EBA EUROPEAN BANKING AUTHORITY

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Opinion of the European Banking Authority on the application of the principle of proportionality to the remuneration provisions in Directive 2013/36/EU

Introduction and legal basis

1. The EBA is monitoring closely the development of remuneration practices within the EU and is mandated with several tasks in this area, including issuing guidelines on sound remuneration practices. Appropriate remuneration policies are an important tool to align the incentives for staff with the risk strategy and profile of an institution. Inappropriate remuneration policies were identified as one underlying factor of the financial crisis.

2. In particular, Articles 74 and 75 of Directive 2013/36/EU[1] mandate the EBA to develop guidelines on sound remuneration policies with respect to the requirements contained in Articles 92 to 95 of Directive 2013/36/EU on both remuneration policies for all staff as part of institutions' internal governance arrangements and remuneration policies for staff whose professional activities have a material impact on an institution's risk profile as defined in the regulatory technical standards on identified staff (RTS on identified staff).

3. In its consultation paper on the guidelines[2], the EBA stated its view that the remuneration principles in Directive 2013/36/EU have to be applied to all institutions but that specific exemptions could be introduced for certain institutions that do not rely extensively on variable remuneration and, if confirmed by further analysis, also for identified staff who receive only a low amount of variable remuneration. The EBA sought input from interested parties on this issue in its consultation paper with a view to providing advice to the EU institutions on appropriate changes to Directive 2013/36/EU.

4. The EBA has analysed the responses received to the consultation paper as well as information obtained from competent authorities and the EBA's findings are presented in this Opinion and in the report included as Annex II thereto.

5. This Opinion is addressed to the European Commission, European Parliament and Council.

[1] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

[2] Consultation paper on Guidelines on sound remuneration policies (EBA/CP/2015/03), published on 4 March 2015.

6. The EBA's competence to deliver this Opinion is based on Articles 29(1)(a) and 34(1) of Regulation (EU) No 1093/2010[3] as institutions' remuneration policies and practices relate to the EBA's area of competence.

7. In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors[4], the Board of Supervisors has adopted this Opinion.

General comments

8. In accordance with Directive 2013/36/EU, an institution's remuneration policy has to be consistent with and promote sound and effective risk management and should not encourage risk-taking that exceeds the level of tolerated risk of the institution.

9. To this end, the remuneration policy has to make a clear distinction between 'fixed' and 'variable' remuneration. Fixed remuneration should primarily reflect relevant professional experience and organisational responsibility as set out in an employee's job description. In turn, variable remuneration should comprise all components linked to performance or, in exceptional cases, other contractual elements that do not form part of routine employment packages.

10. For the variable remuneration of staff whose professional activities have a material impact on the institution's risk profile (identified staff), institutions need to defer at least 40% of the variable remuneration over a period which is not less than 3–5 years and pay at least 50% in specified non-cash instruments. The deferral of variable remuneration allows institutions to apply explicit ex post adjustments to variable remuneration awarded in the past, in particular by the application of malus. The payout in instruments leads to implicit ex post adjustments due to changes in the value of the instruments awarded. In addition, the ratio between the variable and the fixed components of remuneration is limited to 100% (200% with shareholders' approval). All these principles, which are applicable at individual, sub-consolidated and consolidated levels, aim to ensure that the variable remuneration of identified staff is consistent with and promotes sound risk management and that no incentives for excessive risk-taking exist.

11. Article 92(2) of Directive 2013/36/EU requires competent authorities to ensure that the remuneration principles in Articles 92 to 94 are applied 'in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities'. In this regard, recital 66 of Directive 2013/36/EU states that 'the provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature,

[3] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 1).

[4] Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev 4).

scope and complexity of their activities. In particular it would not be proportionate to require certain types of investment firms to comply with all of those principles.'

12. This wording means that, in particular, small and non-complex institutions can comply with the principles by implementing less complex but still appropriate remuneration policies, while large and complex institutions have to implement more sophisticated remuneration policies and risk measurement approaches. For some of the remuneration principles, Directive 2013/36/EU sets out quantitative minimum requirements (e.g. 40% deferral of variable remuneration, a limitation of variable remuneration to 100–200% – with shareholders' approval – of fixed remuneration). The extent to which small and non-complex institutions can implement less complex but still appropriate remuneration policies raises interpretation issues for institutions, competent authorities, the EBA and the European Commission.

13. The EBA held a three-month consultation period on its draft guidelines between March 2015 and June 2015. The consultation paper set out the EBA's legal interpretation, subsequently confirmed by the European Commission, that the wording of Article 92(2) of Directive 2013/36/EU does not permit exemptions or waivers to the application of the remuneration principles. To receive supporting information after the three-month consultation period, a question (Q5) was added to the consultation paper to ensure that the EBA would receive information on the cost impact and on any impediments regarding the application of the consulted approach to proportionality. However, information provided to the EBA by competent authorities, together with evidence gathered from stakeholders during the consultation period, shows that there are different legal interpretations of the proportionality clause as established in Article 92(2) of Directive 2013/36/EU, which have led to different applications of the remuneration principle at national level. These approaches would be in line with the CEBS Guidelines on remuneration policies and practices (CEBS Guidelines).

14. Stakeholders and concerned parties submitted 127 written responses to the EBA's consultation paper, of which 73 responses were non-confidential and were published on the EBA's website. Most of the respondents raised concerns about the limited application of the proportionality principle as developed in the consultation paper.

15. The EBA also requested information from competent authorities about the implementation of Article 92(2) of Directive 2013/36/EU. The information was needed to establish the impact the proposed Guidelines on sound remuneration policies would have on institutions in different Member States and to evaluate the need for further harmonisation. This input was also needed to provide information for the review of the remuneration provisions by the European Commission under Article 161(2) of Directive 2013/36/EU and as additional background information in the context of the finalisation of the abovementioned guidelines and the drafting of the present EBA Opinion and accompanying report.

16. Based on information provided by competent authorities, 21 Member States have implemented waivers in line with the CEBS Guidelines, through both national legislation and supervisory guidelines, for small institutions and for subsidiaries that are not themselves

subject to Directive 2013/36/EU (e.g. an asset management companies), or waivers based on thresholds at group level (total balance sheet). Many Member States have also, in line with the CEBS Guidelines, implemented waivers that apply to individual staff in cases where they do not receive a high amount of variable remuneration. The scope of these waivers differs significantly, in terms of both the institutions which may benefit from them and the remuneration principles to which they apply.

17. Some Member States have implemented the remuneration principles such that some of the principles can be waived when specific criteria are met, as the legal interpretation of the wording 'to the extent' in Article 92(2) of Directive 2013/36/EU allows for such waivers. This interpretation was supported by the previous CEBS Guidelines, which expressly allowed for some waivers. These Member States consider that they can apply the remuneration provisions to a lesser extent to smaller firms and for staff who do not receive a high level of variable remuneration. The provisions waived are, in particular, the requirements to defer part of the variable remuneration and to pay out part of the variable remuneration in instruments.

18. A few Member States also allow the limitation on the ratio between the variable and fixed components of remuneration to be waived, or exclude whole institutions or certain subsidiaries of institutions (e.g. asset management companies) from the application of all the remuneration provisions regarding the variable remuneration of identified staff in Article 94 of Directive 2013/36/EU.

19. Waivers affect a different number of institutions and staff in different Member States; if their application is not harmonised, this could have an impact on the conditions for competition between institutions.

20. In addition, regarding the payout of variable remuneration in instruments, Article 94(1)(l)(i) of Directive 2013/36/EU limits the possibility of paying out variable remuneration in share-linked instruments to non-listed institutions and requires listed institutions to use shares. Here also, two approaches were discussed, as listed institutions nevertheless continue to make use of share-linked instruments. A significant majority of competent authorities and of respondents to the consultation paper were of the view that the use of share-linked instruments, if economically they achieve the same outcome as payments in shares, should also be possible for listed companies.

21. The EBA is of the view that it is essential to establish a more harmonised approach to the application of the remuneration requirements in Directive 2013/36/EU and to provide legal clarification regarding the application of the remuneration requirements in accordance with the proportionality principle established under that directive, where necessary. The tools available to the EBA cannot be relied upon alone to achieve this goal. EBA guidelines addressed to competent authorities and institutions cannot change the different national legislative implementations of Directive 2013/36/EU. The EBA therefore considers that action is necessary at the level of the EU institutions in order to ensure the remuneration requirements are applied consistently across the Union.

22. In the EBA's view this harmonised approach should take the form of legislative amendments to Directive 2013/36/EU to exclude certain small, non-complex institutions from the requirements to apply the remuneration principles regarding deferral and payment in instruments for variable remuneration, and to limit the scope of those remuneration principles as regards staff who receive low amounts of variable remuneration, including in large institutions. This would put the extent to which the principles should be applied beyond doubt, while also ensuring that the scope of the exemptions is consistent across the Union and that the overall objective of ensuring that remuneration policies and practices are consistent with and promote sound and effective risk management is maintained.

23. The EBA is also of the opinion that listed institutions should be able to use share-linked instruments, as, in terms of incentives for prudent risk-taking, they have the same effect as shares, when they reflect exactly the value of shares.

Specific comments

Reasoning behind the proposed legislative change and cost-benefit analysis

Exclusions from the application of deferral and payout in instruments

24. Small and non-complex institutions have a relatively high number of identified staff to whom the remuneration requirements need to be applied. In addition they need to implement the necessary IT systems and processes for, in absolute terms, a low number of staff. Many small institutions estimate that they would need one more staff member for administrative purposes if they were to apply deferral and payout in instruments. Both effects lead to a situation where the administrative costs per staff member and the total costs relative to the total administrative costs are higher in small institutions than in large institutions, creating a competitive disadvantage. In addition small and non-complex institutions, as well as many cooperative and savings banks, often do not have readily available instruments to pay variable remuneration. The creation of instruments for a relatively low amount of variable remuneration would be costly considering the relatively minor improvement in risk alignment achieved.

25. Cooperative banks cannot reasonably use their shares/equity rights, as the amounts per person are limited and also the procedure would be too complicated; in addition no periodical fair value valuations are done. This also makes it impossible for cooperatives to use convertible bonds; they could only use bail-in-able bonds that can be written down. These conditions would be less attractive compared with those in listed companies, which can use convertible instruments (in the case of bail-in, the staff would still have the shares). Savings banks face similar problems to cooperatives: they are state owned and cannot use equity to pay variable remuneration. Both types of institution are unlisted and could create equity-linked instruments, but are also required to use bail-in-able bonds 'where possible'. Still, where linked instruments were used, legal costs would emerge, as well as additional costs for the valuation of instruments.

26. Not allowing for any waivers would lead to a situation where many small and non-complex institutions would change their remuneration policy to pay out exclusively fixed remuneration. In addition, in some jurisdictions, the remuneration, including a small amount of variable remuneration, awarded to staff considered identified staff according to the RTS on identified staff is directly foreseen by collective agreements that cannot be changed unilaterally by institutions. The application of those requirements to these small amounts of variable remuneration would lead therefore to inappropriately high costs. Independent of the size of the institution, these requirements should be waived for staff who receive only an immaterial amount of variable remuneration. The exclusion of these staff from the application of the rules significantly reduces administrative costs. Waivers of the limitation on the ratio between variable and fixed remuneration should not be introduced for institutions falling under the scope of Directive 2013/36/EU. The so-called bonus cap is easy to apply and does not create additional administrative costs. The cap ensures that no inappropriate incentives for risk-taking can be provided.

27. Based on the EBA's benchmarking report on the remuneration paid in 2013 in 140 institutions, including mainly medium-sized and larger credit institutions, the overall percentage of variable remuneration of identified staff compared with the total remuneration of staff was only 3.65%. According to Article 109(2) of Directive 2013/36/EU the remuneration provisions, including the bonus cap, apply also on consolidated and sub-consolidated levels to asset management firms and other financial institutions that are subsidiaries of an institution. The bonus cap may have, in third countries but also between institutions, including their subsidiaries and firms not subject to Directive 2013/36/EU, an impact on competition for the best and most talented staff.

28. Respondents to the public consultation on the EBA guidelines provided estimates of the costs that would arise if they were to implement the requirements on remuneration of Directive 2013/36/EU (deferral and payout in instruments) for all identified staff, as shown in the table below.

Analysis of the major costs related to these Guidelines based on quantitative information provided during the consultation process			
	direct costs		indirect costs
type of institution	one-off	on-going	on-going
large credit institutions	1 - 5 Mio EUR	500 000 -1.5 Mio EUR	increase in fixed remuneration
	mainly related to HR and IT	mainly related to HR and IT	increase in capital requirements
small credit institutions	100 000 - 500 000 EUR	50 000 - 200 000 EUR	increase in fixed remuneration
	mainly related to HR, IT and advisory	mainly related to HR, IT and advisory	increase in capital requirements
large investment firms	1 - 2 Mio EUR	400 000 - 500 000 EUR	3 - 5 times higher fixed remuneration
	mainly related to HR and IT	mainly related to HR and IT	higher risk to business continuity
small investment firms	100 000 - 500 000 EUR	50 000 - 200 000 EUR	3 - 5 times higher fixed remuneration
	mainly related to HR, IT and advisory	mainly related to HR, IT and advisory	higher risk to business continuity

29. The EBA is therefore of the view that it should be possible in particular for small and non-complex institutions to achieve the result prescribed by Directive 2013/36/EU without the application of deferral and payout in instruments for variable remuneration; the same holds true when those principles would not apply to staff who receive non-material amounts of variable remuneration. However, the ratio between the variable and the fixed component of remuneration is limited to 100% (200% with shareholders' approval), and this should not be subject to any waivers, as explained in recital 65: 'In any event, in order to avoid excessive risk-taking, a maximum ratio between the fixed and the variable component of the total remuneration should be set.'

30. Accordingly, the EBA is of the view that Directive 2013/36/EU should be amended to establish a clear basis for excluding the application of the remuneration principles on deferral and payment in instruments under specific conditions.

Use of share-linked instruments in listed institutions

31. When shares are used for variable remuneration it leads to a dilution of voting rights and staff are put in a situation where, after receiving the shares, they may not be able to sell them (insider problematic). In addition issuing new shares would create administrative costs and would require shareholder approval – which might not be granted.

32. Where the value of a share-linked instrument is equal to the share price, the use of shares does not create a prudential benefit. The deferral of shares, however, creates additional costs, as institutions normally buy shares to hedge themselves against price changes. The amount of shares held by banks is deducted from their own funds. This effect does not happen with share-linked instruments.

33. In the long run, the use of shares for variable remuneration does not lead to an increase in institutions' capital, as institutions take into account their capital needs and would just change the balance between shares issued to investors and shares issued for the purpose of variable remuneration, without, however, changing the total amount.

34. Overall the use of share-linked instruments is prudentially sound as long as instruments reflect the share price and do not create additional incentives for risk-taking, e.g. by the use of leveraged share-linked instruments. The sound creation of share-linked instruments for remuneration can be ensured via EBA guidelines.

35. The EBA is also of the opinion that listed institutions should be able to use share-linked instruments, as, in terms of incentives for prudent risk-taking, they have the same effect as shares, when they track the value of shares.

Objective of the proposed legislative changes

36. The application of the remuneration provisions should be harmonised within the Union to achieve a level playing field and avoid distortion of the competition to attract the best and most talented staff. At the same time the administrative burden for, in particular, smaller institutions should be reduced.

37. In addition, for listed institutions, the use of share-linked instruments that reflect exactly the price of shares would reduce administrative costs and the dilution of voting rights.

38. In order to achieve an appropriate level of harmonisation, the EBA proposes that the overall scope of the exemptions to the remuneration principles should be set via the ordinary legislative procedure. The EBA stands ready to provide support in this process, if the EU Commission and the co-legislators are willing to mandate technical work in this area. In particular, Directive 2013/36/EU should limit the exemptions to institutions which are small in terms of their on-balance-sheet and off-balance-sheet activities and non-complex, taking into account their internal organisation and the nature, scope and complexity of their activities. For those institutions the application of the quantitative requirements regarding deferral and payout in instruments provided for in Directive 2013/36/EU would be overly burdensome in terms of costs and could lead to situations that would no longer be prudentially sound, e.g. institutions would introduce a fully fixed remuneration framework.

39. An exemption should also be introduced for staff receiving low levels of remuneration; this exemption would be independent from the first and so would not depend on the size or level of risk of the institution. In this regard, it might be considered that individual staff members,

where the amount of the variable remuneration is low compared with the fixed remuneration and in absolute terms, could be exempted from the application of deferral and payout in instruments.

40. Finally, Directive 2013/36/EU should allow the use of share-linked instruments by listed institutions.

41. To this end, the EBA sets out a draft legislative proposal in Annex I to this Opinion.

This Opinion will be published on the EBA's website.

Done at London, 21 December 2015

Andrea Enria

Chairperson

For the Board of Supervisors

Annex I

Drafting proposals

Current text of Directive 2013/36/EU	Amendments proposed by the EBA[5]
Amendment 1	
Recitals	
No text	**‘(1) Directive 2013/36/EU of the European Parliament and of the Council[6] requires competent authorities to ensure that institutions comply with a number of principles when establishing and applying their total remuneration policies. Institutions are required to comply with those 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.** **(2) Under the current national implementations of this legal framework, institutions of different sizes and complexity have been allowed to implement the remuneration principles to a differing extent. Institutions should in general be required to apply all the principles governing remuneration policies. However, implementing some of the principles for small and non-complex institutions can be particularly burdensome and it is therefore appropriate to provide for exemptions for those institutions from those principles, and for staff who do not receive large amounts of remuneration and can therefore be considered not to be incentivised to act against principles of sound and effective risk management. In order to ensure a level playing field, the EBA should specify in greater detail the types of institutions and staff to which the exemptions should apply.’**
Explanation	
Recitals should set out the general approach that all institutions should comply with the remuneration principles, while establishing the need for limited exemptions based on experience of the costs that are incurred by smaller institutions.	

[5] Bold in the body of the text indicates text that the EBA proposes inserting. Strikethrough indicates text that the EBA proposes deleting.

[6] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Amendment 2

Recital

No text	‘**(3) Directive 2013/36/EU requires that a substantial portion, and in any event at least 50%, of any variable remuneration consists of a balance of 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; and of Alternative Tier 1 or Tier 2 instruments which meet certain conditions. This principle limits the use of share-linked instruments to non-listed institutions and requires listed institutions to use shares. In order to comply, listed institutions need to either issue new shares or acquire shares. Issuing new shares requires shareholders’ approval, creates administrative costs and leads to dilution of voting rights. Acquiring shares reduces the own funds of the institution. Both options create a significant burden for institutions while equivalent benefits can be achieved with a reduced burden and without creating additional incentives for risk-taking for listed institutions by allowing the use of share-linked instruments that reflect the share price. This possibility should therefore be extended to listed institutions.**’

Explanation

The use of share-linked instruments should also be available to listed institutions due to the significant burden of having to issue new shares or acquire shares, without there being additional benefits in terms of the promotion of sound and effective risk management.

Amendment 3

Article 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:’	‘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:’

Explanation

References to applying the remuneration principles 'to the extent' that is appropriate to an institution's size and internal organisation and to its activities should be deleted in order to remove any doubt about the need for all institutions to comply with all of the remuneration principles, subject only to such exemptions as are set out in the Directive.

Amendment 4

Article 94

No text	'**3. By way of derogation from paragraph 1, the principles set out in points (l), (m) and the second subparagraph in point (o) of Article 94(1) shall not apply to either one or both of the following cases:** **(a) institutions which are small in terms of their total balance sheet, off-balance sheet business and non-complex taking into account their internal organisation and the nature, scope and complexity of their activities, and which are not subsidiaries of a significant institution;** **(b) staff who receive low levels of variable remuneration.** **[A mandate to specify the general criteria could be added]**

Explanation

A derogation should be established from the remuneration principles concerning deferral and payment in instruments. The derogation should be limited to institutions which are small based on the size of their balance sheet and their off-balance sheet activities, and non-complex taking into account their internal organisation and the nature, scope and complexity of their activities. In order to avoid arbitrage the derogation should not extend to small subsidiaries of a large institution. The derogation should also apply to staff who receive low levels of variable remuneration. Since the application of malus is not generally practical where there is no deferred pay, the derogations should be extended to part of the principle concerning the vesting of remuneration.

Amendment 5

Article 94(1)(l)

Variable elements of remuneration

'(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;'	'(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~~;"

Explanation

The use of share-linked instruments should also be available to listed institutions due to the significant burden of having to issue new shares or acquire shares, without there being additional benefits in terms of the promotion of sound and effective risk management.

Annex II

Report on Member States' implementation of the principle of proportionality in the area of the CRD IV remuneration provisions

Background

1. Article 92(2) of Directive 2013/36/EU (CRD IV) requires that competent authorities should ensure that institutions apply the remuneration provisions for categories of staff whose professional activities have a material impact on the institutions' risk profile (identified staff) in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities. Under the same conditions the principles for variable elements of remuneration contained in Article 94(1) of the CRD IV should be applied.

2. The principle of proportionality means that small and non-complex institutions can comply with the principles by implementing less complex, but still appropriate, remuneration policies, while large and complex institutions have to implement more sophisticated remuneration policies and risk measurement approaches. For some of the principles the CRD IV sets out explicit quantitative minimum requirements (e.g. 40% deferral of variable remuneration, a limitation of the variable remuneration to 100 or with shareholders' approval –200% of the fixed remuneration). Most Member States have implemented the remuneration principles in such a way that some of them can be waived when specific criteria are met. These are in particular the requirements to defer parts of the variable remuneration and to payout parts of the variable remuneration in instruments in line with the CEBS Guidelines on Remuneration Policies and Practices (CEBS Guidelines). A few Member States also allow waivers regarding the ratio between the variable and fixed components of remuneration.

3. Following the public consultation on the draft guidelines on sound remuneration policies, which started on 4 March 2015, the EBA has collected information on the detailed approaches taken by Member States and competent authorities on the application of the proportionality principle, including the application of waivers. To this end, on 26 March 2015 a questionnaire was sent to the national competent authorities (NCAs). The information was needed to establish the impact that the proposed guidelines on sound remuneration policies would have on the institutions in different Member States and to evaluate the need for further harmonisation. This input was also needed to provide information for the review of the remuneration provisions by the European Commission under Article 161(2) of the CRD IV and

as additional background information in the context of the finalisation of the above-mentioned guidelines and the drafting of the present report, included as Annex II to the EBA Opinion on establishing exemptions from the remuneration principles in Directive 2013/36/EU. All EU NCAs and Iceland have responded to the information request.

4. The EBA has also analysed the need to exempt the application of certain CRD IV remuneration provisions and the impact of a strict legal approach regarding the application of the principle of proportionality in the area of the CRD IV remuneration provisions in order to provide the European Commission with advice on the need for legislative amendments, taking into account, among other things, the information provided by competent authorities on the national implementation of the CRD IV remuneration provisions and responses to the public consultation. The EBA findings are presented in the abovementioned EBA opinion and in this report, included as Annex II thereto.

5. In addition, the appendix to the present report provides an overview of the implementation of national discretions in the area of remuneration, namely the discretions provided in Article 94(1)(g)(ii) of the CRD IV to implement a lower maximum ratio, to allow shareholders to approve a higher ratio between the variable and the fixed remuneration of up to 200% and to apply a discount rate for the calculation of the bonus cap with regard to a maximum of 25% of the variable remuneration awarded in long-term deferred instruments.

The use of proportionality in the area of remuneration in Member States of the Union

6. The majority of respondents apply the principle of proportionality to the CRD IV remuneration requirements. Twenty-one competent authorities[7] state that this includes the possibility of waiving a number of remuneration requirements, subject to certain criteria. Five competent authorities apply the proportionality principle but do not provide for waivers of any of the remuneration requirements[8] and three competent authorities state that they do not apply the proportionality principle to remuneration practices at all[9]. For a more detailed analysis, please refer to the tables contained in the report outlining the waivers applied by Member State.

7. Waivers are in particular applied to the requirements to defer variable remuneration and to pay it in instruments. A few Member States[10] also allow waivers with regard to the limitation of the ratio between the variable and the fixed component of remuneration. Most of the approaches taken deviate significantly from the guidelines on sound remuneration policies as

[7] AT, BE, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, NL, PL, PT, SE, SI and UK. It should be noted that PL was still in the process of implementing the CRD IV.

[8] BG, CY, EE, HU, RO.

[9] IS, MT, SK. It should be noted that the CRD IV has not yet been fully implemented in IS.

[10] FR and UK for small institutions; NL and LU for certain investment firms under strict conditions; in IE, in respect of investment firms, waivers are implicitly permitted as part of the proportionality principle.

consulted on by the EBA, but also from each other with regard to the criteria for the application of waivers.

Impact on firms

8. Most competent authorities commented on the cost of the implementation, uniformly assuming that the proposed EBA guidelines, if adopted as consulted on, would impose a significant cost burden on small and less complex institutions, while they felt that this would not be matched by a corresponding improvement in institutions' risk management practices.

9. Competent authorities were concerned in particular that the payout in instruments was not feasible for small firms that are not listed, that deferral of variable remuneration made little sense where the amount is small, that the removal of waivers from the guidelines would put small CRD IV firms at a competitive disadvantage relative to their non-CRD counterparts and that small firms might move away from variable remuneration packages, which would affect these firms' ability to absorb economic shocks by adjusting the variable component of their staffs' salaries. This was deemed to be inconsistent with the prudential CRD IV objectives. Competent authorities generally did not comment on the impact the proposed guidelines would have on large, complex firms, though one competent authority considered that the proposed guidelines risked incentivising larger firms to reduce the number of identified staff.

10. These views are strongly supported by many views expressed by respondents to the public consultation, who also state that the approach taken in the guidelines would lead to an increase in the number of staff that will be affected by the remuneration provisions in large institutions, as at the moment the application of the requirements is waived in many Member States also in the case of staff receiving only a limited amount of variable remuneration even if they work in large institutions.

11. When analysing the impact in more detail, one needs to consider that non-listed institutions can use share-linked or equity-linked instruments. Even so, the added value in terms of risk alignment compared with the deferral of cash is limited for small firms and low amounts of variable remuneration when compared with the costs for their creation, administration and valuation. One needs to consider that the percentage of identified staff in small institutions is higher than in large institutions and, therefore, that the administrative costs for such arrangements will be higher in relative terms. The identification criteria are set out in the regulatory technical standards (RTS) on identified staff, ensuring that all firms meet harmonised standards in their identification of staff.

Impact on competent authorities

12. Four competent authorities considered that the proposed guidelines would lead to increased pressure on supervisory resources, at least in the short to medium term, to ensure compliance within institutions. These competent authorities were concerned that this could result in diverting significant supervisory resource away from the management of other, more material, risks.

Summary of responses received

Scope of the application of the remuneration principle to subsidiaries

13. The CRD IV requires that the remuneration principles apply to all institutions on a standalone basis, but also on a sub-consolidated and consolidated basis, including their subsidiaries within the scope of prudential consolidation that are not themselves subject to the CRD IV. As the CRD IV sets out minimum requirements, it is possible for Member States to implement a broader scope of application.

14. In most Member States **the remuneration principles apply to subsidiaries within a group within the scope of either accounting or prudential consolidation**, whether or not these subsidiaries are themselves directly subject to the CRD IV. Of these, 14 apply the remuneration principles to all subsidiaries that are institutions, financial institutions or consolidated ancillary undertakings (prudential consolidation)[11] and 11 apply the remuneration principles to all subsidiaries, whether or not they are institutions or financial institutions (accounting consolidation)[12]. Five competent authorities stated that the requirements are not applied to all subsidiaries either based on proportionality considerations or as specific types of financial institutions, e.g. asset management companies, are excluded within the national law or as the competent authority only supervises credit institutions and not investment firms[13]. Specifically, the following subsidiaries are excluded from the scope of application: respondents from two Member States reported that all asset management firms and advisory (M&A) firms are exempt[14]; a few other responses stated that insurance firms or reinsurance undertakings or small retail firms are excluded.

15. Insurance and reinsurance undertakings do not fall within the scope of prudential application. Their exclusion is therefore in line with the CRD IV provisions. Asset management firms are financial institutions and fall within the scope of prudential consolidation. The CRD IV applies also to institutions that are mainly active in the retail area or provide services in the area of mergers or acquisitions and their subsidiaries that are financial institutions that provide similar services. The complete exclusion of institutions, certain business areas or subsidiaries that fall within the scope of prudential consolidation from the scope of application of remuneration provisions is not consistent with the CRD IV requirements.

Proportionality

[11] AT, BE, CY, DE, ES, HR, HU, IS, IT, LT, MT, RO, SE, SI.

[12] CZ, DK, EE, EL, FI, IE, LU, LV, NL, PL, PT.

[13] BG, FR, SK, UK; in DE the bonus cap currently does not apply to asset management firms that are subsidiaries of institutions; the relevant legal implementation is under review.

[14] BG, FR.

16. The majority of competent authorities stated that they apply the proportionality principle to remuneration requirements. Only three respondents[15] stated that they do not apply the proportionality principle to remuneration requirements.

17. Several competent authorities base their national proportionality provisions on the CEBS Guidelines. Six Member States have put in place for single provisions stricter remuneration measures for identified staff than those set out in the CRD IV or the CEBS Guidelines:

- CZ requires the deferral of 60% of the variable remuneration if it exceeds the fixed remuneration.
- DK requires the deferral of 60% of the variable remuneration if it exceeds DKK 750 000 (ca. EUR 100 000).
- DE and IT, where the amount is significant, require the deferral of 60% of the variable remuneration awarded to members of the senior management of 'significant' institutions.
- In addition IT requires a retention period of at least two years for the upfront part of the variable remuneration paid in financial instruments; a limitation of the total remuneration of the chairperson of the supervisory function of 100% of the fixed remuneration of the head of the management function (the threshold can be increased with shareholders' approval); and a maximum ratio of the variable to the fixed remuneration component of one third for identified staff within the internal control functions.
- NL applies stricter requirements in relation to deferral, and the ratio of variable to fixed remuneration in NL is in general limited to 20%.
- PL will clarify in legislation that the CRD IV thresholds are minimum requirements only and that institutions must apply stricter remuneration policies as risk requires. However, the draft national law to implement these CRD IV provisions has not yet been adopted.

Waivers

18. The majority of those Member States that apply the proportionality principle allow institutions and financial institutions to apply **waivers** to some or all of the remuneration requirements, either explicitly or implicitly[16]. Five apply the proportionality principle but **do not interpret this as allowing** institutions and financial institutions to apply **waivers[17]**. As set out above, another three have **not applied the proportionality principle at all** and hence no waivers are granted. However, here also the exclusion of subsidiaries that fall within the scope of prudential consolidation from the scope of application of remuneration provisions is not consistent with the CRD IV remuneration provisions.

19. Waivers are applied at different levels: some Member States apply waivers at an individual level, leading to the situation that some institutions that themselves meet the conditions, but which are part of a larger banking group, do not have to comply with some of the remuneration principles at the individual level, despite the fact that the group to which they

[15] IS, MT, SK.

[16] AT, BE, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, NL, PL, PT, SE, SI, UK (21).

[17] BG, CY, EE, HU, RO.

belong is required to do so and would have the means to do the administration on a consolidated level, for example to process the deferral arrangements and the pay-out in instruments. Such a practice also leads, without prejudice to differences in the national implementation of CRD IV provisions, to an inconsistent implementation of group-wide remuneration policies in those subsidiaries. Other Member States apply waivers at a group level to all institutions and their subsidiaries and apply the criteria to determine if waivers can be applied to the consolidated situation. In some Member States thresholds for both kinds of waivers exist in parallel. In some Member States explicit thresholds are provided; others apply case-by-case decisions or tolerate the disapplication of some requirements even if this is not explicitly allowed under the national implementation of the CRD IV. Where respondents allow the **application of waivers**:

- Eight apply waivers to all entities within a group if certain criteria are met by the EU parent or at consolidated level[18].
- Eleven apply waivers to individual institutions in a group irrespective of the provisions that apply to other parts of the group[19].
- Seven apply waivers to subsidiaries that are not themselves subject to the CRD IV[20].
- Four apply waivers to categories of identified staff or specific individual functions, i.e. based on their role and not on their remuneration, irrespective of whether the institution or group has to apply the remuneration provisions[21].
- Eighteen either apply waivers to identified staff, subject to identified staff benefiting from variable remuneration below certain thresholds, or waive the remuneration provisions where the salary stays below certain remuneration thresholds or on a case-by-case basis.[22] Two Member States[23] apply waivers in line with the CEBS guidelines, without providing further specifications.

20.There is **no consistent approach** across the EU regarding the application of waivers.

Figure 1: Existence of waivers; overview of responses received. Grey fields indicate waivers applied; white fields indicate no waivers; black fields mean that the response cannot be categorised as shown in the table[24].

	Waivers can be applied by all group entities subject to EU parent or	Waivers can be applied by institutions on a case-by-case basis	Waivers can be applied by individual subsidiaries that are outside the	Waivers can be applied to categories of identified staff	Waivers can be applied to individual identified staff below certain

[18] BE, CZ, FR, HR, IT, LU, LV, UK.

[19] AT, CZ, DE, EL, FR, LU, NL, PT, SE, SI, UK.

[20] AT, CZ, EL, FR, PT, SE, UK.

[21] AT, CZ, LU, SI.

[22] AT, BE, CZ, DE, DK, ES, FI, FR, HR, IT, LT, LU, LV, NL, PT, SE, SI, UK.

[23] IE, PL.

[24] IE, PL apply waivers in line with the CEBS Guidelines.

	group meeting criteria		scope of CRD IV		remuneration thresholds
AT					
BE					
BG					
CY					
CZ					
DE					
DK					
EE					
EL					
ES					
FI					
FR					
HR					
HU[25]					
IE					
IT					
LT					
LU					
LV					
MT					
NL[26]					
PL[27]					
PT					
RO					
SE					
SI					
SK[28]					
UK					
Total number of Member	**9**	**11**	**7**	**4**	**18**

[25] The law adopting the CRD IV provisions is not yet in force; at the moment waivers can be applied based on a decree.

[26] NL and LU apply neutralisations for certain investment firms and non-listed institutions on a case-by-case basis.

[27] PL has not yet enforced the provisions in national law.

[28] SK does not apply the remuneration provision to all subsidiaries that are not themselves subject to the CRD IV.

States					

21.The **criteria** that are defined to determine if some or all of the remuneration requirements can be waived include:

- The **size of the institution**, group or subsidiary is a criterion for the application of waivers in 12 Member States[29].
  - o Most of these Member States define size by reference to an entity's balance sheet (ranging from EUR 1 billion over a three-year period to GBP 15 billion per year and EUR 30 billion for the partial application of waivers); only six competent authorities apply a case-by-case assessment. Three Member States allow waivers in general for non-significant institutions, others apply a case-by-case assessment and one Member State allows waivers where the balance sheet total is below EUR 5 billion or where only 20% of the activities fall under the CRD IV or where the required own funds are below EUR 125 million.
  - o Four respondents state that meeting the size criteria alone will not be sufficient to permit the application of waivers[30], but that a risk assessment will be made.
- The **activities of the institution**, group or subsidiary are a criterion for the application of waivers in 11 Member States[31].
  - o In almost all these Member States the assessment of whether this criterion is fulfilled is made on a case-by-case basis.
  - o Two Member States allow the application of certain waivers to investment firms[32].
  - o Two Member States explicitly specify that they apply waivers only to the extent that the institution's or financial institution's activity does not pose a risk to the overall group[33].
- The **nature of the institution**, group or subsidiary is a criterion for the application of waivers in nine Member States[34].
  - o Almost all these Member States assess on a case-by-case basis whether this criterion is fulfilled.

[29] AT, BE, CZ, DE, EL, FR, HR, IT, LU, PT, SE, UK.
[30] AT, BE, DE, LU.
[31] AT, BE, CZ, DE, EL, FR, LU, NL, PT, SE, UK.
[32] LU, NL.
[33] FR, UK.
[34] AT, BE, CZ, DE, EL, FR, PT, SE, UK.

- One Member State applies this criterion only to asset management companies and insurance companies[35].
- One Member State applies it only to non-listed banks[36].

- **Categories of identified staff** are a criterion in three Member States[37].
  - Three competent authorities state that categories of staff benefiting from waivers must not have a material impact on their firm's risk profile.

- The **remuneration of identified staff** is a criterion for the application of waivers in 19 Member States[38]. This criterion is in some cases combined with a case-by-case assessment of the soundness of the remuneration policy and the nature, size and complexity of the institution.
  - Eight of these Member States set a monetary threshold for variable remuneration below which waivers can be applied. This ranges from ca EUR 8 000 to EUR 100 000[39] with a median of EUR 50 000.
  - Two Member States consider either a monetary threshold for variable remuneration or the amount of variable remuneration as a percentage of the individual staff member's fixed remuneration (less than 25% or less than EUR 30 000, and less than 30% or less than EUR 13 000)[40].
  - Three Member States consider a combination of monetary threshold and other criteria (less than 20% of fixed salary and less than EUR 8 000 variable, less than 33% of total remuneration and less than GBP 500 000 variable, and less than a month's salary and less than EUR 10 000 variable)[41].
  - One Member State sets a threshold of variable remuneration by percentage, stating that it should account for less than 70% of the individual staff member's fixed income[42].
  - Five do not specify criteria but take decisions on a case-by-case basis.[43]

22. The application of waivers differs significantly between Member States with regard to the criteria used and thresholds set. Consequently waivers affect different numbers of institutions and staff in different Member States and can have an impact on the conditions for competition between institutions. Some Member States recognise significantly more criteria than others, when considering whether institutions can waive remuneration requirements.

[35] FR.
[36] AT.
[37] AT, CZ, SI.
[38] AT, BE, CZ, DE, DK, ES, FI, FR, HR, IE, IT, LU, LT, LV, NL, PT, SE, SI, UK.
[39] BE, DE, DK, ES, FI, FR, LU, SE.
[40] AT, HR.
[41] LT, UK, NL.
[42] LV.
[43] CZ, IE, IT, PT, SI.

Figure 2: Criteria for the application of waivers; overview of responses received. Grey fields indicate that the respective criterion is applied; black fields mean that the response cannot be categorised as shown in the table[44] provided; white fields mean that the criteria is not applied.

	Size of the institution	Activities of the institution	Nature of the institution	Categories of identified staff	Remuneration of identified staff
AT					
BE					
BG					
CY					
CZ					
DE					
DK					
EE					
EL					
ES					
FI					
FR					
HR					
HU[45]					
IE					
IT					
LT					
LU					
LV					
NL					
PL[46]					
PT					
RO					
SE					
SI					
SK					
UK					
Total number of Member	12	10	8	3	18

[44] IE and PL apply waivers in line with the CEBS Guidelines.

[45] The law adopting the CRD IV provisions is not yet in force; at the moment waivers are based on a decree.

[46] The national law implementing the CRD IV is not yet adopted; the introduction of waivers is intended.

States					

23.**Types of waivers:** Member States allow the following remuneration requirements to be waived, subject to the institution meeting the qualifying criteria:

- the identification of staff (three Member States[47]);
- deferral of variable remuneration (18 Member States[48]);
- payout of variable remuneration in instruments (20 Member States[49]);
- while only 12 Member States stated that they allow for waivers of malus, in fact 18 Member States implicitly waive malus, as in the absence of the deferral of variable remuneration malus cannot be applied. Where deferral is applied, the application of malus is not waived by any Member State;
- clawback (nine Member States[50]); and
- the limitation of the ratio between variable and fixed remuneration for institutions below a certain size criterion (two Member States[51]) and for small investment firms (three Member States[52]).

24.The scope of waivers with regard to the affected remuneration provisions differs significantly across Member States. Though the majority of respondents allow exemptions from payment in instruments and deferral, these are also the two types of waivers most respondents highlighted as being of significant importance to smaller and less complex firms.

Figure 3: Types of waivers; overview of responses received. Grey fields indicate types of waivers permitted; white fields indicate that waivers are not granted; black fields mean that the response cannot be categorised as shown in the table.

	Identification of staff	**Deferral**	**Instruments**	**Malus**	**Clawback**	**Ratio (bonus cap)**
AT						
BE						
BG						
CY						
CZ						
DE					not applied	
DK						

[47] DE, FR, SI.

[48] AT, BE, CZ, DE, DK, EL, ES, FI, FR, HR, IE, LU, LV, NL, PT, SE, SI, UK.

[49] AT, BE, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, NL, PT, SE, SI, UK.

[50] CZ, EL, ES, FR, HR, IE, PT, SE; DE does not require the application of clawback under its national law.

[51] FR and UK.

[52] FR institutions below EUR 10 billion balance sheet total, UK institutions in proportionality tier 3, in particular institutions with less than GBP 15 billion balance sheet total, NL and LU limited to small investment firms and based on an additional case-by-case risk assessment; in IE, in respect of investment firms, waivers are implicitly permitted as part of the proportionality principle.

EE						
EL						
ES						
FI						
FR						
HR						
HU[53]						
IE						
IT						
LT						
LU						
LV						
NL						
PL[54]						
PT						
RO						
SE						
SI						
SK						
UK						
Total number of Member States	**3**	**18**	**20**	**12**	**8**	**5**

Supervision of institutions' compliance with the remuneration principles

25.The majority of competent authorities review the adequacy of institutions' remuneration policies in the context of their ongoing supervision. This includes both off-site and on-site assessments, though the extent to which competent authorities carry out on-site assessments varies and ranges from trigger events (e.g. indications that the institution may not comply with remuneration rules) to routine on-site inspections, which are often carried out on a risk-based approach as part of the supervisory review process.

26.Some competent authorities have put in place additional measures and controls, including:

[53] The law adopting the CRD IV provisions is not yet in force; at the moment waivers are based on a decree.

[54] The national law implementing the CRD IV is not yet adopted; the introduction of waivers is intended.

- providing detailed guidance to firms on the steps they should take, or the criteria they should apply, when considering whether to waive certain remuneration rules;
- specific internal control requirements, for example in relation to the drafting and sign-off of remuneration policies;
- specific remuneration questionnaires and data collection exercises; and
- performing dedicated thematic reviews of firms' remuneration practices.

27. Most respondents indicated that they had not identified any deficiencies in the way institutions have applied waivers. Of the four respondents who did identify deficiencies[55]:

- two found that some institutions were unable to demonstrate that their approach to remuneration was appropriate and commensurate with the risk to which they were exposed[56]; and
- one found that a few institutions did not fully comply with specific remuneration requirements and asked for remedial actions.[57]

Conclusions

28. In many Member States, according to the national implementations of the CRD IV and in line with the CEBS Guidelines, the national regulatory requirements set out so-called 'neutralisations' or explicit waivers for small and less complex institutions or where identified staff receive no more than a defined amount or ratio of variable remuneration.

29. In particular the requirements to defer parts of the variable remuneration and to payout parts of the variable remuneration in instruments are waived by many Member States. A few Member States also allow the limitation of the ratio of the variable to the fixed remuneration to be waived.

30. The criteria and thresholds used to determine the possibility of applying waivers and the scope of waivers granted differ significantly between Member States.

31. This report is included as Annex II to the EBA Opinion on establishing exemptions from the remuneration principles in Directive 2013/36/EU.

[55] AT, BG, CZ, IT.

[56] AT, CZ.

[57] IT.

Appendix - Implementation of national discretions

Member	Maximum ratio, amount	Shareholders can increase ratio, max. ratio	Application of discount rate, percentage
AT	100%	Yes, 200%	No
BE	(i) 50% or (ii) 100% but with a maximum of EUR 50 000, whatever is the most beneficial for the staff member	No	No
BG	100%	Yes, 200%	Yes, 25%
CY	50% for all staff	Yes, 100%	Yes, 25%
CZ	100%	Yes, 200%	Yes, 25%
DE	100%, all staff	Yes, 200%, can be applied to all staff	Yes, 25%
DK	50% for management body and senior management, 100% for other identified staff	Yes, 200% for other identified staff	No
EE	100%	200%	No
ES	100%	Yes, 200%	Yes, 25%, if approved by BdE
EL	100%	Yes, 200%	No
FI	100% for all staff	Yes, 200%, can be applied to all staff	No
FR	100%	Yes, 200%	Yes, 25%
HR	100%	Yes, 200%	No

HU[58]	100%	Yes, 200%	Yes, 25%
IE	100%	Yes, 200%	Yes, 25%
IT	100%, one third for identified staff in internal control functions	Yes, 200%	No
LU	100%	Yes, 200%	Yes, 25%
LT	100%	Yes, 200%	Yes, 25%
LV	100%	Yes, 200%	No
MT	100%	Yes, 200%	Yes, 25%
NL[59]	20% for staff in NL	Increase to 200% possible only outside the EU subject to criteria in Art 94(1)(g)(ii) of the CRD IV being met	No
PL[60]	100%	Yes, 200%	Yes, 25%
PT	100%	Yes, 200%	Yes
RO	100%	No	No
SE	100%	No	No
SI	100%	No	No
SK	100%	No	No

[58] The law adopting the CRD IV provisions is not yet in force.

[59] In 2014 it was allowed to use higher ratios of up to 200% with shareholders' approval. In February 2015 a new law came into force which (after a transitional period) allows a ratio higher than 100% only for staff located in countries that are not Member States. The maximum ratio between variable and fixed remuneration is limited to 100% in the EU and to 20% in the Netherlands (with some exceptions).

[60] The national law implementing the CRD IV is not yet adopted.

UK	100%	Yes, 200%	Yes, 25%
Iceland (EEA)	25% for all staff	No	No