor adjustments of the remuneration policy and the pay out process for fixed remuneration limited to mainly large and complex institutions who use instruments to pay out fixed remuneration in particular for its senior management and executive directors.

101. Option A is retained.
102. The CRD provisions regarding the pay out of variable remuneration in instruments were amended and the guidelines adjusted accordingly. The guidelines specify where it is possible to use both categories of instruments as defined in points (i) and (ii) of Article 94(1)(I) of the CRD.
- a. Option A: as it is always possible to create instruments, a balance of instruments should always be used;
  - b. Option B: differentiating between situations where instruments are readily available in the institution or the group context or can be created without material costs, taking into account the legal form of the institution and their activities;
  - c. Option C: available instruments should not only be instruments of the institution, but also instruments issued in a group context.
103. Option A would be effective, but could lead to material costs in particular in small institutions or depending on the legal form.
104. Option B is effective taking into account the principle of proportionality and the availability of instruments. In particular listed companies and companies who already issued eligible instruments should be able to use them for the purpose of variable remuneration without material additional costs and should prioritise the use such instruments. Costs for the administration of the deferred remuneration were not considered as they are triggered by the CRD.
105. Option C reduces the costs for additional issuances and ensures that consistent group remuneration policies are applied. The methodology to use instruments issued in a group context is also consistent with the approach taken in the COMMISSION DELEGATED REGULATION (EU) No 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to RTS specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.
106. Option B and C are retained.

#### Deferral and retention and pay out of variable remuneration in instruments

107. The framework under CRD III and the CEBS guidelines was not effective as shown in the EBA's Remuneration Benchmarking report the practices for deferral and retention and the pay out of variable remuneration in instruments differ significantly between institutions and Member States.

108. To ensure a more harmonised approach the following was considered:
- a. Option A: in line with the CRD not introducing the possibility to not apply deferral or pay out in instruments provisions;
  - b. Option B: Providing for appropriate guidelines for institutions on instruments which can be used for the payment of variable remuneration;
  - c. Option C: introduce more specific guidelines on minimum retention periods of in general at least one year and specify the situations where longer deferral periods of at least 5 years should be used.
109. Option A would be effective as it ensures full compliance with the CRD provisions, compared to the CEBS Guidelines it would lead to some additional costs in particular for small institutions who have so far not implemented deferral schemes. This will however lead to a higher level of harmonisation.
110. As the RTS on instruments applies only to instruments under Article 94(1)(l)(ii) of the CRD it is appropriate to set out guidelines on shares and share linked instruments in order to ensure that they are appropriate for the use as part of variable remuneration and do not lead to a circumvention of the respective CRD provisions (Option B). This will lead to a higher level of harmonisation.
111. Option C ensures that the minimum standards to be used are harmonised, the costs for clarifying the use of such periods are low as they are within the range of the CRD requirements and established practices.
112. Options B and C are retained.
113. Institutions must be able to apply malus and clawback to up to 100 % of the variable remuneration without prejudice to national labour and contract law. Where it is difficult or not possible to apply clawback under national laws, institutions should reflect this in their remuneration policies and ensure that malus or implicit risk alignments are applied to the extent possible.
114. Taking into account that in particular clawback cannot be effectively applied in many Member States the following options were considered:
- a. Option A: require institutions to ensure that malus can be applied (where possible) when clawback cannot be applied effectively;
  - b. Option B: increase the portion which is paid out in instruments;

- c. Option C: use longer deferral periods and not use pro rate vesting to ensure that malus can be applied;
  - d. Option D: use longer retention periods to ensure that implicit risk alignments can take place (via the change of market prices to instruments).
115. All the options can contribute to a situation where malus and clawback can be applied more effectively. The institutions' remuneration policy needs to take into account the national framework. The costs of this provision for adjusting the procedures and resulting from staff being able to have access to the funds at a later stage are triggered by the CRD provision.
116. All options are retained, but should be applied considering the national laws.

#### Institutions under government support

117. The guidelines clarify further how remuneration policies should ensure a closer risk alignment, ensuring that a sound capital base can be re-established. However, compared to the previous guidelines they only specify in more detail the pay-out provisions which could be applied by competent authorities in order to ensure a more efficient application of the provisions, specifying that the deferred portion could be increased to 100 % and to apply longer deferral periods and to align the awards with the recovery phase and plans. These options ensure that variable remuneration is better aligned with the risk and ensures that it does not conflict with the reestablishment of a sound capital bases. These will be applied as appropriate. This was already possible under the previous framework and therefore no additional costs emerge, but the range of possible actions becomes more transparent.

#### Disclosure

118. The provisions contained in the previous guidelines were updated and aligned with the CRR provisions.
- a. Option A: the CRR disclosure requirements apply to identified staff, the guidelines should suggest that such information is also disclosed for all staff;
  - b. Option B: no further disclosure requirements, beside the disclosure of the total number of staff and the total variable and fixed remuneration, should be implemented, but the requirements for identified clarified by providing further guidance also with regard to newly introduced disclosure requirements.
119. Option A would ensure a high level of transparency and would allow stakeholders to assess better the overall remuneration policy applied to all staff. Not only identified staff has an impact on the risk profile, but also other staff in particular collectively has an impact on the risk profile. In particular sales staff remuneration, when containing inappropriate

incentives, could also give rise to conduct risk and consumer protection issues. Remuneration policies need to be appropriate for all staff and transparent to them. Therefore and to ensure the appropriate information of stakeholders regarding all these information Option A is effective, but would create medium additional costs for such disclosures. However, there is the risk that a too high volume of information is impairing the transparency regarding the relevant information.

120. Option B is effective regarding the information to be provided for identified staff, information on the remuneration paid for all staff is also included in the profit and loss accounts and the respective results are disclosed. Option B provides for a sufficient level of transparency taking into account that for supervisory purposes additional information can always be requested. The aggregated information for all staff is needed to derive benchmarks.
121. Option B is retained as the overall costs are lower and the disclosure should focus on the more relevant remuneration policies for identified staff.

### Guidelines for supervisors

122. The guidelines were aligned with the amended CRD provisions and restructured to ensure a better readability. The level of guidance was reduced to focus on critical areas and as other guidelines (e.g. EBA guidelines on the supervisory review process) also contain respective provisions and set out the review process. The general principle that competent authorities have to perform reviews to ensure that institutions comply with the CRD provisions was maintained. No additional options were considered and it is assumed that the revamped guidelines have no cost impact. Where additional areas were added (e.g. the review of the bonus cap) the additional costs are directly triggered by the CRD and were not assessed.

#### 6.1.4 Conclusion

123. The overall cost impact of the guidelines compared to the baseline scenario is low, while the benefits are medium. However, this does not include an assessment of the changed approach with regard to the application of the proportionality principle.. The EBA will assess the impact of the implementation of all these principles by all institutions in detail taking into account the responses received during the public consultation. The implementation of the guidelines will in particular create one off costs for the change of policies and procedures in credit institutions and investment firms. They create a long term benefit by achieving a higher level of harmonisation, providing a clear definition of variable and fixed remuneration, sound risk management, and thus ensuring that compliance with the remuneration requirements implemented by the co-legislators can be affectively ensured. In that way, these guidelines contribute to ensuring the safety and soundness of the European banking system and to promoting the effective, efficient and stable functioning of the European financial system.

Q 21: Do institutions, considering the baseline scenario, agree with the impact assessment and its conclusions?

Q 22: Institutions are welcome to provide costs estimates with regarding the costs which will be triggered for the implementation of these guidelines. When providing these estimates, institutions should not take into account costs which are encountered by the CRD IV provisions itself.

## 6.2 Overview of questions for Consultation

Q 1: Are the definitions provided sufficiently clear; are additional definitions needed?

Q 2: Are the guidelines in chapter 5 appropriate and sufficiently clear?

Q 3: Are the guidelines regarding the shareholders' involvement in setting higher ratios for variable remuneration sufficiently clear?

Q 4: Are the guidelines regarding remuneration policies and group context appropriate and sufficiently clear?

Q 5: All respondents are welcome to provide their comments on the chapter on proportionality, with particular reference to the change of the approach on 'neutralisations' that was required following the interpretation of the wording of the CRD. In particular institutions that used 'neutralisations' under the previous guidelines for the whole institution or identified staff receiving only a low amount of variable remuneration are asked to provide an estimate of the implementation costs in absolute and relative terms and to point to impediments resulting from their nature, including their legal form, if they were required to apply, for the variable remuneration of identified staff: a) deferral arrangements, b) the pay out in instruments and, c) malus (with respect to the deferred variable remuneration). In addition those institutions are welcome to explain the anticipated changes to the remuneration policy which will need to be made to comply with all requirements. Wherever possible the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately for the three listed aspects.

Q 6: Are the guidelines on the identification of staff appropriate and sufficiently clear?

Q 7: Are the guidelines regarding the capital base appropriate and sufficiently clear?

Q 8: Are the requirements regarding categories of remuneration appropriate and sufficiently clear?

Q 9: Are the requirements regarding allowances appropriate and sufficiently clear?

Q 10: Are the requirements on the retention bonus appropriate and sufficiently clear?

Q 11: Are the provisions regarding severance payments appropriate and sufficiently clear?

Q 12: Are the provisions on personal hedging and circumvention appropriate and sufficiently clear?

Q 13: Are the requirements on remuneration policies in section 15 appropriate and sufficiently clear?

Q 14: Are the requirements on the risk alignment process appropriate and sufficiently clear?

Q 15: Are the provisions on deferral appropriate and sufficiently clear?

Q 16: Are the provisions on the award of variable remuneration in instruments appropriate and sufficiently clear? Listed institutions are asked to provide an estimate of the impact and costs that would be created due to the requirement that under Article 94(1)(l)(i) CRD only shares (and no share linked instruments) should be used in parallel, where possible, to instruments as set out in the RTS on instruments. Wherever possible the estimated impact and costs should be quantified and supported by a short explanation of the methodology applied for their estimation.

Q 17: Are the requirements regarding the retention policy appropriate and sufficiently clear?

Q 18: Are the requirements on the ex post risk adjustments appropriate and sufficiently clear?

Q 19: Are the requirements in Title V sufficiently clear and appropriate?

Q 20: Are the requirements in Title VI appropriate and sufficiently clear?

Q 21: Do institutions, considering the baseline scenario, agree with the impact assessment and its conclusions?

Q 22: Institutions are welcome to provide costs estimates with regarding the costs which will be triggered for the implementation of these guidelines. When providing these estimates, institutions should not take into account costs which are encountered by the CRD IV provisions itself.