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DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Acting Director General

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Mr Andrea Enria
Chairperson
European Banking Authority
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London E14 5AA
United Kingdom

**Subject: Interpretation of Article 92(2) of the Capital Requirements Directive
- remuneration policies**

Dear Mr Enria,

Thank you for your letter of 8 January 2015, whereby you ask for our opinion about the application of Article 94(1) of the Capital Requirements Directive (CRD IV), in light of Article 92(2) of the Directive, to which it refers back.

The issue you raise in your letter is very important because it is essential that CRD IV is fully and correctly implemented across the EU in a way, which ensures financial stability within the EU and improves the functioning of the Single Market for financial institutions. It was thus essential for us to dedicate careful consideration to the issues raised in your letter.

The remuneration provisions in CRD IV contribute to its overall aim by ensuring that institutions have in place total remuneration policies, which are consistent with and promote sound and effective risk management, and which are suitable and appropriate in relation to the risk profile of the institution concerned. To this end, CRD IV lists several principles, which the total remuneration policies of the institutions covered by CRD IV need to comply with.

Articles 92 and 94 apply to all institutions, without any distinction. Article 92(2) clarifies in this context that *competent authorities shall ensure that institutions comply with these 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.*

This means that each of the relevant provisions has to be applied to each institution, while any discretion those provisions may leave to Member States and competent authorities has to be exercised notably in compliance with the principle of proportionality. This is what Article 92(2) means when it stipulates that the "principles"

referred to must be applied "in a manner *and to the extent* that is appropriate ...", as accurately highlighted in your letter.

By contrast, general principles as implicitly referred to in the introductory part of Article 92(2) can in no way justify the non-application of one or the other rule contained in that provision, or indeed in Article 94(1).

The above applies in particular to the provisions identified in your letter, namely points (l), (m) and (n) of Article 94 (1), which regulate deferral of variable remuneration, pay-out in instruments and the application of *malus*. Such provisions lay down clear rules and leave no room for exceptions or exemptions.

You highlight in your letter the significant implementation costs that accompany the requirements on deferral and payment in instruments, and you refer to the fact that in some small and non-complex institutions, where only low amounts of variable remuneration are paid, incentives to take excessive risks are practically non-existent.

However, it is neither for national competent authorities, nor indeed for EBA, acting in the context of Article 16 of Regulation No 1093/2010, to decide that certain rules adopted by the co-legislators shall not apply. It is exclusively for the co-legislators to amend the existing rules, notably with a view to make further distinctions. As you highlight in your letter, not applying certain provisions would be a decision taken "from a policy perspective", as opposed to the "legal view" that ought to govern EBA's action in this matter.

The EBA guidelines are a very important tool in assisting the Member States and the institutions when implementing CRD IV, and therefore contribute to the consistent application of CRD IV across the EU. This purpose can only be fulfilled if they comply with the very terms of CRD IV, but not if they lead national authorities to the adoption of policies incompatible with those terms.

Naturally, guidelines should contribute to the consistent use of the margin of discretion co-legislators have left to national authorities, within the various individual rules. In this area, guidelines can provide a very valuable contribution, notably in light of the high degree of supervisory expertise available within the ESAs.

Yours sincerely,

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