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Final report on

Guidelines on sound remuneration policies under Directive 2013/36/EU

Final report on EBA guidelines on sound remuneration policies

Executive summary

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). Articles 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. Remuneration policies must be gender neutral and respect the principle of equal pay for male and female workers for equal work or work of equal value.

The EBA published guidelines on remuneration policies in 2015, which have now been updated to accommodate the changes to CRD that have been introduced by Directive 2019/878/EU.

In line with Article 92(2) CRD, the specific requirements for the variable remuneration of identified staff should be applied in a manner that is appropriate to the institutions' size, internal organisation and the nature, scope and complexity of their activities. As recommended by the EBA, the co-legislators have introduced the possibility to waive some of the requirements for institutions that are not large institutions and that have total assets below a threshold set by the Member State in national law of up to EUR 15 billion and for staff that receive a low level of variable remuneration of up to EUR 50 000, namely the requirement to pay out a part of variable remuneration deferred and in instruments. In accordance with Article 94(7) CRD, the guidelines provide further details on this particular aspect.

The guidelines are addressed to institutions and competent authorities. For institutions, the guidelines apply on an individual, consolidated or sub-consolidated basis, with some exceptions for financial institutions that are subject to a specific remuneration regime, e.g. investment firms. Most investment firms are no longer subject to the respective provisions under Directive 2013/36/EU, neither on an individual basis nor to the consolidated application of the requirements under Articles 92, 94 and 95 of Directive 2013/36/EU, including the limitation of the ratio between variable and fixed remuneration (bonus cap) to 100% (200% with shareholder's approval). The guidelines also provide details on the application of the requirements in a group context and in particular regarding the application in subsidiaries that are not subject to the CRD themselves.

Parts of the guidelines concern sound and gender-neutral remuneration policies for all staff; other parts of the guidelines focus on the specific provisions that apply to institutions' remuneration policies for identified staff. In particular for identified staff, the alignment of remuneration incentives with the institutions' risk profile is crucial.

The guidelines specify in detail the requirements within Directive 2013/36/EU on remuneration policies, the respective governance arrangements and processes that should be applied when remuneration policies are implemented. The guidelines on severance pay, retention bonuses and discretionary pension benefits have been clarified to avoid such payments being used to circumvent remuneration requirements.

Background and rationale

1. Inappropriate remuneration structures have been a contributing factor to excessive and imprudent risk taking. Poorly designed remuneration policies have potentially detrimental effects on the sound management of risks, control of risk and the risk taking behaviour of individuals. The current remuneration requirements are set by Directive 2013/36/EU (CRD), which came into effect on 1 January 2014. The CRD has been amended by Directive (EU) 2019/878[1]; the amendments are to be implemented by Member States by 28 December 2020.

2. The remuneration requirements aim to ensure that remuneration policies are consistent with and promote sound and effective risk management, do not provide incentives for excessive risk taking, and are aligned with the long-term interests of the institutions across the EU.

3. To ensure a more proportionate approach, the co-legislator introduced in Article 94(3) the possibility to waive the pay out in instruments and the deferral of variable remuneration. When applied to smaller institutions, those requirements are too burdensome and the cost is not commensurate with the prudential benefits. Similarly, this is the case for staff with low levels of variable remuneration. While those waivers are based on thresholds provided within the amended CRD, Member States have some flexibility in their implementation and the EBA has the power to issue guidelines under Article 94(7) of the CRD to facilitate them in this regard.

4. To reduce the costs for the application of the requirement for listed institutions to pay out remuneration in shares, the co-legislators also introduced for those listed institutions the possibility of using share-linked instruments.

5. The new provisions introduced by Directive 2019/878/EU reinforce the principle of equal pay for male and female workers for equal work or work of equal value which is laid down in Article 157 of the Treaty on the Functioning of the European Union (TFEU). Institutions should operate a gender-neutral remuneration policy. In accordance with Article 74(3) of the CRD, the EBA shall issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on gender-neutral remuneration policies for institutions.

6. The framework for applying remuneration provisions in a group context has also been amended. Subsidiaries that are not institutions, and therefore not subject to the CRD on an individual basis, might be subject to other specific remuneration requirements pursuant to the relevant sector-specific legal acts and if this is the case, such specific requirements should prevail. In principle, remuneration requirements set out in this Directive should therefore not apply on a consolidated basis to such subsidiaries, including financial institutions that are subject to the MiFID, IFD, AIFMD or UCITS Directive, unless Member States make use of their discretion to

[1] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures.

implement a different approach under Article 109(6) of the CRD. However, some of their staff might have an impact on the risk profile at the level of the banking group, and in such cases the requirements should apply when they are mandated to perform work for the credit institution.

Legal basis

7. The guidelines are based on Article 16 of EBA founding Regulation 1093/2010, Articles 74 and 75 of the CRD. The guidelines apply on an individual, sub-consolidated and consolidated basis. However, most investment firms will in June 2021, following the implementation into national law of Directive 2019/34/EU (IFD), be subject to a specific remuneration framework for investment firms and the already applicable remuneration framework under MiFID and are therefore no longer subject to the application of Directive 2013/36/EU on an individual basis, nor to the consolidated application of the requirements under Articles 92, 94 and 95 of Directive 2013/36/EU, including the limitation of the ratio between variable and fixed remuneration to 100% (200% with shareholder's approval), unless Member States make use of the national discretion within Article 109(6) of Directive 2013/36/EU.

8. Article 74 of the CRD requires that institutions have robust governance arrangements and remuneration policies and practices that are gender neutral and that are consistent with and promote sound and effective risk management. The EBA has been mandated to issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on those arrangements, processes and mechanisms and to issue guidelines on gender-neutral remuneration policies.

9. Furthermore, the EBA has been mandated within two years of the date of publication of the guidelines on gender-neutral remuneration policies to issue a report on the application of gender-neutral remuneration policies by institutions.

10. 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 developed draft implementing technical standards (ITS) on institutions' public disclosures of the information referred to in Titles II and III of Part Eight of Regulation (EU) No 575/2013. Therefore, the section on disclosures has been removed from the Guidelines.

11. These guidelines should be read in conjunction with other relevant EBA guidelines, in particular guidelines concerning internal governance, remuneration policies for sales staff, reporting requirements and the supervisory review and evaluation process and delegated regulations relevant for this area, including on the identification of staff, other instruments for the pay out of variable remuneration and disclosure requirements.

Rationale, objective and structure of the guidelines

12. In line with Article 16 of the EBA founding regulation 1093/2010, as amended, 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 that are based on sound governance processes, taking into account the institutions' risk strategy and profile, and align the incentives of staff with the interest of owners and other stakeholders. The review of the guidelines ensures that revisions made within the CRD are reflected in the Guidelines.

13.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. In line with the above-mentioned objectives, the guidelines contain requirements as specified in Directive 2013/36/EU on remuneration policies for all staff and specific provisions on remuneration for staff whose professional activities have a material impact on the institutions' risk profile (identified staff) and their implementation.

Remuneration policies and group context

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

15.The gender-neutral 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 the CRD, the requirements on governance in Articles 88 to 91 of the CRD, the EBA guidelines on internal governance, the requirements on the internal capital adequacy assessment process and the requirements of CRR for specific risk categories, including the respective risk measurement approaches.

16.To set the appropriate incentives for long-term oriented and prudent risk taking, the remuneration policy and practices need to be transparent for staff regarding the fixed remuneration, the variable remuneration and the award criteria used. Fixed remuneration should be permanent, predetermined, non-discretionary and non-revocable. Variable remuneration should be based on performance and 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 staff's behaviour in terms of risk-related decisions and are therefore not consistent with the above principles.

17.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 to 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.

18.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 body may differ from the one that approves the remuneration policy for identified staff in business areas and identified staff in control functions. For these reasons, these guidelines should be read together with the relevant national legal provisions.

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

20.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, unless they are themselves subject to specific remuneration requirements on an individual basis under other Union acts or would be subject to such requirements if they were established in the Union. However, under Article 109(5) of the CRD, the remuneration provisions may still apply to individual staff members of certain subsidiaries. As a general principle and taking into account applicable specific remuneration requirements, remuneration policies of different group entities within the scope of prudential consolidation should be consistent with the group's remuneration policy set by the consolidating institution. The remuneration policy needs to comply with the CRD provisions, these guidelines and additional requirements set within national company, labour and other relevant laws.

21.The scope of consolidation includes all institutions, financial institutions, and can include ancillary undertakings that are subsidiaries of the institution that 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, EU parent mixed financial holding company, parent institution in a Member State, parent financial holding company in a Member State or parent mixed financial holding company in a Member State is responsible for compliance with the relevant CRD provisions and guidelines. Subject to national discretion, subsidiaries for which other specific sectoral directives (e.g. MiFID, IFD, AIFMD and UCITS Directive) include a specific remuneration framework do not have to be included in the scope of application of the CRD requirements foreseen under Articles 92, 94 and 95 of the CRD on a 'consolidated basis' in accordance with Article 109 of the CRD. Staff members of subsidiaries that meet the conditions under Article 109(5)(a) of the CRD are subject to those requirements on an individual basis where the staff have been mandated to perform professional activities that have a direct material impact on the risk profile or the business of the institutions within the group.

Gender-neutral remuneration policies

22. The principle of equal pay for male and female workers for equal work or work of equal value is laid down in Article 157 of the Treaty on the Functioning of the European Union (TFEU). The CRD requires institutions to ensure that they apply a gender-neutral remuneration policy for all staff, including their risk takers, i.e. a remuneration policy based on equal pay for male and female workers for equal work or work of equal value. The same principle applies to workers of all diverse genders when implemented into national law.

23. According to Article 157 of the TFEU, equal pay for equal work or work of equal value includes the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of their employment, from their employer. The TFEU calls for further measures to ensure equal opportunities and equal treatment of men and women in matters of employment and occupation. However, the principle of equal treatment shall not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex [2] to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

24. Where the remuneration of most of the staff is subject to collective bargaining, where such contracts are applicable independent of the gender of staff, it is easier to monitor that remuneration policies are applied in a gender-neutral way. Ensuring gender neutrality with regard to individually agreed contracts is more complex and requires a more sophisticated approach.

25. Member States and employers, in line with the Charter of Fundamental Rights of the European Union, European Convention for the Protection of Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights, should strive to avoid any discrimination within the conditions of employment, including discrimination based on gender.

26. Consequently, in addition to ensuring equal pay for the same position or positions of equal value, it is also necessary to ensure equal opportunities for all genders. Equal career prospects help to improve the representation of the underrepresented gender in the management body of institutions in the longer run, by facilitating the existence of a diverse pool of candidates for such positions, e.g. within institutions' senior management.

[2] While Article 157 of the TFEU uses the term 'underrepresented sex' the CRD uses the term 'underrepresented gender'; both terms should have the same meaning for the purpose of these guidelines.

Remuneration committee

27.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 at the group level, all individual institutions that are themselves significant on a standalone basis need to establish their own remuneration committee in line with Article 95 of the CRD.

Proportionality

28.When complying with the CRD and CRR remuneration provisions, institutions should apply them in a manner that is appropriate to the institutions' size, internal organisation and the nature, scope and complexity of their activities. This proportionality principle 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.

29.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. As stated in recital 65 of the CRD, the limitation of the variable remuneration to 100% of the fixed remuneration (200% with shareholders' approval) should be applied in any case.

30.With regard to the requirement under Article 94 of the CRD that institutions pay out at least 50% of the variable remuneration of identified staff in instruments and that they defer the pay out for a part of the variable remuneration, the co-legislator has introduced the possibility that Member States waive the application of those provisions for institutions that are not large and have total assets under a certain threshold set within national law and for staff with a variable remuneration of EUR 50 000 or below, when it does not represent more than one third of the staff member's total annual remuneration. For this purpose, the amounts of variable and fixed remuneration have to be calculated in each financial year, using the amounts paid for the previous financial year. E.g. to determine if the waiver can be applied to the variable remuneration of the financial year ending 31.12.2020, the institutions should calculate the fixed remuneration awarded for 2020 and the variable remuneration awarded in 2021 for 2020, including all amounts for performance periods that have ended in 2020, which may include performance periods that are longer than one year. When implementing the quantitative thresholds, Member States have some flexibility regarding the amounts, as further specified in the CRD. While the implementation of waivers and thresholds is at the discretion of Member States, the guidelines contain some procedural requirements on their application.

Identification of staff

31.The guidelines aim 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. This also holds true if identified staff benefit from the application of waivers under Article 94(3) of the CRD.

32. 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 and 109(2) of the CRD, the identification also has to be performed at a consolidated and sub-consolidated level, including certain subsidiaries which are not themselves subject to the CRD, while other subsidiaries are excluded from the scope of consolidated application of the specific remuneration provisions. The primary responsibility for the identification process for the consolidated and sub-consolidated level 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 the complete and harmonised identification of staff, the guidelines set out how institutions should apply the identification criteria set within Article 92(3) of the CRD and the Commission Delegated Regulation mandated under Article 94(2) of the CRD.

33. Notwithstanding the definition of criteria within the CRD and Commissions Delegated Regulation, institutions are obliged under the CRD to identify all staff whose professional activities have a material impact on the institutions' risk profile and therefore institutions should consider the need to apply additional internal criteria which ensure that the specific risk profile and internal organisation of the institution is taken into account.

Capital base

34. Institutions must have a sound capital basis. Remuneration represents an important cost factor for institutions and remuneration payments directly influence 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(1)(g) of the CRD empowers competent authorities 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 and Articles 141 and 141b of the CRD and Article 16 a of Directive 2014/59/EU limits distributions, including the variable remuneration, where the combined capital buffer or the leverage ratio or the combined buffer when considered in addition to the requirements referred to in Article 45c and 45d of Directive 2014/59/EU (minimum requirements for own funds and eligible liabilities) are not met.

Categories of remuneration

35. According to Article 94 of the CRD, it must be ensured that the fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion to allow a fully flexible policy on variable remuneration. Remuneration is either fixed or variable; there is no third category of remuneration. 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.

36. 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.

37. 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 in which remuneration is paid should be taken into account. It should be noted that the pay out of remuneration which would per se meet the requirements for fixed remuneration but is made in instruments rather than cash may be understood as performance-related depending on the features of the instrument awarded. Where remuneration is subject to additional contractual conditions (e.g. malus and clawback), these conditions would contradict the criterion that fixed remuneration should be predetermined.

Requirements for variable remuneration

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

39. 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

40. 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 should also not be able to transfer the downside risks to another party, e.g. through hedging or insurance.

41. 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 bonuses or guaranteed variable remuneration. Therefore, institutions need to be able to justify the use of any variable remuneration element, including allowances, retention bonuses, guaranteed variable remuneration and severance payments.

42. 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 staff's 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 (e.g. malus or clawback), or are based on a formula that links variable remuneration to current year revenues rather than risk-adjusted profit, there are strong incentives for staff to shy away from conservative valuation policies, to ignore concentration risks, to rig the internal transfer pricing system in their favour and 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 provisions to the remuneration policy, the aforementioned risks can be counterbalanced.

43. The guidelines on risk alignment contain the general provisions 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 and their specification within these GLs to additional categories of staff.

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

45. So-called 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 staff's risk-taking behaviour.

46. Ex post risk adjustment should ensure that staff are rewarded in line with the sustainability of the performance in the long term, which is the result of decisions taken in the past. A framework for ex post risk adjustment is always necessary, including 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, in particular the application of deferral, malus and clawback and the pay out in suitable instruments.

47. 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.

48. 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.

49. 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.

50. 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.

51. Every criterion used has its risks, limitations and advantages. Institutions need to take these into account and weight them carefully when determining the performance and risk criteria at every level (i.e. the institution, the business area and the individual) and use an appropriate mix to minimise the risks and assess the performance as objectively as possible.

Pay-out process

52. The CRD requires that at least 50% of variable remuneration comprises a balance of shares, equivalent ownership rights, share-linked or equivalent non-cash instruments 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. For institutions that are not large institutions and meet the other

conditions of Article 94(3) of the CRD and for staff with a low amount of variable remuneration, waivers from those requirements have been introduced within the CRD.

53.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.

54.A deferral schedule is key to ensuring risk alignment effects in a remuneration package, since it allows for parts of the remuneration to be adjusted for risk outcomes over time through ex post risk adjustments. The ratio of deferred remuneration to variable 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 institution's business model.

55.Although variable remuneration should already be aligned to risk through ex ante risk adjustments, due to the 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 is 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, the deferral and the retention scheme in order to ensure that needed ex post risk adjustments are reflected, e.g. in price changes of the instruments.

56.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.

57.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 implies 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.

58.Unlike 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 vest and be paid out.

59.Ex post risk adjustments should not lead to an increase in the variable remuneration as they would expose the staff member to both the positive and the negative parts 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.

60.When the variable remuneration takes the form of instruments, the final monetary value received by staff depends also on the market prices or the fair value of these instruments. This implicit adjustment of remuneration due to changes in 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

61.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.

Supervisory review by competent authorities

62.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.

63.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 and evaluation process.[3]

64.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.

[3] https://www.eba.europa.eu/regulation-and-policy/supervisory-review-and-evaluation-process-srep-and-pillar-2.

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Guidelines on sound remuneration policies under Directive 2013/36/EU

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010[4]. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.

2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by ([dd.mm.yyyy]). In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website with the reference 'EBA/GL/2021/04'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to the EBA.

4. Notifications will be published on the EBA website, in line with Article 16(3).

[4] 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. 12).

2. Subject matter, scope and definitions

Subject matter

5. These guidelines specify further, on the basis of Articles 74(3) and 75(2) of Directive 2013/36/EU[5], the sound and gender-neutral remuneration policies that institutions and investment firms that are subject to Title VII of Directive 2013/36/EU in application of Article 1(2) and (5) of Regulation 2019/2033/EU should have in place for all their staff and for staff whose professional activities have a material impact on the institutions' risk profile in accordance with Articles 92 to 95 of that Directive (identified staff), including for staff and identified staff on an individual and consolidated or sub-consolidated basis as set out in paragraph 9.

6. Institutions may apply on their own initiative the provisions of these guidelines concerning identified staff to all their staff on an individual and consolidated or sub-consolidated basis.

Addressees

7. These guidelines are addressed to competent authorities as defined in point (i) of paragraph 2 of Article 4 of Regulation (EU) No 1093/2010, and to financial institutions as set out in Article 4(1) of Regulation (EU) No 1093/2010 that are either institutions, as defined in point 3 of Article 3(1) of Directive 2013/36/EU, or investment firms that are subject to Title VII of Directive 2013/36/EU in application of Article 1(2) and (5) of Regulation 2019/2033/EU. Each reference to institutions should be understood as including such investment firms.

Scope of application

8. These guidelines apply to institutions on an individual and consolidated or sub-consolidated basis, in accordance with the level of application set out in Articles 2 and 109 of Directive 2013/36/EU.

9. When meeting the requirements under Title VII, Chapter 2, Section II of Directive 2013/36/EU in line with Article 109 of this Directive at the consolidated or sub-consolidated level, parent undertakings and subsidiaries subject to Directive 2013/36/EU should ensure that the arrangements, processes and mechanisms set out in the Directive and these guidelines are implemented in and complied with on a consolidated basis by their subsidiaries not subject to this Directive that are within the scope of prudential consolidation, including:

[5] 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).

(a) any subsidiary undertaking and its staff (including identified staff), where this undertaking is established in the Union and is not subject to specific remuneration requirements in accordance with other instruments of Union legal acts;

(b) any subsidiary undertaking and its staff (including identified staff), where this undertaking is established in a third country and it would not be subject to specific remuneration requirements in accordance with other Union legal acts, were it established in the Union, unless the application of the requirements is unlawful under the laws of the third country where the subsidiary is established;

(c) any subsidiary and its staff (including identified staff), where this undertaking is subject to specific remuneration requirements in accordance with other instruments of Union legal acts or would be subject to such requirements if it were established in the Union with regard to gender-neutral remuneration policies under Article 74 of Directive 2013/36/EU, but excluding the remuneration requirements under Articles 92, 94 and 95 of Directive 2013/36/EU and the related guidelines;

(d) where the discretion set out in Article 109(6) of the CRD has been invoked by the Member State of the consolidating undertaking, to any subsidiary undertaking and its staff (including identified staff) with the broader scope of application set out by that Member State; and

(e) to the branches and their members of staff (including identified staff) of the consolidating undertaking or of any undertaking set out in points (a) to (e), where this branch is established in a third country.

10. The exception regarding the non-application of the requirements under Articles 92, 94 and 95 as further specified in paragraph 9(c) does not apply with regard to individual members of staff in the case of a subsidiary that is an asset management company, or an undertaking that provides the investment services and activities listed in points (2), (3), (4), (6) and (7) of Section A of Annex 1 to Directive 2014/65/EU, where those members of staff have been mandated to perform professional activities that have a direct material impact on the risk profile or the business of the institutions within the group.

Definitions

11. Terms used and defined in Directive 2013/36/EU and Regulation (EU) 575/2013 have the same meaning in the present guidelines. In addition, for the purposes of these guidelines, the following definitions apply:

Remuneration	means all forms of fixed and variable remuneration and includes payments and benefits, monetary or non-monetary, awarded directly to staff 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 Directive 2011/61/EU[6], and other payments made via methods and vehicles which, if they were not considered as remuneration, would lead to a circumvention [7] of the remuneration requirements of Directive 2013/36/EU.
Fixed remuneration	means payments or benefits for staff which comply with the conditions for its award set out in section 7.
Variable remuneration	means all remuneration which is not fixed.
Routine employment packages	means ancillary components of remuneration that are obtainable for a wide population of staff or staff in specified functions based on predetermined selection criteria, including, for example, healthcare, child care facilities or proportionate regular pension contributions on top of the mandatory regime and travel allowance.
Retention bonus	means variable remuneration awarded on the condition that staff stay in the institution for a predefined period of time.
Staff	means all employees of an institution and its subsidiaries, including of undertakings referred to in paragraph 9 and all members of the respective management bodies in its management function and in its supervisory function.
Identified staff	means staff whose professional activities have a material impact on the institution's individual or the group's risk profile in accordance with the criteria set out in Article 92(3) of Directive 2013/36/EU, the Commission Delegated Regulation adopted under the empowerment within the last subparagraph of Article 94(2) of this Directive (RTS on identified staff) and, where appropriate to ensure the complete identification of staff whose professional activities have a material impact on the risk profile, additional criteria defined by the institution.
Prudential consolidation	means the application of the prudential rules set out in Directive 2013/36/EU and Regulation (EU) No 575/2013 on a consolidated or sub-consolidated basis, in accordance with Part 1, Title 2, Chapter 2 of Regulation (EU) No 575/2013.[8]
Underrepresented gender	means the less represented male or female gender.
Gender pay gap	means the difference between the average gross hourly earnings of men and women expressed as a percentage of the average gross hourly earnings of men.
Consolidating institution	means the institution which is required to abide by the prudential requirements on the basis of the consolidated or a sub-consolidated situation in accordance with Part One, Title II,

[6] 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 (AIFMD).

[7] Regarding circumvention please refer to section 10.2 of these guidelines.

[8] See also RTS on prudential consolidation at: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/973355/Final%20Report%20Draft%20RTS%20methods%20of%20consolidation.pdf.

	Chapter 2 of Regulation (EU) No 575/2013 and Article 109 of Directive 2013/36/EU.
Bonus pool	means the maximum amount of variable remuneration which can be awarded in the award process set at the level of the institution or an institution's business unit.
Accrual period	means the period of time for which the performance is assessed and measured for the purposes of determining an award of variable remuneration.
Non-revolving multi-year accrual period	means a multi-year accrual period that does not overlap with other multi-year accrual periods.
Award	means the granting of variable remuneration for a specific accrual period, independently of the actual point in time where the awarded amount is paid.
Vesting	means the effect by which the staff member becomes the legal owner of the variable 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.
Upfront payments	means payments which are made immediately after the accrual period and which are not deferred.
Deferral period	means the period of time between the award and the vesting of the variable remuneration during which the staff member is not the legal owner of the remuneration awarded.
Instruments	means those financial instruments or other contracts that fall within one of the two categories referred to in Article 94(1)(l) of Directive 2013/36/EU.
Retention period	means a period of time after the vesting of instruments that have been awarded as variable remuneration during which they cannot be sold or accessed.
Malus	means an arrangement that permits the institution to reduce the value of all or part of deferred variable remuneration based on ex post risk adjustments before it has vested.
Clawback	means 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.
Significant institutions	means institutions referred to in Article 131 of Directive 2013/36/EU (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 or national law, based on an assessment of the institutions' size, internal organisation and the nature, the scope and the complexity of their activities.
Share-linked instruments	means those instruments whose value is based on the value of the stock and that have the share value as a reference point, e.g. stock appreciation rights, types of synthetic shares.

Shareholders	means a person who owns shares in an institution or, depending on the legal form of an institution, other owners or members of the institution.
Severance payments	means payments to staff relating to the early termination of a contract, i.e. in the case of temporary contracts, termination before the end date of the contract and in the case of indefinite contracts, before the contractual or legal retirement, by an institution or its subsidiaries.

3. Implementation

Date of application

12. These guidelines apply from 31 December 2021.

Repeal

13. The EBA/GL/2015/22 on remuneration policies and practices published on 22 December 2015 are repealed with effect from 31 December 2021.

4. Guidelines

Title I - Remuneration policies

1. Remuneration policies for all staff

14. In accordance with Article 74 of Directive 2013/36/EU, institutions are required to have in place a remuneration policy for all staff. The remuneration policy for all staff should comply with the principles set out in Articles 92 and 94 of Directive 2013/36/EU and these guidelines, taking into account the mapping of the requirements within Annex I[9]. The remuneration policy for all staff should be gender neutral, i.e. staff, independent of their gender, should be equally remunerated for equal work or work of equal value in line with point 65 of Article 3(1) of Directive 2013/36/EU and Article 157 of the TFEU.

15. The remuneration policy should specify all components of remuneration and also include the pension policy, including, where relevant, the framework for early retirements. The remuneration policy should also set a framework for other persons acting on behalf of the institution (e.g. tied agents), ensuring that the payments made are not providing any incentive for excessive risk taking or the mis-selling of products. All institutions should consider which requirements of the remuneration policy on the variable remuneration of identified staff under Article 94 of Directive 2013/36/EU should be included in the remuneration policy for all staff.

16. The institution's remuneration policy for all staff should be consistent with the objectives of the institution's business and risk strategy, including environmental, social and governance (ESG[10]) risk-related objectives, corporate culture and values, risk culture, including with regard to long-term interests of the institution, and the measures used to avoid conflicts of interest, and should not encourage excessive risk taking. 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 their overall risk appetite, taking into account all risks, including reputational risks and risks resulting from the mis-selling of products. Institutions should also take into account the long-term interests of shareholders or owners, depending on the legal form of the institution.

17. Institutions should be able to demonstrate to the competent authorities that the remuneration policy and practices are consistent with and promote sound and effective risk management.

18. Where variable remuneration is awarded, such awards should be based on the institutions', business units' and staff's performance and take into account the risks taken. The remuneration

[9] 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 or recommended.

[10] See also Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

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.

19. The remuneration policy should support the institution in achieving and maintaining a sound capital base in line with section 6 of these guidelines. The remuneration policy should also take into account the restrictions on distributions under Articles 93, 141 and 141b of Directive 2013/36/EU and Article 16a of the BRRD.

20. The remuneration policy should contain:

    a. the performance objectives for the institution, business areas and staff;

    b. the methods for the measurement of performance, including the performance criteria;

    c. the structure of variable remuneration, including where applicable the instruments in which parts of the variable remuneration are awarded;

    d. the ex ante and ex post risk-adjustment measures of the variable remuneration[11].

21. Institutions should ensure that potential conflicts of interest caused by the pay out of instruments as part of the variable or fixed remuneration are identified and managed. This includes that the compliance with insider trading rules is ensured and that no measures are taken that can have a short-term impact on the share or instruments price.

22. Where remuneration policies or group remuneration policies are implemented in institutions, including in their subsidiaries, and 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. For identified staff, the institution should ensure that the remuneration policy complies with the relevant CRD requirements within Articles 92 and 94 and these guidelines.

23. Without prejudice to any measures adopted by Member States[12] to prevent or compensate for disadvantages in professional careers of the underrepresented gender[13], the remuneration policy and all related employment conditions that have an impact on the pay per unit of measurement or time rate should be gender neutral, i.e. there should be no differentiation between staff of the male, female or diverse genders.

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[11] Specific requirements for the remuneration of identified staff and its risk alignment are contained in Titles III and IV of these guidelines.

[12] E.g. when implementing Directive 2006/54/EC.

[13] While Article 157 of the TFEU uses the term ’underrepresented sex’, the CRD uses the term ’underrepresented gender’; both terms have the same meaning for the purpose of these guidelines.

24. A gender-neutral remuneration policy should ensure that all aspects of the remuneration policy are gender neutral, including the award and pay-out conditions for remuneration. Institutions should be able to demonstrate that the remuneration policy is gender neutral.

25. When determining the pay per unit of measurement or time, institutions should duly consider the remuneration awarded, working time arrangements, annual leave periods and other financial and non-financial benefits. Institutions may use as a unit of measurement the annual gross remuneration of staff calculated on a full-time equivalent basis.

26. In order to monitor that gender-neutral remuneration policies are applied, institutions should document appropriately the value of the position, e.g. by documenting job descriptions or defining wage categories, for all staff members or categories of staff and determine which positions are considered as having an equal value, e.g. by implementing a job classification system, taking into account at least the type of activities, tasks and duties assigned to the position or staff member. Where a job classification system is used for determining pay, it should be based on the same criteria for men, women and staff of diverse genders and drawn up so as to exclude any discrimination, including on grounds of gender.

27. Institutions may consider in a gender-neutral manner additional aspects when determining the remuneration of staff. Such aspects may include:

    a. educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of tasks involved[14];

    b. the place of employment and its costs of living;

    c. the hierarchical level of staff and if staff have managerial responsibilities;

    d. the level of formal education of staff;

    e. the scarcity of staff available in the labour market for specialised positions;

    f. the nature of the employment contract, including if it is temporary or a contract with an indefinite period;

    g. the length of professional experience of staff;

    h. professional certifications of staff;

    i. appropriate benefits, including the payment of additional household and child allowances to staff with spouses and dependent family members.

[14] See also Commission recommendation of 7.3.2014 on strengthening the principle of equal pay between men and women through transparency.

2. Governance of remuneration

2.1 Responsibilities, design, approval and oversight of the remuneration policy

28.The management body[15] 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 individual staff members and changes to the remuneration policy and carefully consider and monitor their effects. Any exemptions should not be based on gender considerations or other aspects that would be discriminatory, should be well reasoned and should be in line with the remuneration requirements under national law.

30.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.

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

32.Conflicts of interests with regard to the remuneration policy and remuneration awarded should be identified and appropriately mitigated, including by establishing objective award criteria based on the internal reporting system, appropriate controls and the four eyes principle. The remuneration policy should ensure that no material conflicts of interest arise for staff, including for staff in control functions.

33.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, and other relevant documents) and the reasoning behind the remuneration policy should be maintained.

34.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.

[15] 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, with two independent bodies being established, one for the management function and the other for the supervision of the management function.

35. The remuneration policy should provide for an effective framework for performance measurement, risk adjustment and the linkages of performance to reward.

36. Risk and compliance functions should provide effective input in accordance with their roles into the setting of bonus pools, performance criteria and remuneration awards where those functions have concerns regarding the impact on staff behaviour and the riskiness of the business undertaken.

37. 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 2.4 has not been established, directly oversee the remuneration of the senior officers in the independent control functions, including the risk management and compliance functions.

38. The supervisory function should take into account the input provided by all competent corporate functions and bodies (e.g. committees, control functions[16], human resources, legal, strategic planning, budget function, etc.) and business units about the design, implementation and oversight of the institution's remuneration policies.

39. 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, the aspect of gender neutrality, remuneration levels and incentive schemes, in a way that would not only attract and retain the staff the institution needs but also ensure that the remuneration policy is aligned with the institution's risk profile.

40. The risk management function should assist with and inform on the definition of suitable risk-adjusted performance measures (including ex post adjustments), as well as with 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 be invited to attend the meetings of the remuneration committee on this matter.

41. 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, review procedures and oversight of the remuneration policy.

42. 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 2.5.

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[16] 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 26 to 29.

43.Within a group context, the competent functions within the consolidating institution and subsidiaries should interact and exchange information as appropriate.

2.2 Shareholders' involvement

44.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 and other identified staff may also be assigned to the shareholders' meeting in accordance with national company law[17]. The shareholders' vote may be either consultative or binding.

45.Where the approval of the remuneration of individual members of the management body and other identified staff is assigned to shareholders, shareholders should approve all components of remuneration, including severance payments. Where the approval of the remuneration policy is subject to approval by the shareholders, they should also either approve ex ante the maximum amount of the payments that can be awarded to the management body and other identified staff in the event of early termination of a contract or criteria for the determination of such amounts.

46.In order that shareholders can make informed decisions in line with paragraphs 44 and 45, 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 processes 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 it is ensured that the remuneration policy is gender neutral;

d. how the points under (b) are taken into account in ex ante/ex post adjustments, in particular for identified staff.

47.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.

[17] See also Shareholders Rights Directive 2007/36, as amended by Directive 2017/828, Articles 9a and 9b.

48.Where shareholders are requested to approve a higher maximum level of the ratio between the variable and the 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 fixed components of remuneration are those of the institution where the identified staff affected by the higher maximum levels of variable remuneration operate. For institutions that are 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 Directive 2013/36/EU, 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 a 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 shareholders' 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 Directive 2013/36/EU; 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 the CRD, staff who are directly affected 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 in 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.

49. Shareholders should be able to vote on a reduction of a higher maximum ratio that has been approved in the past. Such a vote should require a majority of shareholder votes in line with the applicable rules for regular decisions foreseen by national law. Where the approved higher maximum was reduced, the institution should inform the competent authority of the decision and the approved ratio within five working days.

2.3 Information to competent authorities

50. 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 Directive 2013/36/EU, the institution should report to the competent authority all the information submitted to the shareholders, including the proposed higher maximum ratio and the reasons therefor, at the latest five working days after having notified to the shareholders that an approval of the higher ratio will be sought.

51. When informing the competent authority about the decision taken by its shareholders, in accordance with the fifth indent of Article 94(1)(g)(ii) of Directive 2013/36/EU, the institution should provide the following information:

a. the result of the decision and the approved higher maximum ratio, including, where the ratios differ between business areas and functions, the 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[18];

b. the number of identified staff affected by the higher maximum ratios and, where the ratios differ between business areas and functions, the corresponding 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 Directive 2013/36/EU and Regulation (EU) 575/2013, having regard in particular to the institution's own funds obligations;

[18] Both guidelines can be accessed at the following link: http://www.eba.europa.eu/regulation-and-policy/remuneration.

d. the information included in Annex 2, using the template provided;

e. other information that may be requested by the competent authority.

2.4 Setting up a remuneration committee

52. In accordance with Article 109 of the CRD and Article 95(1) of the CRD, all institutions which are themselves significant, considering the individual, parent company and group level, must establish a remuneration committee. Subsidiaries which are regulated by specific sectoral legislation (e.g. investment firms, 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.

53. Where a remuneration committee is established in a non-significant institution, the institution should comply with the provisions 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.

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

2.4.1 Composition of the remuneration committee

55. The remuneration committee should be composed of members of the supervisory function[19] who do not perform executive functions. In G-SIIs and O-SIIs, the remuneration committee should include a majority of members who are independent and be chaired by an independent member. In other significant institutions, determined by competent authorities or national law, the remuneration committee should include a sufficient number of members who are independent[20]. If employee representation on the management body is provided for by national law, it must include one or more employee representatives.

56. 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.

2.4.2 Role of the remuneration committee

[19] 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, with two independent bodies being established, one for the management function and the other for the supervision of the management function. In these cases, the remuneration committee should comprise members of the supervisory body.

[20] Independence as set out in the EBA guidelines on internal governance and see also the joint EBA-ESMA guidelines on the assessment of the suitability of members of the management body and key function holders.

57.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, including that such remuneration policy is gender neutral and supports the equal treatment of staff of different genders;

c. support the supervisory function in overseeing the remuneration policies, practices and processes and 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 a 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, risk culture and 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 clawback arrangements;

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.

58.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.

2.4.3 Process and reporting lines

59.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 relevant functions (e.g. human resources, legal and strategic planning) within the respective areas of expertise and where necessary seek external advice.

60.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.

61.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.

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

2.5 Review of the remuneration policy

63.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 internal review at least annually. The review should include an analysis of whether the remuneration policy is gender neutral.

64.Institutions should monitor the development of the gender pay gap on a country-by-country basis separately for:

a. identified staff, excluding members of the management body;

b. members of the management body in its management function,

c. members of the management body in the supervisory function; and

d. other staff.

65.Where material differences between the average pay of male and female staff or male and female members of the management body exist, institutions should document the main reasons and take appropriate action where relevant, or should be able to demonstrate that the difference does not result from a remuneration policy that is not gender neutral.

66. A central review of compliance with the regulation, group policies, procedures and internal rules should be performed by the internal audit function of the consolidating institution.

67. Institutions should perform the central and independent review on an 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 or sub-consolidated basis included the institution and where the results are made available to the supervisory function of that institution.

68. Notwithstanding the responsibility of the management body, the tasks of the periodic independent review of remuneration policies may be, partially or totally, outsourced by institutions that are non-significant institutions[21]. Qualified and independent external consultants[22] may complement and support the institution in carrying out such tasks. The supervisory function is responsible for the review.

69. As part of the central and independent internal 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 pay outs 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, are compliant with Articles 141 and 141b of Directive 2013/36/EU and with Article 16a of Directive 2014/59/EU and do not limit the institution's ability to maintain or restore a sound capital base in line with section 6 of these guidelines.

70. 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 ensure alignment with the institutions' risk management strategy and framework.

71. Where periodic reviews reveal that the remuneration policies do not operate as intended or prescribed or where recommendations are made, the remuneration committee, where established, or the supervisory function, should ensure that a remedial action plan is proposed, approved and timeously implemented.

[21] See EBA guidelines on outsourcing arrangements.

[22] For further details on outsourcing, refer to EBA guidelines on internal governance.

72. The results of the internal review performed 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 or the supervisory function, and made available to the management body, relevant committees and corporate functions.

2.6 Internal transparency

73. The remuneration policy of an institution should be internally disclosed to all staff and accessible for all staff at all times. Confidential aspects of the remuneration of single staff members are not subject to internal transparency.

74. 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 professional 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.

3. Remuneration policies and group context

75. Where applying these guidelines on a consolidated or sub-consolidated basis, the consolidating institution should ensure that the provisions of these guidelines apply to the staff and identified staff of its subsidiaries within the scope of prudential consolidation as set out in paragraph 9. The consolidating or sub-consolidating institution should have available and send to its competent authority on request information on the application of remuneration policies in line with these guidelines on a consolidated or sub-consolidated basis, including their subsidiaries in the scope of prudential consolidation.

76. The consolidating supervisor and the competent authority of the sub-consolidating institution should effectively supervise the application of the previous paragraph and endeavour to engage, including within the colleges of supervisors, with other authorities of Member States responsible for the supervision of the relevant subsidiaries and with authorities from third countries where this is feasible.

77. At the consolidated or sub-consolidated level, the consolidating institution and competent authorities should ensure that a group-wide remuneration policy is implemented and complied with for all staff, including all identified staff, in all institutions and other entities within the scope of prudential consolidation and all branches. When setting the remuneration policy at group level, specific remuneration requirements of subsidiaries should be taken into account. The group remuneration policy should be consistent with and promote sound and effective risk management and be gender neutral

78. 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 differences between national implementations of the remuneration requirements of Directive

2013/36/EU, in particular regarding the application of the limitation of the maximum ratio between the variable components of remuneration and the fixed remuneration to 100% (if applicable, up to 200% with shareholders' approval)[23], the possibility to apply the notional discount rate[24], any restrictions regarding the use of instruments[25], the application of waivers under Article 94(3) of Directive 2013/36/EU and the national discretion in Article 109(6) of this Directive to include subsidiaries that are subject to a specific remuneration framework in the scope of the consolidated application of Articles 92, 94 and 95 of that Directive.

79. When applying the requirements on a consolidated basis, the remuneration requirements applicable in the Member State where the consolidating institution is located apply, including to identified staff that have a material impact on the group's risk profile, even if the implementation of the requirements set out by Article 94 of Directive 2013/36/EU by the Member State where the consolidating institution is located is stricter. Likewise, subsidiaries subject to Directive 2013/36/EU must comply for their staff with the applicable requirements under national law, even if they are stricter than the requirements on a consolidated basis.

80. Staff seconded from a parent undertaking in a third country to an EU subsidiary that is an institution or a branch who, were they employed directly by the EU institution or branch, would fall under the scope of identified staff of that EU institution or branch, are identified staff. Such seconded staff should be subject to the provisions of Articles 92, 93 and 94 of Directive 2013/36/EU as they are implemented in the Member State where the EU institution or branch is established and applicable Regulatory Technical Standards. 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 RTS on identified staff, taking into account the remuneration awarded for the relevant time period and the role and responsibilities during the secondment.

81. Short-term contracts or secondments must not be used as a means of circumventing the remuneration requirements of Directive 2013/36/EU and any related standards or guidelines.

82. Regarding subsidiaries established in third countries that are included in the application of Articles 92, 94 and 95 of Directive 2013/36/EU on a consolidated basis, the group-wide remuneration policy 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 at the group level), specify whether the notional discount rate is applied and ensure that, for the pay out of variable remuneration, instruments are used in line with these guidelines and Commission Delegated Regulation (EU) No 527/2014[26], unless the

[23] Article 94(1)(g)(i) and (ii) of Directive 2013/36/EU.

[24] Article 94(1)(g)(iii) of Directive 2013/36/EU.

[25] Article 94(1)(l) of Directive 2013/36/EU.

[26] 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 (OJ L 148, 20.5.2014, p. 21). It is published at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_148_R_0006.

application of those requirements is unlawful in that third country. The remuneration policy of such third country subsidiaries should be consistent with the group-wide remuneration policy and comply with the requirements of Articles 92(2), 93 and 94 of Directive 2013/36/EU at least for those staff whose professional activities have a material impact on the group's risk profile.

83. Competent authorities should ensure that branches in a Member State of credit institutions authorised 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.

84. The remuneration requirements of Directive 2013/36/EU and the provisions of these guidelines apply to institutions in Member States independent of the fact that they may be subsidiaries of a parent institution in a third country. Where an EU subsidiary of a parent institution in a third country is a consolidating institution, the scope of prudential consolidation does not include the level of the parent institution located in a third country and other direct subsidiaries of that parent institution. The consolidating institution should ensure that the group-wide remuneration policy of the parent institution in a third country is taken into consideration within its own remuneration policies as far as this is not contrary to the requirements set out under relevant EU or national law, including these guidelines.

4 Proportionality

85. The proportionality principle encoded in Article 92(2) of Directive 2013/36/EU 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 remuneration requirements are effectively achieved.

86. When applying the remuneration requirements and the provision of these Guidelines in a proportionate manner, institutions and competent authorities should consider a combination of all the following criteria:

a. the size,

b. the internal organisation; and

c. the nature, scope and complexity of the institution's activities.

87. When assessing what is proportionate and in determining the required level of sophistication of the remuneration policies and risk measurement approaches, institutions and competent authorities should take into consideration the combination of qualitative and quantitative aspects of all the criteria above. For instance, a business activity may well have a small scale but could still include complex activities and risk profiles because of the nature of its activities or the complexity of its products.

88. For the above purposes, institutions and competent authorities should take into account at least the following criteria:

a. whether the institution meets the criteria for small and non-complex institution or large institution as set out in points 145 and 146 of Article 4(1) of Regulation (EU) No 575/2013;

b. whether the institution meets the criteria and the thresholds set out in paragraphs 3 and 4 of Article 94 of Directive 2013/36/EU with regard to the waivers of the variable remuneration pay-out process;

c. the geographical presence of the institution and the size of the operations in each jurisdiction;

d. the legal form and the available equity and debt instruments;

e. the authorisation to use internal methods for the measurement of capital requirements (e.g. IRB, AMA);

f. whether the institution is part of a group and, if so, the proportionality assessment done for the group and the characteristics of the group to which the institution belongs;

g. the type of authorised activity and services (e.g. loans and deposits, investment banking);

h. the underlying business strategy;

i. the structure of the business activities and the time horizon, measurability and predictability of the risks of the business activities;

j. the funding structure of the institution;

k. the internal organisation of the institution, including the level of variable remuneration that can be paid to identified staff;

l. the structure of profits and losses of the institution;

m. the type of clients (e.g. retail, corporate, small businesses, public entity);

n. the complexity of the products or contracts.

89. When applying remuneration requirements and the provisions set out in these Guidelines in a proportionate way, institutions are responsible for considering their risk profile, risk appetite and other characteristics and for developing and implementing remuneration policies and practices which are appropriately aligned to the business strategy, objectives, values and long-term interest of the institution. However, the obligation to have sound and effective remuneration policies and practices applies to all institutions and with respect to all staff, regardless of the institutions’ different characteristics.

90.Before remuneration requirements and the provisions set out in these Guidelines are applied in a proportionate way, the identification of staff, based on the criteria provided in Article 92(3) of Directive 2013/36/EU, the Commission Delegated Regulation mandated under Article 94(2) of Directive 2013/36/EU and additional internal criteria, should be performed[27].

91.The limitation of the maximum ratio between the variable components of remuneration and the fixed components to 100% (200% with shareholders' approval) should be applied to all identified staff in the institution.

92.When implementing specific remuneration policies for different categories of identified staff in line with sections 3 and 4 of these guidelines, the application of proportionality should take into account the impact on the institution's risk profile of that category of identified staff.

93.Competent authorities should ensure that institutions comply with the remuneration requirements and the provisions of these guidelines in a manner that provides for a level playing field among different institutions.

Waivers of the variable remuneration pay-out process

94.Without prejudice to the implementation of Article 94(3) of Directive 2013/36/EU by Member States, institutions that are not large institutions as defined in point 146 of Article 4(1) of Regulation (EU) 575/2013 and that have total assets under the threshold defined in national law may not apply the requirements to defer variable remuneration and to pay it out in instruments as set out in points (l), (m) and second paragraph of point (o) of Article 94(1) of Directive 2013/36/EU. An institution that meets one or more of the criteria within point 146 of Article 4(1) of Regulation (EU) 575/2013 is a large institution.

a. The assessment of whether an institution is a G-SII or O-SII is made in line with Article 131 of Directive 2013/36/EU and the Commission Delegated Regulation (EU) 2016/1608 with regard to regulatory technical standards for the specification of the methodology for the identification of global systemically important institutions and for the definition of subcategories of global systemically important institutions and the EBA guidelines on the criteria to determine the conditions of application of Article 131(3) of Directive 2013/36/EU (CRD) in relation to the assessment of other systemically important institutions.

b. When assessing whether a consolidating institution meets the threshold in point 146(d) of Article 4(1) of Regulation (EU) 575/2013, the criteria is met if the amount on a consolidated basis[28] exceeds the threshold. Amounts, if necessary, should be converted into EUR, using the exchange rate published by the Commission for financial programming and the budget for the last month of the consolidating institution's financial year.

[27] Please refer to guidelines for the identification process outlined in section 5 of these guidelines.

[28] Article 19 of Regulation (EU) 575/2013 with regard to entities excluded from the scope of prudential consolidation applies.

95. When establishing the amount of the annual variable remuneration paid to a staff member and the ratio between the variable and fixed annual remuneration for the purposes of Article 94(3)(b), i.e. the application of waivers to the requirement to defer and pay out in instruments the variable remuneration to individual staff members, institutions should take into account the amounts specified in points (a) and (b) and apply the further conditions in points (c) to (f):

   a. the annual variable remuneration awarded for the performance period that equals the financial year for which it is determined if the waiver can be applied and all performance periods that ended in this financial year, independent of the length of the underlying performance periods that have ended in this financial year, e.g. it should include the full amount of variable remuneration based on revolving and non-revolving multi-year accrual periods and retention bonuses for periods longer than one year where the underlying period ended in the given financial year;

   b. the annual fixed remuneration awarded for the financial year for which the waiver may be applied; institutions may exclude other components of fixed remuneration as specified under paragraphs 132 and 133 for the calculation;

   c. the amounts should be based on the definition for fixed and variable remuneration within these guidelines and should be calculated based on the gross remuneration awarded;

   d. the variable remuneration should consist of all forms of variable remuneration awarded, including performance-based variable remuneration, amounts paid as guaranteed variable remuneration, retention bonuses, severance payment or discretionary pension benefits;

   e. where the amounts are determined by institutions on an individual basis, the remuneration awarded by the institution should be taken into account, when the amount is determined on a consolidated basis by the consolidating institution, all remuneration awarded by financial institutions and ancillary service undertakings within the scope of prudential consolidation should be taken into account;

   f. where the remuneration is paid in a currency other than EUR, the amounts should be converted into EUR, using the exchange rate published by the Commission for financial programming and the budget for the last month of the institution's financial year.

96. When calculating the average of the value of the assets for the four-year period immediately preceding the current financial year for the purpose of point (a) of Article 94(3) of Directive 2013/36/EU, institutions should use the simple average of this value at the end of the four preceding financial years. Where the accounts are kept in a currency other than EUR, the amounts should be converted into EUR, using the exchange rate published by the Commission for financial programming and the budget for the last month of each financial year.

97. Where national law empowers competent authorities to set the thresholds under Article 94(3) and 94(4) of Directive 2013/36/EU for individual institutions, competent authorities should,

when lowering or increasing the thresholds under Article 94(3) and 94(4) of Directive 2013/36/EU, take into account the institution's nature, scope and complexity of its activities, its internal organisation or, if applicable, the characteristics of the group to which it belongs, and also take into account the proportionality criteria set out within this section.

5. The identification process

98. 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.

99. The self-assessment should be based on the qualitative and quantitative criteria set out in Article 92(3) of Directive 2013/36/EU, the RTS on identified staff and where needed to ensure the complete identification of all staff whose professional activities have a material impact on the institution's 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.

100. When applying quantitative criteria based on staff members' remuneration, the fixed remuneration awarded for the preceding financial year and the variable remuneration awarded to staff in or for the preceding financial year should be taken into account. The variable remuneration awarded in the preceding financial year is the variable remuneration awarded in the preceding financial year with reference to previous performance. Institutions should define the applicable method in their remuneration policy. When applying quantitative criteria based on staff members' remuneration, institutions should take into account all monetary and non-monetary fixed and variable remuneration components awarded for professional services. Routine remuneration packages that are not accounted for on an individual level should be taken into account based on the overall sum broken down by objective criteria to the individual staff member.

101. When applying quantitative criteria that are defined in EUR, institutions which award remuneration in a currency other than EUR should convert the applicable thresholds using either the internal exchange rate used for the consolidation of the accounts or the exchange rate used by the Commission for financial programming and the budget for the month where the remuneration was awarded or the exchange rate for the last month of the institution's financial year[29]. The institution should document the applicable method to determine the exchange rate in its remuneration policy.

102. The self-assessment should be clear, consistent, properly documented and periodically updated during the year at least with regard to qualitative criteria under Article 92(3) of

[29] The exchange rates can be found on the website of the European Commission at: http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm.

Directive 2013/36/EU, the RTS on identified staff and, where appropriate, in addition based on institutions' criteria. Institutions should ensure that staff that fall or are likely to fall under Article 92(3), points (a), (b) and (c) of Directive 2013/36/EU or under the criteria of Article 5 of the RTS on identified staff for a period of at least three months in a financial year are treated as identified staff.

103.The following information should at least be included in the documentation of the self-assessment done regarding the identification of staff:

a. the rationale underlying the self-assessment and the scope of its application;

b. the approach used to assess the risks emerging from the institution's business strategy and activities, including in different geographical locations;

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 role and responsibilities of the different corporate bodies and internal functions involved in the design, oversight, review and application of the self-assessment process; and

e. the identification outcome.

104.Institutions should keep records 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 under Article 92(3) of Directive 2013/36/EU, the RTS on identified staff and any additional criteria used by the institutions.

105.The documentation of the self-assessment 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.

106.The documentation should also include staff members who have been identified under quantitative criteria, but whose professional activities are assessed as not having a material impact on the institution's risk profile, in accordance with the RTS on identified staff. Institutions should maintain the documentation for an appropriate time period to enable the review by the competent authorities.

5.1 Prior approval of exclusions

107.Where the institution determines according to 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 applies for a prior approval, the following should apply:

a. The management body should decide based on the analysis performed within the annual identification process if staff have in fact no material impact on the institution's risk profile and inform the supervisory function of the decision taken. The supervisory function or the remuneration committee when it is established should review the criteria and process under which the decisions are taken and approve the exemptions made.[30]

b. 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.

c. Where the staff member was awarded total remuneration of EUR 1 000 000 or more in the preceding financial year, the competent authority should immediately inform the EBA about the application received and provide its 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 such exclusions are granted in a consistent way before the decision regarding the approval or rejection of the application is taken by the competent authority.

108.The prior approval regarding exclusions of staff identified in relation to the quantitative criteria should be granted only for a limited time period. The request for prior approval under 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 for whom the exclusion has already been approved for the ongoing financial year, the prior approval should only concern the following financial year.

109.Where identified staff would be excluded in subsidiaries which are not themselves subject to Directive 2013/36/EU, 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.

110.Requests for prior approval should include all names or another unique identifier for identified staff for whom an exclusion should apply, the percentage of internal capital allocated in accordance with Article 73 of Directive 2013/36/EU to the business unit in which the staff member is active and the analysis of the impact of staff on the institution's risk profile for each identified staff member. Where identified staff are active in the same business unit and have the same function, a joint assessment should be conducted.

[30] Please refer to paragraph 110 with regard to the approval of exemptions to the remuneration policy.

5.2 Governance of the identification process

111.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 performed properly in accordance with Directive 2013/36/EU, the RTS on identified staff and these guidelines;

d. oversee the identification process on an ongoing 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 the RTS on identified staff where the institutions deem that the quantitative criteria defined in the Commission Delegated Regulation are not met by the staff, as they in fact do not have a material impact on the institutions' risk profile; and

g. periodically review the approved policy and, if needed, amend it.

112.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 established, the non-executive and where possible the independent members of the management body in its supervisory function should execute the respective tasks.

113.The 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 involved in the identification process in accordance with their respective role and 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. The identification process and its result should be subject to an independent internal or external review.

5.3 Identification process at individual, sub-consolidated and consolidated level

114.The qualitative and quantitative identification criteria included in Article 92(3) of Directive 2013/36/EU and the RTS on identified staff and those additionally set by the institutions should be applied both by institutions on an individual basis, using the figures and considering the situation of the individual institution, and in addition by the consolidating institution on a consolidated and sub-consolidated basis as defined in points (48) and (49) of Article 4(1) of

Regulation (EU) 575/2013, including– subject to the provisions of Article 109(4) to (6) of Directive 2013/36/EU – all subsidiaries in the scope of prudential consolidation which are not themselves subject to the CRD, using the consolidated figures and considering the consolidated situation and the impact on the institutions' risk profile on a consolidated basis. The identification process on a consolidated basis should include staff members as defined in Article 109(5) of Directive 2013/36/EU, even if the subsidiary that employs that staff member is not subject to the application of the requirements in Articles 92, 94 and 95 of Directive 2013/36/EU on a consolidated basis and is not subject to Directive 2013/36/EU on an individual basis.

115.When applying qualitative identification criteria at consolidated or sub-consolidated level, staff members in a subsidiary are only captured if they are responsible for the functions referred to 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 '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.

116.The applicable quantitative identification criteria should apply to all staff within the institution and its subsidiaries that are subject to the requirements under Articles 92, 94 and 95 of Directive 2013/36/EU on a consolidated and sub-consolidated basis, taking into account all remuneration awarded within the full scope of prudential consolidation.

117.When applying qualitative identification criteria, institutions should identify the staff responsible for the function named in the qualitative criteria; the main criterion for the identification is not the name of the function but the authority and responsibility conferred on the function.

5.4 Role of the consolidating institution

118.Without prejudice to Article 109(4) of the CRD, 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 individual basis.

5.5 Role of subsidiaries and branches

119.Institutions that are subsidiaries of a consolidating institution should implement within their remuneration policy the policy issued by the consolidating parent institution and the 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 in the scope of prudential consolidation, including those not themselves subject to Directive 2013/36/EU, 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 a consolidated or sub-consolidated basis.

120.Subsidiaries that are not themselves subject to Directive 2013/36/EU are not required to perform an identification process at an individual level, unless they are required to do so under sector-specific remuneration requirements. For those subsidiaries that are not subject to the Directive or other specific remuneration requirements as specified under Article 109(4) of Directive 2013/36/EU, the assessment should be performed by the consolidating institution at the consolidated and sub-consolidated level, based on information provided by the subsidiary. Institutions falling within the scope of Directive 2013/36/EU should conduct their own self-assessment for the identification of staff at an individual 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 at an individual level to the consolidating institution.

121.Branches in a Member State of credit institutions that have their head office in a third country and institutions in a Member State which are subsidiaries of parent institutions in third countries should conduct the identification process and inform their parent institution of its results. Institutions in a Member State should also include their subsidiaries that fall in the scope of prudential consolidation and branches located in third countries in their assessment. Institutions should be aware that branches form a non-independent part of the institution.

122.For third-country branches located in a Member State, 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 at an individual level.

6. Capital base

123.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.

124.When assessing if the capital base is sound, the institution should take into account its overall own funds and in particular the Common Equity Tier 1 capital, the capital requirement, including the combined capital buffer requirement as defined in Article 128(6) of Directive 2013/36/EU, the leverage ratio buffer requirement as defined in Article 92(1a) of Regulation (EU) No 575/2013, the minimum requirement for own funds and eligible liabilities as defined in Article 45c of Directive 2014/59/EU and any capital add on and the restrictions on distributions set out in Articles 141 and 141b of Directive 2013/36/EU and Article 16a of Directive 2014/59/EU which applies to the variable remuneration of all staff as well as the result of the internal capital adequacy assessment process. The requirement to maintain a sound capital base and the restrictions on distributions apply also on a consolidated and sub-consolidated basis. Additionally, competent authorities should take into account the results of the supervisory review and evaluation process in line with the respective EBA guidelines.

125.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.

126.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. The institution should consider these requirements, the results from the internal capital adequacy assessment process, its multi-year capital planning, the restrictions on distributions set out in Articles 141 and 141b of Directive 2013/36/EU and Article 16a of Directive 2014/59/EU and recommendations on distributions by competent authorities and European Supervisory Authorities, 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.

127.Institutions which do not have a sound capital base or where the soundness of the capital base is at risk should take the following measures with regard to variable remuneration:

a. Reduce the variable bonus pool in line with Articles 141 and 141b of Directive 2013/36/EU and Article 16a of Directive 2014/59/EU, including the possibility to reduce it down to zero;

b. Apply the necessary performance adjustment measures, in particular malus;

c. Use the net profit of the institution for that year and potentially for subsequent years to strengthen the capital base. The institution should not compensate for any reduction of the variable compensation made in order to ensure a sound capital base in later years or by other payments, vehicles or methods which lead to a circumvention of this provision.

128.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 reduce or apply a cap to the overall pool of variable remuneration determined until the capital adequacy situation improves, and if necessary to apply performance adjustment measures, in particular malus, and require institutions to use net profits to strengthen own funds.

Title II - Structure of remuneration

7. Categories of remuneration

129.Under Directive 2013/36/EU, remuneration is either fixed or variable remuneration; there is no third category of remuneration. Without prejudice to the national implementation of waivers under paragraphs (3) to (5) of Article 94 of Directive 2013/36/EU, where remuneration is variable and is paid to identified staff, all requirements of Article 94 of Directive 2013/36/EU have also to be met in addition to the general requirements contained in Article 92 thereof. For that purpose, institutions should allocate in line with these guidelines the components of remuneration to either fixed or variable remuneration and their remuneration policies should set out clear, objective, predetermined and transparent criteria to assign all remuneration components to either the fixed or variable categories in accordance with the criteria provided in Article 92(2)(g) of Directive 2013/36/EU and these guidelines.

130.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.

131.Remuneration is fixed where the conditions for its award and its amount:

a. are based on predetermined criteria;

b. are non-discretionary reflecting the level of professional experience and seniority of staff;

c. are transparent with respect to the individual amount awarded to the individual staff member;

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. cannot be reduced, suspended or cancelled by the institution;

g. do not provide incentives for risk assumption; and

h. do not depend on performance.

132.Remuneration components that are either part of a general institution-wide policy where they meet the conditions listed in paragraph 131 or payments mandatory under national law are considered as fixed remuneration. This includes payments which form part of routine employment packages as defined in these guidelines.

133.The following remuneration components should also be considered as fixed, where all similar situations are treated in a consistent way:

a. remuneration paid to expatriate staff considering the cost of living and tax rates in a different country;

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 a comparable position where all of the following specific conditions are met:

i. the allowance is paid on a non-discriminatory basis to all staff in a similar situation;

ii. the allowance is awarded because staff work temporarily abroad or in a different position with a remuneration level requiring adjustment 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 referred to above.

8. Particular cases of remuneration components

8.1 Allowances

134.The variable and fixed remuneration of institutions may consist of different components, including additional or ancillary payments or benefits. Institutions should analyse allowances[31] and allocate them to the variable or fixed component of remuneration. The allocation should be based on the criteria in section 7.

135.In particular where allowances are considered as fixed remuneration, but show any of the following features, the institution should duly document the results of the assessments conducted under section 7:

a. They are paid only to identified staff members[32].

b. They are limited to cases where the ratio between the variable and fixed components of remuneration would otherwise exceed 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 with the performance indicators used.

136.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 131, taking into account all of the following:

[31] The label may differ according to the institution: 'role-based pay, staff allowance, adjustable role allowance, fixed pay allowance', etc.

[32] Being an identified staff member should not be considered as a role or function.

a. the allowance is tied to a role or organisational responsibility and awarded as long as there are no material changes regarding the responsibilities and authorities of the role so that in fact the staff would have a different role or organisational responsibility;

b. the amount does not depend on any factors other than fulfilling a certain role or having a certain organisational responsibility and the criteria in paragraph 203;

c. 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.

137.Competent authorities should ensure that allowances are not a vehicle or method that facilitates the non-compliance of institutions with the CRD.

8.2 Variable remuneration based on future performance

138.When the award of variable remuneration, including LTIPs, is based on past performance of at least one year, but also depends on future performance conditions, the following should apply:

a. Institutions should clearly set out to staff the additional performance conditions that have to be met after the award for the variable remuneration to vest.

b. Institutions should assess before the vesting of variable remuneration that the conditions for its vesting have been met.

c. The additional forward-looking performance conditions should be set for a predefined performance period of at least one year.

d. When the additional forward-looking performance conditions have not been met, up to 100% of the variable remuneration awarded under those conditions should be subject to malus arrangements.

e. The deferral period should end at the earliest one year after the last performance condition has been assessed; all other provisions regarding the deferral of variable remuneration for identified staff set out in section 15 apply in the same way as to variable remuneration that is exclusively based on performance previous to its award.

f. For the calculation of the ratio between the variable and fixed components of the total remuneration, the total amount of the variable remuneration awarded should be taken into account in the financial year for which the variable remuneration, including LTIPs, was awarded. This should also apply when the past performance was assessed in a multi-year accrual period.

139.Where a prospective remuneration plan for variable remuneration, including LTIPs, is exclusively based on future performance conditions (e.g. where new staff receive an LTIP at the beginning of the first year of employment), the amount should be considered as awarded after the performance conditions have been met, otherwise no award should be made. Awarded amounts should be taken into account for the calculation of the ratio between the variable and fixed components of the total remuneration in the financial year prior to their award. Where a specific number of instruments are awarded, they should exceptionally be valued for the purpose of the calculation of the ratio between the variable and fixed components of the total remuneration with the market price or fair value determined at the time the prospective remuneration plan for variable remuneration was granted. Points (a) to (c) of paragraph 138 should apply. All other requirements apply in the same way as to variable remuneration, e.g. the deferral period starts after the award of the variable remuneration.

8.3 Dividends and interest payments

140.'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 II of the AIFMD specifically includes carried interest in the definition of remuneration[33]. The ESMA guidelines on sound remuneration policies under the AIFMD apply[34]. For the purposes of these EBA guidelines and in particular of calculating the ratio between the variable and fixed components of remuneration for staff identified under section 13 of these guidelines, the following should apply:

a. all payments made by the alternative investment funds to these staff members through carried interest vehicles which are not representing a pro-rata return on the investment made by these staff members should be considered as variable remuneration and be valued at the time of their award;

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

141.Dividends paid on vested shares or equivalent ownership interests that staff received as part of their remuneration or other shares held by staff as shareholders or owners of an institution are not part of remuneration for the purpose of these guidelines. The same applies to interest paid to staff on other vested instruments or investments.

[33] Annex II, 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).

[34] ESMA/2013/232, available at: 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.

142.Dividend and interest 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.

8.4 Retention bonuses

143.Institutions should be able to substantiate their legitimate interest in awarding retention bonuses to retain an identified staff member. For example, retention bonuses may be used under restructurings, in wind-down, after a change of control or to ensure the finalisation of major projects. Institutions should document the event or justification that made it necessary to award a retention bonus and the time period, including the start and the end date, for which the reason is assumed to exist. Institutions should define the retention conditions and applicable performance conditions (see also paragraph 147). Institutions should specify a retention period and a date or event after which it determines whether the retention and performance conditions have been met.

144.As a general principle, institutions should not award multiple retention bonuses to a staff member; in exceptional cases and where duly justified, more than one retention bonus may be paid to a staff member, but at different moments in time and under the conditions specified in this section with regard to each retention bonus. The retention bonuses should only be awarded after the retention conditions and applicable performance conditions have been met. Moreover, the retention bonus should only be awarded if no reasons exist that lead to a situation where the retention bonus should not be awarded, e.g. material compliance breaches, misconduct or other failures of that staff member.

145.A retention bonus should be in accordance with the requirements under Articles 93, 141 and 141b and the respective supervisory powers under Article 104(1)(g) of Directive 2013/36/EU, which could lead to a situation where the retention bonus might need to be reduced, possibly even down to zero, depending on the maximum distributable amount (MDA) or other restrictions imposed by competent authorities.

146.When assessing and considering whether the award of a retention bonus to identified staff is appropriate, institutions and competent authorities may take into account at least the following:

a. the concerns that lead to the risk that certain staff may choose to leave the institution;

b. the reasons why the retention of that staff member is crucial for the institution;

c. the consequence if the staff member concerned leaves the institution; and

d. whether the amount of the awarded retention bonus is necessary and proportionate to retain the targeted staff member.

147.A retention bonus should be based on specific conditions that differ from the performance conditions applied to other parts of the variable remuneration and include a retention condition and specific performance conditions. The specific conditions for a retention bonus should lead to the retention objective (i.e., retention of staff in the institution for a predefined period of time or until a certain event). The specific performance conditions should include conditions that are related to the legitimate interest for which the staff member should be retained and to the conduct of staff and should be compatible with the provisions in paragraph 145. Retention bonuses should not lead to a situation where the total variable remuneration, consisting of performance-related variable remuneration and retention bonus, of the staff member is no longer linked to the performance of the individual, the business unit concerned and the overall results of the institution as required under Articles 92(2)(g)(ii) and 94(1)(a).

148.Retention bonuses should not be awarded to merely compensate for performance-related remuneration not paid due to insufficient performance or the institution's financial situation.

149.Retention bonuses are variable remuneration and therefore, if awarded to identified staff, must comply with the requirements on variable remuneration under Article 94 of Directive 2013/36/EU, including the maximum ratio between the variable and fixed remuneration, ex post risk alignment, payment in instruments, deferral, retention, malus and clawback.

150.A retention bonus must be taken into account in the calculation of the ratio between the variable and fixed remuneration as variable remuneration. Independent of the fact that the retention bonus will be awarded only after the end of the retention period, the retention bonus should be taken into account in the calculation of the ratio between the variable and fixed components of remuneration following one of the methods specified below:

a. The retention bonus is split into annual amounts for each year of the retention period calculated on a linear pro rata basis. Where the exact length of the retention period is not known upfront, the institution should set and duly document a period considering the situation and measures taken that justify the payment of a retention bonus. The calculation of the ratio should be based on the period set; or

b. The full amount of the retention bonus is considered in the year when the retention condition is met.

8.5 Discretionary pension benefits

151.Discretionary pension benefits are a form of variable remuneration. Where the terms of the company's pension scheme include pension benefits that are not based on performance and that are consistently granted to a category of staff, such pension benefits should not be considered discretionary, but should be considered as part of routine employment packages in line with the section of these guidelines on definitions. Discretionary pension benefits are not severance payments, even if the employee decides to retire early.

152.The institution should ensure that, where a staff member 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.

153.The full amount of discretionary pension benefits must be awarded, in accordance with Article 94(1)(o) of Directive 2013/36/EU and subject to the derogation under Article 94(3) of this Directive, in instruments referred to in point (l) of this Article and:

a. where an identified staff member 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 an identified staff member reaches retirement, a five-year retention period must be applied to the full amount paid in instruments.

154.Institutions should ensure that malus and clawback arrangements are applied in the same way to discretionary pension benefits as to other components of variable remuneration.

9. Exceptional remuneration components

9.1 Guaranteed variable remuneration

155.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.

156.When awarding guaranteed variable remuneration in accordance with Article 94(1)(d) and (e) of Directive 2013/36/EU when hiring new staff, institutions are not permitted to guarantee variable remuneration for longer than the first year of employment. 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 that Directive and section 6 of these guidelines.

157.Institutions should only award once to the same single staff member guaranteed variable remuneration. This requirement should also apply at a consolidated and sub-consolidated level and includes situations where staff receive a new contract from the same institution or another institution within the scope of consolidation.

158.Institutions and competent authorities may decide to not include the amount of guaranteed variable remuneration in the calculation of the ratio between the fixed and variable components of the total remuneration for the first performance period, where the guaranteed variable remuneration is awarded when hiring new staff before the first performance period starts.

159.As part of the arrangements guaranteeing this part of variable remuneration, institutions may decide to not apply the requirements on malus and clawback arrangements to guaranteed variable remuneration. Institutions may pay out the full amount in non-deferred cash.

9.2 Compensation or buyout of previous employment contract

160.The compensation for the buyout of a previous contract should be awarded only when the conditions defined in paragraph 156 of these guidelines are met.

161.Remuneration should be considered as being granted as compensation or for the buyout of a previous contract where the deferred variable remuneration of the staff member was reduced or revoked by the previous employer because of the termination of the contract. For remuneration packages relating to the compensation or buyout of contracts in previous employment, all requirements for variable remuneration and the provisions within these guidelines apply, including deferral, retention, pay out in instruments and clawback arrangements.

9.3 Severance and other payments after the end of a contract

9.3.1 Severance pay

162.Institutions' remuneration policies should specify the possible use of severance payments, including the maximum amount or criteria for the determination of such amounts that can be awarded as severance pay to identified staff.

163.Institutions should have a framework in which severance pay is determined and approved in the context of the early termination of a contract by the institution, including a clear allocation of the responsibilities and decision-making powers and the procedural involvement of the control functions.

164.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. In accordance with Article 94(1)(h) of Directive 2013/36/EU, severance payments must reflect performance achieved over time and must not reward failure or misconduct.

165.Severance pay should not be awarded where there is an obvious failure which allows for the immediate cancellation of the contract or the dismissal of staff.

166.Severance pay should not be awarded 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.

167.Severance payments include additional payments on top of the regular remuneration in the following specific situations:

a. redundancy remuneration for loss of office in case of an early termination of the contract by the institution or its subsidiary;

b. remuneration awarded for a limited time period that is agreed to introduce a cooling-off period after the termination of the contract and is subject to a non-competition clause;

c. the institution terminates the contracts of staff because of a failure of the institution or early intervention measures;

d. the institution wants to terminate the contract following a material reduction of the institution's activities in which the staff member was active or where business areas are acquired by other institutions without the option for staff to stay employed in the acquiring institution;

e. the institution and a staff member agree on a settlement in case of an actual labour dispute that could otherwise realistically lead to an action in front of a court.

168.Where institutions award severance pay, the institutions should be able to demonstrate to the competent authority the reasons for the severance payment, the appropriateness of the amount awarded and the criteria used to determine the amount, including that it is linked to the performance achieved over time and that it does not reward failure or misconduct.

169.When determining the amount of severance pay to be awarded, 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 pay for staff is determined, taking into account the capital base of the institution; such severance pay 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.

170.Failures of institutions include the following situations:

a. where the institution benefits from government intervention or is subject to early intervention or resolution measures in accordance with Directive 2014/59/EU[35];

b. where the opening of normal insolvency proceedings of the institution, as defined in Article 2(1)(47) of Directive 2014/59/EU, has been filed;

[35] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

c. where significant losses lead to the situation that the institution no longer has a sound capital base and, following this, the business area is sold or the business activity is reduced.

171.Failures of identified staff should be assessed on a case-by-case basis, and include the following situations:

a. where a member of the management body is no longer considered as meeting appropriate standards of fitness and propriety;

b. where the identified staff member participated in or is responsible for conduct which resulted in significant losses for the institution, as defined in the institution's remuneration policy;

c. where an identified staff member acts contrary to internal rules, values or procedures based on intent or gross negligence.

172.Severance payments should be considered as variable remuneration and as a general principle therefore, if awarded to identified staff, all requirements under Article 94 of Directive 2013/36/EU apply. However, severance payments should in the following circumstances not be taken into account for the purpose of the calculation of that ratio and for the application of deferral and the pay out in instruments:

a. severance payments mandatory under national labour law or mandatory following a decision of a court;

b. severance payments under (i) and (ii) where the institution is able to demonstrate the reasons and the appropriateness of the amount of the severance payment:

(i) severance payments calculated through an appropriate predefined generic formula (e.g. gardening leave) set within the remuneration policy in the cases referred to in paragraph 167;

(ii) severance payments corresponding to the additional amount due in application of a non-competition clause in the contract and paid out in future periods, up to the amount of the fixed remuneration which would have been paid, for the non-competition period, if staff were still employed;

c. severance payments under paragraph 167, not fulfilling the condition in point (i) of paragraph 172(b), where the institution has demonstrated to the competent authority the reasons and the appropriateness of the amount of the severance payment.

173.When calculating the amount that is not taken into account in the calculation of the ratio between the variable and fixed components of remuneration, the fact that a non-competition clause is included in the contract does not necessarily imply that the whole amount paid for the early termination of the contract is paid to compensate the identified staff for committing to not competing for a certain period of time. Only those amounts of the settlement specifically identified in the contract as compensation for the non-competition clause would comply with paragraph 172. Where national legislation limits the length of non-competition clauses, any payment made beyond those time limits cannot be considered as a 'settlement made for a non-competition clause' and therefore cannot be excluded from the ratio of variable to fixed.

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

a. the sum of any amounts higher than the fixed remuneration for the future periods under point (b)(ii) of paragraph 172;

b. any other severance pay not listed in paragraph 172.

9.3.2 Other payments after the end of a contract

175.Regular remuneration payments related to the duration of a notice period should not be considered as severance payments. The payment of an appropriate fixed amount after the regular end of an employment contract (i.e. after coming to its regular end or being cancelled by staff in line with the applicable notice periods) and to compensate staff where the institution restricts the taking up of an occupational activity should not be subject to the requirements applicable to variable remuneration, where this is compatible with national law. Such payments should not be made to replace severance payments under paragraph 167.

176.Additional payments in the context of the regular end of a contractual period or of the appointment as member of the management body, e.g. awarded discretionary pension benefits, should not be treated as severance payments. Where such components are variable remuneration and are paid to identified staff, they are subject to all specific requirements for variable remuneration and the provisions within these guidelines.

10 Prohibitions

10.1 Personal hedging

177.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.

178.Institutions should ensure to the extent possible that identified 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.

179.Identified staff should be considered to have hedged the risk of a downward adjustment in remuneration if the identified staff member enters into a contract with a third party or the institution and either of the following conditions is met:

a. the contract requires the third party or the institution to make payments directly or indirectly to the identified staff member that are linked to or commensurate with the amounts by which the staff member's variable remuneration has been reduced;

b. the identified staff member purchases or holds derivatives that are intended to hedge losses associated with financial instruments received as part of the variable remuneration.

180.Identified staff should be considered to have insured the risk of a downward adjustment where staff take out an insurance contract with a stipulation to compensate them in the event of a downward adjustment in remuneration. This should in general not prevent taking out insurance to cover personal payments such as healthcare and mortgage instalments.

181.The requirement to not use personal hedging strategies or insurance to undermine the risk alignment effects embedded in staff's remuneration arrangements should apply to deferred and retained variable remuneration.

182.Institutions should maintain effective arrangements to ensure that the identified staff member complies with the provisions of this section. At least a declaration of self-commitment by the identified staff member that he or she will refrain from concluding personal hedging strategies or insurance for the purpose of undermining the risk alignment effects is necessary. Institutions' human resources or internal control functions should perform at least spot-check inspections of the compliance with this declaration with regard to the internal custodianship accounts. Random checks should at least include the internal custodianship accounts of identified staff. Notification to the institution of any custodial accounts outside the institution should also be made mandatory.

10.2 Circumvention

183.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 and the provisions of these Guidelines 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 in which the staff member has a financial or personal interest.

184.'Circumvention' is 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 individual remuneration requirements.

185.Circumvention takes place in the following circumstances, among others:

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 other than guaranteed variable remuneration is awarded or vests although, effectively:

   i. there has been no positive performance measured in line with Title IV of these guidelines 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 receive 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 staff receive 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 to circumvent the remuneration requirements (e.g. non-redeemable loan);

e. where fixed remuneration components are awarded as a fixed number of instruments and not as a fixed amount;

f. where staff are awarded remuneration in instruments or are 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;

g. where adjustments to fixed remuneration components are frequently negotiated and adjustments are in fact made to align the remuneration with the performance of staff;

h. where allowances are awarded at an excessive amount that is not justified for the underlying circumstances;

i. where remuneration is labelled as payment for early retirement and not taken into account as variable remuneration, where in fact the payment has the character of a severance payment, as it is made in the context of the early termination of the contract, or where in fact the staff member does not retire after such award is made or where the payments are not granted on a monthly basis;

j. any measures that would lead to a situation where in fact the remuneration policy would no longer be gender neutral.

186. Institutions should ensure that the method for measuring the performance has appropriate controls 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.

187. Institutions should not provide compensation for any reduction or restructuring of variable remuneration, e.g. made in the context of recovery and resolution measures or other exceptional government intervention, in later years or by other payments, vehicles or methods.

188. Institutions should not create group structures or offshore entities or contracts with persons that act on behalf of the institution in order to manipulate the outcome of the identification process (e.g. because one Member State applies the derogation within Article 109(6) of Directive 2013/36/EU) and to circumvent the application of the remuneration requirements and the provisions of these Guidelines to staff to which these requirements and provisions should otherwise apply.

189. Where short-term contracts (e.g. one year) are 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 remuneration requirements of Directive 2013/36/EU, e.g. as they would in fact create variable remuneration, and take appropriate measures to ensure that institutions comply with the requirements of Articles 92 and 94 of Directive 2013/36/EU.

190. Where remuneration is fixed remuneration according to the guidelines in section 7, but is paid out in instruments, institutions and competent authorities should consider if the instruments used turn the fixed component of remuneration into 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 incentives for excessive risk taking.

Title III - Remuneration of specific functions

11. Remuneration of members of the management and supervisory function of the management body

191. 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.

192. In order to properly address conflicts of interest and without prejudice to paragraphs 193 and 194, 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 per working hour or day, even if the time to be reimbursed is not predefined, are considered as fixed remuneration.

193.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.

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

12 Remuneration of control functions

195.The internal control functions should be independent and have sufficient resources, knowledge and experience to perform their tasks with regard to the institution's 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.

196.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, to reflect the nature of their responsibilities.

197.The methods used for determining the variable remuneration of control functions, i.e. risk management, compliance and internal audit function, should not compromise staff's objectivity and independence.

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

13. Remuneration policy for identified staff

198.Institutions must ensure that the remuneration policy for identified staff complies with all principles set out in Articles 92 and 94 and, where applicable, Article 93 of Directive 2013/36/EU and is gender neutral.

199.Institutions should implement, for different categories of identified staff, specific remuneration policies and risk alignment mechanisms as appropriate to ensure that the impact of the category of identified staff on the institution's risk profile is appropriately aligned with their remuneration.

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

201.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 institution's policies. When a shareholding requirement is applied, staff should 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 equal or higher seniority.

13.1 Fully flexible policy on variable remuneration

202.Institutions must have a fully flexible policy on variable remuneration for identified staff, in accordance with Article 94(1)(f) of Directive 2013/36/EU. The amount of variable remuneration awarded should appropriately react to changes in 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. This should include performance levels where variable remuneration decreases down to zero. Unethical or non-compliant behaviour should lead to a significant reduction of the staff member's variable remuneration.

203.The gender-neutral fixed remuneration of identified staff should reflect their 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.

204.The amount of fixed remuneration must 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 short-term-oriented excessive risk taking, including the mis-selling of products, where without such short-term risk taking the performance of the institution or staff would not allow for the award of variable remuneration.

205.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.

13.2 Ratio between fixed and variable remuneration

206.Institutions should set in advance in their remuneration policy the appropriate level of the maximum ratio between the variable and fixed components of total remuneration for identified staff, in accordance with the limits and procedures provided in Article 94(1)(g) of Directive 2013/36/EU and national law, taking into account the business activities, the risks and the impact that different categories of staff have on the risk profile. Institutions may set different ratios for different jurisdictions, different business units, corporate and internal control functions and different categories of identified staff. The ratio set is the ratio between the variable component of remuneration that could be awarded as a maximum for the following performance period and the fixed component of remuneration for the following performance period.

207.The maximum 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 components of remuneration to be awarded in relation to the same performance year. In any case, 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.

208.In exceptional and duly justified cases, the remuneration policy may provide for a different ratio for individual identified staff members belonging to a certain category of staff compared with other staff members included in the same category of staff.

209.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.

210.The effective ratio should be calculated as the sum of all variable components of remuneration that have been awarded for the last performance year as set out in these guidelines, including amounts awarded for multi-year accrual periods, divided by the sum of fixed components of remuneration awarded for the same performance year. For multi-year accrual periods that do not revolve annually, institutions may alternatively take into account in each year of the performance period the maximum amount of variable remuneration that can be awarded at the end of the performance period divided by the number of years of the performance period.

211.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'. The effective ratio must not exceed the maximum ratio set in accordance with Article 94(1)(g) of Directive 2013/36/EU, national law and the institution's remuneration policy.

212.When calculating the maximum or effective ratio, institutions should apply the EBA guidelines on the applicable notional discount rate for variable remuneration under Article 94(1)(g)(iii) of Directive 2013/36/EU only when Member States have implemented Article 94(1)(g)(iii) of Directive 2013/36/EU or when the ratio is calculated for identified staff of an institution located in a third country that is a subsidiary of an EU parent institution.

14. Risk alignment process

213.The risk alignment process includes the performance and risk measurement process (section 14.1); the award process (section 14.2); and the pay-out process (section 15). At each stage of the risk alignment process, the variable remuneration should be adjusted for all current and future risks taken. Institutions should ensure that incentives to take risks are balanced by incentives to manage risk.

214.Institutions should align the time horizon of the risk and performance measurement with the institution's business cycle 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 that 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.

215.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' (i.e. within the organisation) or 'external' (i.e. similar institutions). Quantitative and qualitative criteria and the processes applied should be transparent and, as far as possible, predefined. Both quantitative and qualitative criteria may partly rely on judgement.

216.Where judgemental 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 judgement will be based;

b. providing clear and complete documentation of the final decision regarding the risk and performance measurement or risk adjustments applied;

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 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.

217.Institutions should make the risk alignment process transparent to identified staff, including any elements that are based on judgement rather than objective facts or data.

218.Institutions should provide detailed information to the remuneration committee or to the supervisory function if the final outcome after applying judgemental measures is significantly different from the initial outcome using predefined measures.

14.1 Performance and risk measurement process

219.The variable remuneration of identified staff 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 in which he or she is active and current and future risks.

14.1.1 Risk assessments

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

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

222.Institutions should also use measures for the 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.

223.In order to conservatively take into account all material risks at the institution and business unit levels, 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 incorporate stressed conditions.

224.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.

14.1.2 Risk-sensitive performance criteria

225.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.

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

227.The criteria used to measure risk and performance should be linked as closely as possible to the decisions made by the identified 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 staff's behaviour.

228.Performance criteria should include achievable objectives and measures on which the identified 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 results and outcomes actually realised should be measured.

229.Quantitative criteria should cover a period which is long enough to properly capture the risk taken by identified 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.

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

231.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, teamwork, creativity, motivation and cooperation with other business units, internal control and corporate functions.

14.1.3 Specific criteria for control functions

232.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.

233.The criteria used for assessing the performance and risks should predominantly be based on the internal control functions' objectives. Variable remuneration for control functions should predominantly 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 may be based also to some extent on the performance of the institution as a whole. The institution should consider setting a significantly lower ratio between the variable and fixed components of remuneration for control functions compared to the business units they control.

234.If the head of the risk management function (Chief Risk Officer or CRO) is also a member of the management body, the principles set out in paragraphs 232 and 233 should also apply to the CRO's remuneration.

14.2 Award process

235.Institutions should set a bonus pool. 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.

236.Variable remuneration should be awarded after the end of the accrual period. The accrual period should be at least one year. Where longer periods are used, different accrual periods may overlap, for example if a new multi-year period starts each year.

237.After the accrual period, the institution should determine the individual identified 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').

14.2.1 Setting of bonus pools

238.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.

239.When setting the bonus pools, institutions should take into account the ratio between the variable and fixed components of total remuneration applicable to categories of identified staff, performance and risk criteria defined for the overall institution, control objectives and 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, capital base and liquidity.

240.The bonus pools should not be set at a certain level to meet remuneration demands.

241.Institutions should have appropriate processes and controls in place when determining the overall bonus pool.

242.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.

243.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 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.

244.When distributing the bonus pool to the level of the business unit or individual staff member, the allocation should be based as appropriate on predefined formulae and judgemental approaches. Institutions may use scorecards or other appropriate methods to combine different approaches.

245.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 judgemental approaches. The judgemental 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.

246. Factors such as budget 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.

247. Institutions should maintain records on how the bonus pool and staff's remuneration were determined, including how estimates based on different approaches were combined.

14.2.2 The ex ante risk adjustment in the award process

248. Institutions should determine the bonus pool and variable remuneration to be awarded based on an assessment of performance and risks taken. The adjustment for risks before the award is made ('ex ante risk adjustment') should be based on risk indicators and 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 to reflect all relevant risks.

249. Depending on the availability of risk adjustment criteria, institutions should determine at what level they apply ex ante 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. the trading desk or the individual staff member.

250. Risk alignment should be achieved by using risk-adjusted performance criteria, including performance criteria that are adjusted for risk based on separate risk indicators. Quantitative and qualitative criteria should be used.

251. 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 (i.e. mismatch liquidity costs, cost of contingent liquidity risk and other liquidity risk exposures that an institution may have).

252. 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.

253.Institutions should make qualitative ex ante risk adjustments when determining the bonus pool and identified staff's remuneration through, for example, 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.

15. Pay-out process for variable remuneration

254.Institutions 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 in accordance with Article 94 of Directive 2013/36/EU. Before paying out the deferred part of cash or the vesting of deferred instruments, a reassessment of the performance and, if necessary, an ex post risk adjustment should be applied to align variable remuneration to additional risks that have been identified or materialised after the award. This also applies where multi-year accrual periods are used.

15.1 Non-deferred and deferred remuneration

255.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 identified staff members, so that a sufficient part of the variable remuneration can be adjusted for risk outcomes over time through ex post risk adjustments.

256.A deferral schedule is defined by different components:

a. the proportion of the variable remuneration that is being deferred (section 15.2);

b. the length of the deferral period (section 15.2);

c. the speed at which the deferred remuneration vests, including the time span from the end of the accrual period until the vesting of the first deferred amount (section 15.3).

257.Institutions should take into account within the deferral schedule the form in which the deferred variable remuneration is awarded and should, where appropriate, differentiate their deferral schedules by varying these components for different categories of identified 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.

15.2 Deferral period and proportion of deferred remuneration

258.The deferral period starts after the award is made (e.g. 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.

259.When setting the actual deferral period and proportion to be deferred in accordance with the minimum requirements under Article 94(1)(m) and Article 94(3) of Directive 2013/36/EU, institutions should consider:

a. the responsibilities and authorities of identified staff and the tasks they performed;

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 identified staff on these fluctuations;

d. the approved ratio between the variable and fixed components of the total remuneration and the absolute amount of variable remuneration.

260.Institutions should determine for which categories of identified staff, also considering their roles and responsibilities, deferral periods longer than the required minimum period of at least four 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 than the deferral periods which would be appropriate when a one-year accrual period would be used. The minimum requirement of a four-year deferral period and five year deferral period for members of the management body and senior management in significant institutions applies in any case.

261.For members of the management body and senior management, significant institutions that do not benefit from the waiver within Article 94(3) of Directive 2013/36/EU should defer a significantly higher portion than 50% of the variable remuneration paid in instruments.

262.Institutions should set an appropriate portion of remuneration that should be deferred for a category of identified staff or a single identified staff member at or above the minimum proportion of 40%. In case of particularly high amounts of variable remuneration, the proportion of deferral for such staff members should be at least 60%.

263.Institutions should define what level of variable remuneration constitutes a particularly 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, competent authorities should set an absolute or relative threshold, considering the above criteria. Remuneration at or above that threshold should always be considered as being a particularly high amount.

264.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 the rest is deferred; and part above 200: 25% upfront and the rest is deferred), institutions should be able to demonstrate to the competent authority that on an average weighted basis for each identified 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 identified staff member in question.

265.Where the general principles of national contract and labour law prevent the substantial reduction of variable remuneration 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 which ensure that ex post risk adjustments are applied as far as possible. This may include any of the following:

a. the setting of longer deferral periods;

b. avoiding the use of pro rata vesting in situations where malus can be applied, but the application of clawback would be subject to legal impediments;

c. awarding a higher portion of variable remuneration in instruments that are aligned to the performance of the institution and subject to sufficiently long deferral and retention periods.

15.3 Vesting of deferred remuneration

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

267.Deferred remuneration should either vest fully at the end of the deferral period or be spread out over several payments in the course of the deferral period in accordance with Article 94(1)(m) of Directive 2013/36/EU.

268.Pro rata vesting means for e.g. a deferral period of four years that at the end of years n+1, n+2, n+3 and n+4, one fourth of the deferred remuneration vests, with *n* being the moment at which the upfront part of awarded variable remuneration is paid.

269.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.

15.4 Award of variable remuneration in instruments

270.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.

271.Where instruments issued by an institution in the scope of consolidation under points (i) and (ii) of Article 94(1)(l) of the 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.

272.The availability of instruments under Article 94(1)(l)(i) of the CRD depends on the legal form of an institution:

a. For institutions which are stock corporations (both listed and non-listed), shares or share-linked instruments are available.

b. For institutions which are non-stock corporations, ownership interests that are equivalent to shares or non-cash instruments that are equivalent to share-linked instruments are available.

273.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 interests.

274.The availability of 'other instruments' under Article 94(1)(l)(ii) of Directive 2013/36/EU depends on whether an institution or an institution in the scope of consolidation has already issued such instruments and 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 their capital requirements, such instruments should be available for the purposes of variable remuneration, provided that these 'other instruments' comply with Commission Delegated Regulation (EU) No 527/2014.

275.Where there are no specific factors or national laws that prevent the use of 'other instruments' under Article 94(1)(l)(ii) of Directive 2013/36/EU, or factors that prevent institutions from issuing instruments in compliance with Commission Delegated Regulation (EU) No 527/2014, then such instruments should be used for the award of variable remuneration, where they are available.

276.Where both equity or equity-linked and other eligible instruments defined under Commission Delegated Regulation (EU) No 527/2014 are available, it is possible to pay variable remuneration as a balance of different instruments. In that case, institutions must 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 Directive 2013/36/EU. 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.

277.Institutions should ensure that they have the awarded instruments available when the variable remuneration awarded in instruments vests. Institutions may decide not to hold the instruments during the deferral period, but should in that case take into account the relevant market risks.

278.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 to ensure that ex post risk adjustments are applied correctly and before the retention period ends. Institutions that are not large institutions and that are not listed may establish the value of the ownership interests and ownership interest-linked instruments based on the last annual financial results.

279.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 instruments awarded is provided to identified staff at vesting, unless the number or nominal amount is reduced by the application of malus. Institutions should make sure that the awarded instruments are available for the pay out to staff at the latest when they vest.

280.Institutions should not pay any interest or dividend on instruments which have been awarded as variable remuneration under deferral arrangements to identified staff; this also means that interest and dividends payable during the deferral period should not be paid to staff after the deferral period ends. Such payments should be treated as received and owned by the institution.

281.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 Directive 2013/36/EU.

15.5 Minimum portion of instruments and their distribution over time

282.Where applicable, the requirement to pay, in accordance with Article 94(1)(l) of Directive 2013/36/EU, at a minimum 50% of any variable remuneration in instruments should 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 15.4.

283. Institutions should prioritise the use of instruments rather than award variable remuneration in cash. Institutions should set the percentage which must be awarded in a balance of instruments at or above 50% separately for the deferred and non-deferred parts of variable remuneration. Where institutions award 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.

284. The ratio of variable remuneration that is paid out in instruments should be calculated as the quotient between the amount of variable remuneration awarded in instruments and the sum of the variable remuneration awarded in cash, instruments and in other benefits. All amounts should be valued at the point of award unless stated otherwise in these guidelines.

15.6 Retention policy

285. 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.

286. Institutions 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.

287. When setting the retention period, institutions should consider the overall length of the deferral and the planned retention period and the impact of the category of identified staff on the institutions' risk profile and the length of the business cycle relevant to the category of staff.

288. 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.

289. 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 in the value of instruments which have been awarded. Where the deferral period is at least five years, a retention period for the deferred part of at least six months may be imposed for identified staff other than members of the management body and senior management for whom a minimum retention period of one year should be applied.

15.7 Risk adjustment

15.7.1 Malus and clawback

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

291. Without prejudice to the general principles of national contract or labour law, institutions must be able to apply malus or clawback arrangements to up to 100% of the total variable remuneration in accordance with Article 94(1)(n) of Directive 2013/36/EU regardless of the method used for the payment, including deferral or retention arrangements.

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

293. Institutions should analyse whether their initial ex ante risk adjustments were 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.

294. When setting criteria for the application of malus and clawback in accordance with Article 94(1)(n) of Directive 2013/36/EU, institutions should also set a period during which malus or clawback will be applied to identified staff. This period should at least cover deferral and retention periods. Institutions may differentiate between criteria for the application of malus and clawback. Clawback should in particular be applied in the case of fraud or other conduct with intent or severe negligence which led to significant losses.

295. Institutions should use at least the performance and risk criteria initially used in order to ensure a link between the initial performance measurement and its back-testing. Institutions should, in addition to the criteria set out in Article 94(1)(n)(i) and (ii) of Directive 2013/36/EU, use 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 identified staff member works suffers a significant failure of risk management;

d. significant increases in the institution's or business unit's economic or regulatory capital base;

e. any regulatory sanctions, e.g. punitive, administrative, disciplinary or otherwise, where the conduct of the identified staff member contributed to the sanction.

296. Where malus can only be applied at the time of vesting of the deferred payment, institutions may choose, where possible, to apply clawback after the pay out or vesting of the variable

remuneration. The application of malus may not be possible where the derogation under Article 94(3) of Directive 2013/36/EU applies as the requirement to defer variable remuneration is not applied; institutions should ensure that clawback can be applied.

297.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 variable remuneration initially awarded or, where malus or clawback was already applied in the past, to an increase of the reduced variable remuneration.

15.7.2 Implicit adjustments

298.Institutions should use instruments for variable remuneration where the price reacts to changes in the institution's 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.

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

Title V - Institutions that benefit from government intervention

16. State support and remuneration

300.In line with section 6 of these guidelines, 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 of variable remuneration to ensure compliance with Articles 93 and 141 of Directive 2013/36/EU. Any payment of variable remuneration should not endanger compliance with the established recovery and exit plan from exceptional government intervention.

301.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.

302.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 restructuring plan.

303.The institution should ensure that a bonus pool or the vesting and pay 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.

304.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 intervention, the percentage of the net revenue under point (a) of Article 93 of Directive 2013/36/EU 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 measures to restructure the remuneration where necessary.

305.Strict limits on 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 Directive 2013/36/EU 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 intervention 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.

306.In order to restructure remuneration in accordance with Article 93(b) of Directive 2013/36/EU in a manner aligned with sound risk management and long-term growth, competent authorities should require:

a. where appropriate, the limiting of variable remuneration for members of the management body to amounts down to zero so that the variable remuneration has no considerable impact on the recovery of the institution;

b. the alignment of 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. the application of 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. an increase in the percentage of variable remuneration which is deferred up to 100%;

e. the alignment of the accrual and deferral periods with the recovery or restructuring phase and plans.

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

Title VI - Competent authorities

17. Remuneration policies

308.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 requirements on remuneration policies set out in Directive 2013/36/EU, Regulation (EU) 575/2013 and the provisions of the RTS on identified staff, including that they have appropriate gender-neutral remuneration policies for all staff and for identified staff. Competent authorities should apply a risk-based approach when supervising the remuneration policies of institutions.

309.Without prejudice to other supervisory and 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 requests, appropriate supervisory measures should be taken.

310.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.

311.Competent authorities should ensure that institutions' remuneration policies, practices and processes are appropriate and review, in addition to the reviews required under the EBA guidelines on the supervisory review process, in particular:

a. the governance arrangements and processes for designing and monitoring the remuneration policy;

b. that an 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 its main results, including whether the remuneration policy is gender neutral;

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;

f. that remuneration policies are taken into account within the internal capital adequacy assessment process and the liquidity planning and vice versa.

312.As part of the above reviews, competent authorities should in particular, but not only :

a. use the minutes of the deliberation of the supervisory function on remuneration policies, in particular with respect to the results of the oversight of the institution's remuneration system's design and processes and the tasks conducted by the remuneration committee;

b. use 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. hold meetings with members of the institution's management body and other relevant functions.

313.Competent authorities should ensure that institutions supervised on a consolidated and sub-consolidated basis have established a remuneration policy at the group and sub-consolidated level, including – as far as required by the national implementation of Article 109(4) to (6) of Directive 2013/36/EU – subsidiaries which are not themselves subject to Directive 2013/36/EU, which is implemented consistently within the group, including for the purposes of the determination of identified staff.[36]

314.Competent authorities should ensure that the institutions' identification process:

a. includes the qualitative and quantitative criteria set out in Article 92 of Directive 2013/36/EU and in the RTS on identified staff and where appropriate additional criteria defined by the institution;

b. is applied appropriately on an individual, consolidated or sub-consolidated level; and

c. ensures that requests for prior approval under the RTS on identified staff are processed in accordance with these guidelines.

315.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 were only identified by the quantitative criteria under Article 92 of Directive 2013/36/EU and in the RTS, are well reasoned and that the requirements under Article 92 of Directive 2013/36/EU and the respective processes set out in these guidelines and the RTS have been complied with.

[36] Please also refer to the guidelines in paragraphs 74 and 75 of these guidelines.

18. Specific forms of remuneration

316.With regard to specific forms of remuneration under section 8 of these guidelines, competent authorities should, without prejudice to Section 19:

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.

19. Variable remuneration

317.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:

  ii. the criteria are aligned with the institution's objectives;

  iii. they are realistic compared with the individual's, business unit's and institution's objectives;

  iv. the individual criteria are appropriate to measure the individual's performance;

c. whether internal control functions, in particular the 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 complying with the limitation of the ratio between the variable and fixed components of the total remuneration and the capping of its overall bonus pool to the limits set by Articles 141 and 141b of Directive 2013/36/EU and by Article 16a of Directive 2014/59/EU;

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 interests 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 Directive 2013/36/EU 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 as specified in these Guidelines for identified staff or, where applicable, for all staff.

20. Disclosures

318. Competent authorities should review the public disclosures on remuneration made by institutions in accordance with Article 96 of Directive 2013/36/EU and Article 450 of Regulation (EU) 575/2013, and should establish for which institutions a regular review of disclosures should be performed.

319. In addition to the benchmarking of remuneration practices required under Article 75(1) of Directive 2013/36/EU and the exercise on data collection regarding high earners under Article 75(3) of that Directive, competent authorities should require periodic (or ad hoc) supervisory reporting on remuneration disclosures as appropriate in order to monitor the development of remuneration practices within institutions and in particular within significant institutions.

21. Colleges of supervisors

320. Colleges of supervisors established pursuant to Article 116 of Directive 2013/36/EU should discuss remuneration issues in line with the supervisory review process, taking into account the additional areas of supervisory review required under these guidelines.

Annex 1 - MAPPING OF THE REMUNERATION REQUIREMENTS INCLUDED IN DIRECTIVE 2013/36/EU AND REGULATION (EU) 575/2013 AND THEIR SCOPE OF APPLICATION

Remuneration requirements: Articles 74 and 92 to 96 of DIRECTIVE 2013/36/EU	All staff (institution-wide including identified staff)	Mandatory for identified staff; institutions should consider applying the requirements to all staff	Comments
Art. 74	x		
Art. 92	x		
Art. 93	x		
Art. 94(1)(a)		x	
Art. 94(1)(b)		x	
Art. 94(1)(c)	x		
Art. 94(1)(d)	x		
Art. 94(1)(e)	x		
Art. 94(1)(f)		x	
Art. 94(1)(g)(i)		x	
Art. 94(1)(g)(ii)		x	
Art. 94(1)(g)(iii)		x	Application of the discount rate is not mandatory
Art. 94(1)(h)		x	
Art. 94(1)(i)		x	
Art. 94(1)(j)	x		
Art. 94(1)(k)	x		
Art. 94(1)(l)		x	
Art. 94(1)(m)		x	
Art. 94(1)(n)		x	
Art. 94(1)(o)		x	
Art. 94(1)(p)		x	
Art. 94(1)(q)		x	The circumvention provisions should be applied to all staff regarding requirements and provisions which are applied to all staff
Art. 95	Obligatory for significant institutions; other institutions should consider establishing such a committee		
Art. 96	x		
Art. 109	Institutions' arrangements, processes and mechanisms/group application		
Art. 141	Limitation of distributions		
Art. 141b	Limitation of distributions		

Annex 2 - Information with regard to the approval of higher ratios

Institution name	*text*
Legal Entity Identifier	*text*
Number of staff (end of the last financial year)	*number*
Number of identified staff (outcome of the last identification process)	*number*
Balance sheet total (end of the last financial year)	*number*
Decision taken	*dd/mm/yyyy*
Decided ratio	*number (percentage)*
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	*text*

5. Accompanying documents

5.1 Draft cost-benefit analysis/impact assessment

1. Article 16(2) of 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) (EBA Regulation) provides that the EBA should carry out an analysis of 'the potential related costs and benefits' of any guidelines it develops. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

A. Problem identification and policy objectives

2. Directive 2013/36/EU has been amended. The EBA guidelines on sound remuneration policies needed to be amended to reflect those changes and supervisory experience regarding the application of the currently applicable guidelines (EBA-GL-2015-22).

3. The amendments to the guidelines should ensure that there are gender-neutral remuneration policies and clarity about the application of the requirements within groups and with regard to the application of waivers. Further clarity on the treatment of retention bonuses and severance payments has been provided to ensure that such tools are not used to circumvent remuneration requirements and in particular the bonus cap. The EBA has been mandated to develop draft RTS on disclosures and therefore guidelines on disclosures have been removed from the guidelines.

B. Baseline scenario

4. The current EU legislative framework for credit institutions' remuneration policies consists mainly of Directive 2013/36/EU and the EBA guidelines on sound remuneration policies, guidelines on the data collection exercise regarding high earners and guidelines on the remuneration benchmarking exercise.

5. The impact assessment covers guidelines developed to ensure the harmonised application of the amended remuneration requirements introduced by Directive 2013/36/EU and areas where the policy has changed. Areas that have not changed in substance and the underlying changes introduced within Directive 2013/36/EU and Regulation (EU) No 575/2013 have not been assessed.

6. Following changes to the scope of application of the CRD, several parts of the GL had to be aligned accordingly to reflect the changes within the CRD. There has not been another option as the guidelines must follow the legal text in this respect and therefore no cost-benefit analysis is provided for such changes to the guidelines.

C. Options considered

Scope of application and implementation date.

7. The scope of application of the CRD changes and specific requirements regarding remuneration policies are being introduced for investment firms in June 2021 with Directive (EU) 2034/2019. At the same time, further amendments to the CRD are coming into force. On 28 December 2020, additional requirements enter into force, including that institutions' remuneration policies are gender neutral.

8. Considering the time needed for the implementation of guidelines, the extent of the changes made and also the resources available at EBA, it has been decided to revise the guidelines only once, instead of providing guidelines for the amendments that apply from 28 December 2020 and 26 June 2021 separately. To allow for a sufficiently long implementation period, the date of application has been moved back to 31.12.2021.

Gender-neutral remuneration policies

9. The CRD requires institutions to have gender-neutral remuneration policies. The principle of gender neutrality and the need to provide for equal opportunities are included in the Treaty on the Functioning of the European Union and the European Charter of Fundamental Rights. Guidelines should ensure that those principles are implemented efficiently.

   Option A: The guidelines should provide for measures that enable a review of whether remuneration policies are indeed gender neutral.

10. To ensure that work done by different staff is comparable, institutions need to properly document the responsibilities of staff or have a job classification system in place. Institutions should also identify the gender pay gap and monitor its development over time. The ratios included in the guidelines help to make such differences comparable between different institutions and enable auditors and supervisors to challenge the appropriateness of policies. However, considering the demographic differences between Member States and institutions, such indicators cannot form hard criteria. Another option would have been to provide for very granular criteria for comparing payment levels, but such criteria would possibly not suit all business models and would be too burdensome to apply.

    Option B: The guidelines should clarify aspects that could justify differences in pay that are not related to gender.

    Some differentiations in pay are possible, but must not lead to any discrimination. The guidelines specify common provisions that may lead to a differentiation in pay to provide for legal certainty that such differentiations are not considered to be discriminatory, even if some payments may be more often made to the female gender (e.g. child allowances).

Option C: The guidelines should clarify that institutions must also take care to provide for equal opportunities.

To ensure that remuneration is gender neutral in the long run and that all genders have the same chance of progression, it is appropriate to require institutions to ensure that they provide for equal opportunities, even if in the short run such measures do not reduce any pay gap that might exist.

Option D: The guidelines should clarify that gender neutrality is not limited to the male and female gender, but also applies to diverse genders where implemented by Member States.

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

11. All options have been retained to provide an effective framework for ensuring gender-neutral remuneration policies and equal opportunities. The implementation will cause one-off costs to amend policies and establish (if not in place) documentation (e.g. job descriptions); low ongoing costs will be created due to the calculation of pay gap data.

Group application and waivers

12. Article 109 of the CRD sets out how remuneration requirements are applied in the group context. The guidelines provide clarity about the application of this provision, including where Article 109 has changed. The guidelines in particular clarify that firms that are subject to a specific remuneration requirement are not subject to the CRD provisions unless Member States make use of the derogation in Article 109(6) or Article 109(5) applies to single staff members. This does not lead to additional costs.

13. The guidelines clarify how the thresholds for waivers should be calculated. The implementation of the waivers and the level of thresholds used (within the limits provided within the CRD) as such is subject to national discretion.

14. The waivers have been introduced by the co-legislators to reduce the burden for institutions that are not large or for staff that have a low amount of variable remuneration as the costs would exceed the prudential benefit. Institutions that are subsidiaries of large institutions can rely on the resources of their parent institution and can use the instruments issued by it.

15. The guidelines specify how different elements of remuneration are taken into account when the threshold for staff is calculated. Two options have been considered:

Option A: Including all components of variable and fixed remuneration;

Option B: Including all elements of variable remuneration and only the directly quantifiable elements of fixed remuneration with the option to include other fixed elements as well.

Option B has been retained. Leaving out a few elements of fixed remuneration increases the ratio between the variable and the fixed part of remuneration. Therefore there is no prudential risk, but the higher level of flexibility reduces the cost for the application of waivers under CRD.

16. No additional costs are created by the guidelines on the application of waivers; the costs are driven by the provisions within the CRD directly.

Retention bonus

17. Supervisory review in some Member States showed that institutions sometimes used retention bonuses to replace performance-based bonuses and that the justification provided was not always sufficient. Two options have been considered:

Option A: Keeping the guidelines in place as the supervisory dialogue with individual institutions will lead to a correct application of the requirements in the longer run.

Option B: Providing further clarity on the conditions of retention bonuses and the assessment of their appropriateness.

Option B has been retained. Option A would not be efficient and would bind additional resources at institutions and competent authorities.

Severance payments

18. Supervisory review in some Member States showed that institutions also used severance payment in situations where they were actually discretionary pension benefits or other payments than for the early termination of the contract by institutions to the benefit of the specific regime for the calculation of the ratio between the variable and fixed remuneration. Two options have been considered:

Option A: Keeping the guidelines in place as the supervisory dialogue with individual institutions will lead to a correct application of the requirements in the longer run.

Option B: Providing further clarity on the conditions of severance payments, the calculation of the ratio and the assessment of their appropriateness.

Option B has been retained. Option A would not be efficient and would bind additional resources at institutions and competent authorities. Option B also increases the legal certainty. However, the amendments are creating some costs for the potential review by competent authorities before the award and the limitation to actual labour conflicts instead of actual or potential labour conflicts. It is left to the competent authorities if they want to implement a prior approval or review process. To limit in any case the regulatory burden, such a process should be limited to severance payments that exceed EUR 200 000.

D. Cost-benefit analysis

19. Given the limited amendments to the guidelines and given that they are based on amendments of Directive 2013/36/EU and other existing legal requirements, it is assumed that the changes to the guidelines as such create low implementation costs mainly for updates to internal policies and additional required documentation. Where implemented by the competent authority, a pre-assessment of severance payments will lead to some additional costs at institutions and competent authorities. Such assessments, if implemented, should therefore be limited to severance payments that are material.

5.2 Feedback on the public consultation and on the opinion of the Banking Stakeholder Group[37]

The guidelines have been consulted on for a three-month period until 29 January 2021. The EBA received overall 18 responses; 17 of them have been published. One was submitted on a confidential basis. In addition, the EBA's Banking Stakeholder Group (BSG) submitted its opinion.

Most respondents noted that the date of application is too ambitious and the institutions need some time for internal implementation of the new guidelines (in particular, concerning the analysis and application of the gender-neutral principle or the modifications to the identification process). Many respondents suggested delaying the date of application to 1 January 2022.

Some respondents found that the guidelines go further than explicitly stated in Directive 2013/36/EU (CRD) regarding gender-neutral remuneration policies. For instance, the obligation for the supervisory function (or remuneration committee/internal audit function) to analyse the 'gender pay gap' would be burdensome, while it would not be required for the purpose of gender-neutral remuneration policies. Having job descriptions has been considered as too burdensome. Also it has been considered that the guidelines have too wide a scope as they include aspects on equal opportunities. Respondents proposed to introduce references to the application of proportionality and to exclude some institutions from the measurement of the gender pay gap.

A few respondents highlighted the importance of avoiding 'conflicts of laws' among the guidelines and national social and labour legislations or conflicts with regard to collective bargaining, in particular concerning gender-neutral remuneration policies.

Some comments were raised on the scope of application, suggesting in some cases to exclude non-regulated entities (advisory and corporate finance companies, in addition to FinTech subsidiaries) from the application of the CRD V, or at least the bonus cap.

Some participants deemed as too restrictive the amendments to the GL on retention bonuses. They have suggested different wording/ideas concerning when the retention bonuses should be awarded or the possibility of multiple retention bonuses, among others.

On severance payments, many respondents expressed concerns on new provisions and found them too restrictive, which could lead to a situation where court settlements would become necessary in order to comply with the bonus cap.

The BSG suggested some amendments to the guidelines to reinforce the gender neutrality of remuneration policies and the compliance with the obligation under European directives to ensure equal opportunities for different genders and to make reference to the Commission Recommendation C (2014) 1405 final regarding the gender pay gap. Regarding severance payments, the BSG is of the view, like many other respondents, that there should be the same

[37] The opinion of the BSG is published at: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2021/Guidelines%20on%20sound%20remuneration%20policies%20under%20Directive%202013-36-EU/962514/EBA%20BSG%20CP%20Remuneration%20Policy.pdf.

treatment for the calculation of the amounts when applying the waivers and the calculation of the ratio between the variable and fixed remuneration.

The EBA has taken into account the comments received and the opinion of the Banking Stakeholder Group and revised the guidelines. The guidelines aim to further specify requirements under the CRD and to achieve harmonisation at the EU level. Given the need of Member States to implement the CRD provisions and to abide by the principles set out within the European Charter of Fundamental Rights, it would be surprising if social or labour law, including collective bargaining, would lead to results that are not gender neutral. Therefore, it is presumed that the guidelines do not lead to any conflicts regarding those matters. However, the obligation to ensure a gender-neutral remuneration policy is on the institutions and not on the social partners that negotiate employment conditions.

The EBA is aware of the challenges that might exist regarding the application of remuneration requirements on a consolidated basis to firms that are not themselves subject to the CRD. However, the scope of the guidelines is set in line with the scope of application of the CRD. Guidelines cannot reduce the scope of application set out in the CRD. The date of application has been moved back as suggested: the guidelines will enter into force at the end of 2021 and will then apply to institutions' remuneration policies.

All aspects of the remuneration policy must be gender neutral. Some aspects concerning equal opportunities and anti-discrimination have been further specified in the EBA guidelines on internal governance. However, some aspects have also been retained in these guidelines as they are linked to the remuneration of staff. This is in line with Article 75 of the CRD that requires the benchmarking of the gender pay gap, which is also linked to the issue of how the principle of equal opportunities and respective national requirements [38] are implemented within institutions' governance arrangements, which include remuneration policies as specified in Article 74 of the CRD. The guidelines have been revised to reduce the burden for the implementation of a job categorisation regime. The EBA will provide additional guidance regarding the benchmarking of the gender pay gap in line with its mandate under Article 75 of the CRD.

The guidelines have been revised to provide more clarity on retention bonuses and on severance pay. Retention bonuses are variable remuneration and therefore subject to the requirements under Article 94 of the CRD.

The different calculation of amounts regarding the application of waivers under Article 94(3) of the CRD and the application of the bonus cap in the context of severance payments has been retained, but has been further specified. The calculation differs as the context and the underlying provisions of the CRD differ. The thresholds for the application of waivers are set out in the CRD and cannot be increased by guidelines. The waivers introduced and thresholds set by the co-legislators have the purpose of reducing the burden for the pay out of a part of the variable remuneration in instruments and under deferral arrangements, in situations where only a low amount is paid. Where in fact a higher amount is paid out, the prudential benefits of applying those requirements exceed the burden for their application.

[38] E.g. Directive 2006/54/EU on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The different calculation of amounts in the context of severance payments is a technical necessity and ensures that the limitation of the ratio between variable and fixed remuneration can be applied in a meaningful way. If some amounts would not be excluded from the calculation of the maximum ratio, institutions would be forced to either breach the requirements or to have a decision by the court in several cases of severance payments. The calculation of a ratio with regard to severance payments also differs as the payment is made for the early termination of a contract and not for a defined performance period. Also, in the case of an early termination of a contract, the variable remuneration received should be aligned with the institution’s risks.

More detailed feedback on the comments is included in the following feedback table.

Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
Background and rationale Executive summary, para 3, 29 and 52	A few respondents suggested replacing the term 'low level of variable remuneration' with a reference to the 'quantitative threshold that applies in the individual MS' or other term defined within the GL.	The same term is used in the recitals to the CRD. The GL are based on the CRD and clearly point to the issue of national implementation. However, the background section has been clarified.	GL amended
Executive summary (page 8)	Some respondents commented that the mandate of the EBA is limited to reflecting the changes introduced by the revision of the CRD, thus it does not comprise the clarifications on severance payments, retention bonuses and discretionary pension benefits.	Article 16 of the EBA Regulation empowers the EBA to set GL in its field of competence, which includes the whole Directive 2013/36/EU. This power includes the power to revise GLs.	No change
Background and rationale (page 10)	One respondent asked for details concerning references to reporting requirements and delegated regulations mentioned in paragraph 11.	The EBA has drafted (and submitted to the Commission) RTS on the criteria to identify material risk takers, on instruments and ITS on institutions' public disclosure, as mentioned in paragraph 11.	No change
Background and rationale (page 13)	Some respondents pointed out that the 'Gender-neutral remuneration policies' goes beyond the scope of the CRD. The respondents' proposals were to: delete the first sentence in paragraph 22 (concerning career perspectives, senior management representation and diversity); clarify in paragraph 23 the wording 'any form of discrimination, based on gender or otherwise' since the reference in the CRD (as well as in Article 157 of the TFEU); is made exclusively to gender and an extension of the requirements could have further-reaching consequences; clearly communicate that collectively agreed remuneration policies are in principle regarded as non-discriminatory, since	Not all staff receive pay based on collectively agreed contracts, which indeed should be providing for remuneration levels independent of staff's gender. However, it is on the institution to ensure that the remuneration policies are gender neutral and not the responsibility of the social partners. It is a core value of the EU that discrimination cannot be tolerated; it is encoded in the European Charter of Fundamental Rights. This principle also has to be respected by institutions' robust governance arrangements and within remuneration policies.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	they are negotiated on an equal basis; eliminate the last sentence of paragraph 23 (the reference to the equal opportunity principle as a pre-condition for gender-neutral pay); and redraft paragraph 24 to remove references to 'further measures to ensure equal opportunities' since the remuneration policy is just part of the global HR gender equality policy.	The issue of gender representation at the level of the management body is linked to career prospects and the available pool of candidates of all genders. Respecting the principle of equal opportunities, even if not strictly related to remuneration policies, should help to build up a diverse pool of candidates. Hence, ensuring equal opportunities is relevant within institutions' sound governance arrangements. The background section, which is not part of the guidelines, explains how those different aspects are linked. The background section has been clarified.	
Background and rationale (page 18)	One respondent asked for further clarifications on how to differentiate the pay out of the variable remuneration among material risk takers (paragraph 53).	Section 15 of the GL sets out the pay-out process for variable remuneration.	No change
Responses to questions in Consultation Paper EBA/CP/2020/24			
Question 1 (Subject matter, scope and definitions)			
Subject matter Para. 8	Some respondents raised concerns on the scope of application of the guidelines. Regarding letter (a), a few respondents considered that its application could limit banking innovation and damage competition among banks and unregulated/differently regulated companies, thus it is suggested to exempt FinTech subsidiaries from the application of the bonus cap or even the application of CRD requirements. Another respondent asked for further guidance on the case contained in letter (b).	The scope of application on an individual and consolidated basis is set by the CRD. The GL do not deviate from the scope set by the CRD, nor can GL have this effect. The aim of paragraph 9 is to elaborate on the different types of subsidiaries and situations in the scope of prudential consolidation in line with Article 109 of the CRD. Letter b) describes the situation of firms in third countries which, if located in the EU, would not be subject to a specific remuneration framework. Article 74 of the CRD, requiring gender-neutral remuneration policies, applies on a consolidated basis, Article 109 of the CRD	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Concerning letter (c), a few respondents noted that it is not clear why a subsidiary of an asset management or investment firm should comply on a consolidated basis with the requirements concerning gender-neutral remuneration policies.	exempts firms that are subject to a specific remuneration regime from the application of remuneration provisions encoded in Articles 92, 94 and 95 of the CRD.	
2. Definitions (para. 11) Gender pay gap	Some respondents noted that the definition of gender pay gap does not take into account the type of work, level of responsibility or experience, thus this definition is insufficient to meet the purpose of having gender-neutral remuneration policies and also differs from the 'equal pay for equal work or work of equal value'. In addition, it is proposed to replace the term 'earnings' with 'remuneration'; and the term 'hourly' with 'full-time annual remuneration awarded' or 'monthly/yearly remuneration' or 'gross annual remuneration'. In addition, it is proposed to link this definition with the methodology defined in section 2.5	In line with work published by the European Parliament[39], the gender pay gap is the difference in average gross hourly earnings between women and men. It is based on salaries paid directly to employees before income tax and social security contributions are deducted. Calculated this way, the gender pay gap does not take into account all the different factors that may play a role, for example education, hours worked, type of job, career breaks or part-time work. The gender pay gap indicates more than just the difference in hourly or annual gross remuneration for the same job (which should not be different at all), but provides information on how successfully equal opportunities have been provided within society and within the institution. The GL were amended to replace unclear terms.	GL amended
2. Definitions (para. 11) Gender-neutral remuneration policy	It is suggested to align the definition with the one set out in Article 3(65) of the CRD V or to delete the last sentence ('and that are assumed to affect all sexes equally').	The definition has been deleted as it is included in the CRD.	GL amended
2. Definitions (para. 11) Underrepresented gender	One respondent queried what happens if, in the case that national law foresees diverse categories of gender, the new total of the previously underrepresented gender exceeds the number of the previously overrepresented male or female gender.	While this is not likely to happen considering current practices, the definition has been clarified to avoid possible confusion. To ensure that the gender-neutral remuneration policies are also	GL amended

[39] https://www.europarl.europa.eu/news/en/headlines/society/20200109STO69925/understanding-the-gender-pay-gap-definition-and-causes.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		applied to staff of diverse genders, the GL on gender-neutral remuneration policies have been clarified.	
2. Definitions (para. 11) Severance payments	Some respondents considered that the concept of 'early termination of a contract' is unclear and should be developed, specifying that it comprises both contracts with predefined periods terminated before their end-date and indefinite contracts terminated before the legal retirement of the risk taker.	The term 'early' implies that the contract has not reached it 'regular end', which means end date in the case of temporary contracts and contractual or legal retirement in the case of indefinite contracts.	GL amended
2. Definitions (para. 11)	It has been suggested to keep the definition of prudential consolidation.	The comment has been accommodated.	GL amended
3. Implementation Para. 12	Some respondents pointed to the necessity of an appropriate timeframe for implementing internally the new requirements (at least six months after the translation), suggesting 1 January 2022 as the starting date. They also mentioned that in most cases the shareholders could have approved the remuneration policies by 26 June 2021, thus it is suggested to state that adjustments would proceed for remuneration policies as of the performance year 2022.	The date of application has been set to 31.12.2021. However, institutions must comply with national laws implementing the CRD. Given the implementation date of the CRD and the limited additional requirements that have been introduced, additional transitional arrangements are not deemed necessary.	GL amended
Question 2. Title I- Requirements regarding remuneration policies			
Para. 16	One respondent asked for clarification of the conditions under which the remuneration policies can be considered compliant with the regulations on environmental, social and governance sustainability and using a uniform concept, aligned with Article 5 of Regulation (EU) 2019/2088.	A reference to the RTS has been added as a footnote.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Para. 16	One respondent questioned the competence of the EBA to add this requirement to the EBA GL on remuneration, considering, on top of that, the lack of ESG risks definition, which is only a proposal consulted in November.	Institutions' remuneration policies must be aligned with their risks; ESG risk factors are relevant to the risk profile of institutions.	No change
Gender-neutral remuneration policies			
Para. 23	Several respondents considered that the reference to 'all related employment conditions that have an impact on the pay per unit of measurement or time rate should be gender neutral' should be deleted since it significantly broadens the scope of remuneration policies and is more related to institutions' diversity policy. One respondent found that the term 'pay per unit of measurement or time' is unclear.	The GL have been streamlined to better clarify which concepts are to be included within the gender-neutral remuneration policies. Other aspects have been included in the EBA GL on internal governance. The term 'pay per unit of measurement or time' has been derived from Article 157 of the TFEU. In the context of banking, the unit of measurement could be the annual gross total remuneration calculated on a full-time equivalent (FTE) basis.	GL amended
Para. 24	A few respondents asked for detailed guidance on how to demonstrate that a remuneration policy is gender neutral and another respondent suggested that the GL should clarify that existing forms of documentation currently used by banks (for example, common labour agreements) shall be deemed as suitable to demonstrate the remuneration policy is gender neutral.	There is a methodology in paragraph 63 (section 2.5) which could be followed in this regard.	No change
Para. 25	Some respondents proposed to replace 'working time arrangements' with 'full -time basis annual remuneration awarded'/'gross annual remuneration calculated on a full-time equivalent basis'. Also it is proposed to clarify the concept 'pay per unit of measurement or time' (same comment on paragraph	See comments under paragraph 23. Not all contracts are based on collective labour agreements and even if this were the case, it is on the institution to ensure that there are gender-neutral remuneration policies.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	23) and link it to the parameters determined in the context of collective labour agreements.		
Para. 26	Some respondents noted that provisions contained in paragraph 26 or 27 may interfere with national legislation or collective bargaining agreements. In this regard, it is proposed to use the compliance with the collective bargaining agreement provisions as evidence of having a gender-neutral remuneration policy. Also, it is suggested to clarify that institutions located in jurisdictions where there is an obligation to analyse equal pay for work of equal value should not be subject to additional requirements, in order to avoid the risk of redundant or even contradictory requirements among the GL and national laws. However, one respondent considered that a detailed list of criteria on what is a gender-neutral position should be included in the GL. In addition, several respondents asked for (according to the proportionality principle) an elaboration on categories of job positions instead of documenting job descriptions for all institutions' staff members (or carry out an assessment by bands, which simplifies the mapping of staff within an institution); and the use of current methods to measure the 'weight' of positions, instead of determining which positions are considered as equal or of equal value based on 'unit of measurement or time rate' (or let institutions decide how to monitor that gender-neutral remuneration policies are applied).	These GLs do not oblige institutions to follow a different approach regarding contracts with employees than the one prescribed in the national legislation, including conditions established by collective bargaining. The mandate of the EBA is to ensure compliance with the principle of equal pay for male and female workers for equal work or work of equal value, thus there is a need to identify the jobs considered as equal or of equal value. Where national law has the same objective as the GL, it is highly unlikely that there are contradictions between the requirements that would prevent institutions from complying with all requirements. It should be remembered that GL are subject to a comply or explain process that would allow competent authorities to remedy such situations if they existed. This identification could be carried out according to existing methods. The principle of proportionality (e.g. the proportionate application of all provisions) applies to the whole GL. Some clarifications have been accommodated in this regard (concerning job descriptions and reference to 'unit of measurement or time rate').	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Para. 27	Some targeted changes have been suggested, as follows: (i) adding a point related to 'specific skills or competences of staff'; (ii) replacing 'additional aspects when determining the value of work' by 'additional aspects as differentiating factors when determining the individual remuneration'; (iii) substituting 'dependent children' with 'dependent family members' and including allowances for expatriates in letter (h); and (iv) delete letter (e). In addition, it is proposed to review in general the objective of the paragraph; and particularly the wording of letters (a) and (h); and to align the criteria with the requirements developed by the Commission to assess what is equal value of work (Commission Recommendation C(2014) 1405).	The criteria included in the Commission Recommendation have been included; however, the recommendation does not provide for an exhaustive enumeration of criteria. The GL have been reviewed. It has been seen as important to stress that there are also factors that would allow differentiating the remuneration for equal work, if there are well-justified situations, in particular e.g. where institutions are active in different countries with different pay levels and costs of living. However, all such differentiations must be gender neutral.	GL amended
Para. 46	One respondent proposed to exclude from the reporting requirements those institutions which are subject to the information and reporting regime under the Shareholder Rights Directive, to avoid conflict of rules and enhance clarity. Concerning letter (c), several respondents noted that equal opportunity policy is a general HR responsibility and should not be included here; and another respondent asked for more criteria on what information should be provided to shareholders.	The section around paragraph 46 sets out guidelines for two situations. 1) situations where shareholders are required by national law to approve the remuneration policy and 2) where shareholders approve the ratio between the variable and fixed remuneration. Paragraph 46 applies with regard to the first aspect. It is not a general reporting requirement. The GL have been clarified. Letter (c) has been amended. .	GL amended
Para. 55	A few respondents considered that the term 'significant institution' should be clarified or directly remove the reference to 'other significant institutions'. Also it is mentioned that small and non-complex institutions which belong to significant groups supervised by the SSM are out of the scope of this paragraph (since they would be subject to the application of the proportionality principle) and in general significant institutions	'Other significant institutions' are those determined as significant by CAs or by virtue of national law and which are not considered O-SIIs or G-SIIs. The determination of G-SII and O-SII is set out in separate RTS and GL. On the need for independent members within the remuneration committees, the EBA is empowered to issue GL to ensure the common, uniform and consistent application of Union law	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	(according to the ECB's definition) should not be assimilated to G-SIIs/O-SIIs either. Some respondents raised concerns regarding the lack of legal basis for the composition requirements of the remuneration committee in systemically relevant institutions. In their view, Article 95(1) of the CRD in conjunction with Article 75(2) of the CRD would not be considered as enough legal basis to go beyond what is set by the CRD (no requirements on independent members of the remuneration committees) and Article 16(1) of the EBA Regulation would not apply given that requirements on independence are different among national legislations.	(Article 16(1) of the EBA Regulation), which is the current case, given that some MS have developed different provisions on the composition of the remuneration committee. Having independent members within the management body and remuneration committee is part of the provisions of robust governance arrangements which are required under Article 74 of the CRD. The guidelines have been amended and need to be read together with other GL in the area of governance that concern the composition of committees.	
Para. 57(b) and (c)	It has been proposed to eliminate references to gender neutrality (given that other features of the policies are not mentioned).	The GL are sufficiently clear with regard to the requirement on gender neutrality, hence the references in this paragraph have been eliminated. The remuneration policy and all its elements must be gender neutral.	GL amended
Para. 63	Several respondents questioned the obligations contained in this paragraph, namely: whether the obligation for the supervisory function (or, where established, the remuneration committee) to monitor the potential gender pay gap and its development goes beyond the mandate of the CRD V; and if requirements are disproportionate and burdensome, involve high expenses and do not meet the purpose of gender-neutral remuneration policies. It is also pointed out that the paragraph should be split into two parts, since the appropriate actions mentioned at the end of the paragraph should not be the responsibility of the internal audit function (which would be in charge of the independent internal review). As an application of the proportionality principle, it has been suggested that only entities with more than 1 000 members of	Article 92 of the CRD requires a periodic review of the remuneration policy by the supervisory function and an annual central and independent review of its implementation for compliance with policies and procedures. The remuneration policy must be gender neutral, institutions must also be able to provide information on the gender pay gap as required by Article 75 of the CRD. Institutions also need to comply with other national laws, e.g. the ones implementing Directive 2006/54/EC. The EBA is mandated to issue a report on the application of gender-neutral remuneration policies by institutions within two years of the date of publication by the EBA. Moreover, under Article 75(2) of the CRD, the EBA will receive data on the gender pay gap for benchmarking purposes. Such information should be available following the implementation of requirements based	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	staff (which is the measure for the calculation of the 0,3% ratio in the EBA RTS for identifying material risk takers) and a minimum member of men and women per same category of work calculate the ratio between the average remuneration of male and female staff. The proportionality principle would apply also based on either the fact that in some countries the national law already requires a reporting or there are institutions remunerating on a collective bargaining basis. In addition, it has been highlighted that there is a need of defining accurate standard reporting criteria to develop a consistent reporting line over time; and it is proposed to consider the size and activity of each institution when assessing the differences on average pay.	on Commission Recommendation C(2014) 1405 by Member States for firms with 50 or more staff. To meet this obligation, the EBA needs to receive consistent information from competent authorities, which implies an obligation for institutions to calculate ratios to allow the EBA to compare information among institutions. In particular, where institutions are already subject to similar reporting requirements, making available such data to competent authorities as well should create only a limited burden. The GL have been reviewed to provide more clarity and limit the burden for the smallest institutions. Related governance aspects have been moved to the EBA guidelines on internal governance. The EBA will issue additional guidelines on the benchmarking of the gender pay gap.	
Para. 71	It has been proposed to eliminate the word 'internal' since confidential aspects of the remuneration of single staff members should not be subject to external transparency either.	This paragraph is included within the 'Internal transparency' part (point 2.6) and does not intend to preclude other obligations on transparency. Some Member States require the disclosure of the individual remuneration of members of the management body.	No change
Question 3. Are the GL on the application of the requirements in a group context sufficiently clear?			
Para. 73	A few respondents deemed the term 'readily available' as too broad taking into account that they are independent legal entities and suggested the GL expressly recognise that institutions need time to present information of the subsidiaries or even that they are not allowed to give the information due to	Paragraph 73 refers to consolidated or sub-consolidated information. The paragraph has been clarified. The scope of prudential consolidation is established by the CRD and cannot be changed via GL.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	the impediments introduced by national laws (for instance, concerning data protection). Other respondents asked to exclude FinTech and Advisory and corporate finance companies that are part of a banking group from the application of the CRD provisions on remuneration (same comment concerning paragraph 8). One respondent suggested adding a sentence stating that these GL should be applied without prejudice to the rights of employee representatives under national law.	The GL do question the rights of employee representatives under national legislation, which are preserved in any case.	
Para. 75	A few respondents pointed out that Article 65(3)(a) of the CRD does not allow CAs to obtain information directly from subsidiaries. And, particularly, CAs are not enabled to gather information from subsidiaries based in a third-country jurisdiction.	The GL refer only to point (v) of Article 65(3)(a) of the CRD, such powers might sometimes be used in the context of supervision to receive information from persons belonging to an institution. The powers under the CRD exist independently of guidelines. Given the limited relevance, the paragraph has been deleted.	GL amended
Para. 76	It has been asked to change the order of the paragraph since the last sentence ('Specific remuneration requirements of subsidiaries should be taken into account') seems to be linked to the disposal that the remuneration policy should be gender neutral. In addition, some respondents highlighted that there is a lack of clarity on the subsidiaries' specific remuneration requirements that should be taken into account.	Some subsidiaries are subject to specific remuneration requirements; however, Article 74 of the CRD is applied on a consolidated basis and includes the requirement of gender-neutral remuneration policies. The specific requirements depend partly on national legislation, thus it is not possible to enumerate them within the GL. However, the group policy should not contradict such requirements. The provision has been clarified.	GL amended
Para. 76	One respondent queried under which conditions Article 109(5) would apply.	Article 109(5) requires the application of CRD remuneration provisions to staff in subsidiaries that are subject to specific	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		remuneration conditions under the conditions specified in this paragraph.	
Question 4. Are the GL regarding the application of waivers within section 4 sufficiently clear?			
Section 4	It has been proposed to develop separate criteria for individual and institutional proportionality. Another respondent suggested to include a new waiver for FinTech belonging to banking groups (same comment on paragraph 8 and section 3). Another respondent queried if GL under Article 94(7) are a separate document.	CRD requirements are directed only towards institutions. The waivers that institutions may pay out variable remuneration to individual identified staff without applying deferral or pay out in instruments requirements are specified. See responses above, the GL cannot introduce waivers above the waivers provided explicitly in the CRD/CRR. Parts of section 4 have been developed following the mandate under Article 94(7) of the CRD and form part of the GL.	No change
Para. 93	A few respondents queried whether the threshold defined in point (b) should apply on an individual or consolidated basis; and also if the rule applies to non-credit institutions (for instance, leasing companies within the group).	Reference in Article 94(3) (a) is made to 'Institutions' as defined by the CRD V, therefore the threshold in this case applies on a consolidated basis, including e.g. leasing companies within the group (scope of prudential consolidation).	No change
Para. 94	Some respondents proposed to delete the reference to the exchange rate used by the Commission, allow for using other exchange rates or stress that the rate to be used should be part of the institutions' remuneration policy before each yearly exercise is launched. Some respondents considered that a number of modifications should be introduced in the GL, as follows: (i) The option for MS to raise the threshold of Article 94.3(b) of the CRD V to a maximum of EUR 100 000;	The former GL on remuneration policies already mentioned the exchange rate published by the Commission as a rate to be used when the remuneration is paid in a currency other than EUR. The prescription of a specific exchange rate provides for a level playing field. Point (i): the GL further specify the CRD, but cannot introduce additional or wider waivers. Points (ii) and (iii): the use of the national discretion provided is on Member States.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	(ii) Clarify that the compliance with one of the two criteria set by Article 94(4) is enough for a MS to lower or raise the threshold of EUR 5 billion; (iii) Extension of the exemptions foreseen in Article 94(3) to small and non-complex institutions belonging to significant banking groups (to align the treatment of these institutions with the rest of small and not complex institutions in view of the implications it may have); where this exemption is not foreseen, one respondent stated that the institutions belonging to a banking group, which would not qualify as large institutions on an individual basis, should be able to apply the exemption under Article 94(3) of the CRD V to the risk takers identified only at an individual level. (iv) Non-application of the minimum deferral period of four years to staff whose professional activities have a material impact on the institution's risk profile (if the shorter deferral period is consistent with the time horizon of the risks).	Point (iv): the CRD provides for explicit minimum requirements that cannot be further reduced based on the principle of proportionality. The deferral requirement may be waived in line with the waivers implemented by Member States. The GL on the exchange rate ensure harmonised application.	
Para. 94	On letters (a) to (d), some respondents suggested simplifying the wording by stating that all variable remuneration awarded in a performance year compared to the fixed remuneration in the preceding performance year should be taken into account. It has been considered confusing to combine the calculation of remuneration (for the identification of material risk takers) and the ratio; in this regard, it is proposed to clarify that in order to calculate variable remuneration compared to fixed remuneration, institutions should consider remuneration	While for the identification of staff a timely process is required, the application of possible waivers is based on the actual award of variable remuneration in a financial year in line with Article 94(3) of the CRD. This paragraph is applicable in the context of the application of waivers, which requires the calculation of the variable remuneration and the ratio between variable and fixed remuneration based on staff's annual remuneration. The RTS on identified staff have been aligned to allow for the application of the same method. In line with the RTS, the	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	related to a performance year, while for MRT identification institutions have the choice to take remuneration awarded in relation to a performance year or remuneration awarded in a performance year. Also in this respect, the EBA has been asked to provide guidance on the second part of letter (a) and on how to consider (for estimating the threshold) the amounts mentioned in paragraph (c) or (d) in any moment before the award of variable remuneration (for example, at this time it could be possible that a retention bonus was not foreseen to be awarded in this performance year) or directly to include the option to replace references to 'remuneration awarded for the preceding last year' with references to 'current performance year'. Other comments in this regard were: Include in point (c) the option of a pro rata allocation in case of variable remuneration relating to multi-year performance or periods; and clarify in point (d) that severance payments excluded from the bonus cap and the deferral and payment in instruments are not taken into consideration for the calculation of the remuneration awarded.	financial year should be understood to be the same as the performance year. Additional simplifications/clarifications have been made, in particular concerning the financial/performance year to consider in letters (a) to (d). The guidelines regarding multi-year periods have not been changed as in fact the variable remuneration will be awarded in a specific year independent of the fact that there might be a longer performance period. The waivers were granted to reduce the burden of applying the requirements where only low amounts of variable remuneration have been awarded. Where a higher award is made, the prudential advantages of applying the requirements exceed the regulatory burden. For severance payments, it needs to be considered that the staff member is an identified staff member and risk alignment measures are therefore deemed necessary, even if the threshold is exceeded only by the award of a severance payment. Clarifications have been provided.	
Para. 96	One respondent noted that paragraph 96 of the GL refers to section 5 of the GL instead of section 4	The reference should be to section 4	Paragraph 96 modified
Section 5			
Para. 100	One respondent questioned the rationale behind the obligation to document the applicable method to determine the exchange rate in the remuneration policy. It has been proposed to adjust the wording to allow for documenting methodologies wherever	The requirement to document in the remuneration policy will lead to a permanent choice. It is a one-off decision, hence the burden for institutions should be limited.	No change

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	institutions deem appropriate (not necessarily in the remuneration policy).		
Para. 101	A few respondents referred to paragraph 101 of the amended GL (which requires institutions to periodically update the self-assessment during the year at least with regard to the qualitative criteria) and commented that the identification rule has become more stringent since paragraph 89 of the EBA/GL/2015/22 outlined that the intra-year update of the self-assessment shall ensure that 'staff who fall or are likely to fall under the criteria in Article 3 for a period of at least three months in the financial year' are identified as MRT.	The comment has been accommodated.	GL amended
Para. 110	It has been requested to clarify if letter (f) allows the exclusion of employees falling under a certain qualitative criteria based on the fact that they do not affect the risk profile, or they are already excluded.	Staff identified by qualitative criteria of the RTS on identified staff can never be excluded. The RTS does not provide for this possibility. The clerical error has been corrected and the term 'quantitative' has been used to replace 'qualitative'.	GL amended
Para. 135	One respondent pointed out that it would be unclear why the reference to paragraph 182 (currently paragraph 200) has been deleted in paragraph 135(c), given that it remains relevant.	The change is of editorial nature, it is not necessary to mention this paragraph again, as point (b) of the same paragraph already refers to it and allows those factors to be taken into account.	No change
Question 5: Is section 8.4 on retention bonuses sufficiently clear?			
Para. 142	Some respondents claimed that the GL entail a tightening of the rules, which would not be justified by the CRD V. Thus, it has been recommended to delete the part of the paragraph that states that institutions should not award to a staff member multiple retention bonuses, and consider to (i) specify that multiple tranches of a retention bonus may be agreed that vest in case of continued employment, provided that there is only one award of the retention bonus, or (ii) include that it is allowed	The CRD does not explicitly foresee the award of retention bonuses. Variable remuneration of identified staff must be based on performance in line with Articles 92 and 94 of the CRD. However, the GL take into account that the award of retention bonuses should ensure the continuing performance of the institution and allow therefore that retention conditions are added to a bonus and that different specific performance	GL amended

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	to grant more than one retention bonus linked to one event, provided that the aggregated amount is taken into account for the purposes of the relevant bonus cap. Some respondents focused on the sentence 'or under simultaneous events or justifications', and proposed to repeal this part of the paragraph which would lead to the consideration, within the concept of retention bonus, of amounts provided for in collective plans (often negotiated and agreed with the trade unions) besides the amounts agreed in individual agreements. It has been considered that there may well be justified and legitimate reasons for awarding to individual staff members, already participating in collective plans, an additional individual retention bonus as part of a stability agreement that provides for the acceptance of a specific obligation by the worker.	conditions are applied. Those specific conditions have been further specified. In some cases, retention bonuses have led to situations where the mere retention of staff becomes the driving factor of the bonus system, rather than the performance of the staff, business unit or institution. Such structures are not in line with the requirement of performance-related variable remuneration. Therefore, clarifications have been necessary. Multiple retention bonuses or retention conditions are possible only in exceptional and well-justified cases and as long as they do not lead to a misalignment of performance and the total variable remuneration. The guidelines have been clarified. The guidelines do not lead to a prohibition of a higher or additional retention bonus to a single staff member already included in agreements that concern a group of staff. However, all retention bonuses must be well justified.	
Para. 142	Some respondents suggested to remove the wording 'that lead to a change of control' within the example mentioned, in order to distinguish initial public offerings from changes of control, and elaborate on what is meant by 'special projects'.	The example illustrates possible situations in which a retention bonus could be appropriate, it does not restrict retention bonuses to those situations. The examples have been simplified.	GL amended
Para. 145	Some respondents deemed this paragraph as too prescriptive since there could be situations in which the individual is responsible for a project of significant size or importance, where pro rata awards (linked to intermediate milestones, for instance, in case of acquisitions) would be more appropriate than a single award at the end of the retention period. Also in this regard, it has been suggested a split where part of the retention bonus is paid to the employees during the retention period, while a	The paragraph has to be read in conjunction with other provisions in this section. Retention bonuses should only be awarded if the retention period and the agreed specific performance conditions are met. Institutions also might need to reduce retention bonuses where the conditions in Articles 93, 141 or 141b of the CRD apply.	GL amended

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	significant amount will only be paid after the retention period is over and conditions fulfilled (in order to keep key staff motivated to help navigate the institution through tough times or similar circumstances). Another reason argued in favour of the pro rata award is based on paragraph 147, which allows payment of the retention bonus as a lump sum at the time the retention condition is met or pro rata over the retention period (should the employee resign before the end of the retention period, he would have to pay a predetermined penalty concerning the retention period not respected, thus generating unexpected income).	Retention bonuses are variable remuneration and subject to all requirements on variable remuneration. The GL have been amended to exclude the prohibition of multiple retention events. However, the retention of staff and the retention bonus must always be justified and multiple retention bonuses are considered an exceptional situation.	
Para. 146	Some respondents suggested clarifying that retention bonuses could not be based on performance, since it may be deduced from the wording of this paragraph that retention bonuses should always be partly based on certain performance criteria, which does not seem its intention, and also would result in eliminating the ability to adopt collective retention plans (aimed at motivating staff and rewarding loyalty to the institution). According to this, it has been proposed the following modification: 'retention bonuses are not, *or not exclusively*, based on performance criteria'. Additionally, it is noted that individual performance conditions are already required in incentive plans; requiring them for retention bonuses would mean, in many cases, providing the same performance conditions for different types of bonuses. Another respondent suggested adding that the performance criteria could be fulfilled if the institution confirms (when deciding on the payment of the retention bonus) that any negative performance contributions of the employee prevent	Article 92(2)(g) requires that the remuneration policy differentiates between fixed remuneration and '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.' Article 94(1)(n) of the CRD requires that variable remuneration of identified staff is performance related. '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.' The specific performance conditions for retention bonuses can differ from performance conditions for other parts of the variable remuneration.	GL amended

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	the retention bonus being paid in the amount originally promised, subject to the general principles of national contract or labour law. This clarification would also be aligned with the main goal of the retention bonuses, which is to incentivise the employee to continue working for the institution over the entire retention period. Finally, it has been welcomed the introduction of the possibility to apply deviations from the main rule of deferred payments where an agreement would be reached with the local supervisory authority.	All variable remuneration must be subject to ex post risk alignment measures. Variable remuneration that is only based on a retention condition would not meet the regulatory requirements. Staff that are not identified staff are not subject to such a requirement. Waivers for the requirements to defer variable remuneration have been introduced by the CRD. Guidelines cannot provide for any additional discretion to competent authorities regarding this matter. The guidelines have been further clarified.	
Para. 147	One respondent questioned how to proceed if the final amount is based on performance criteria and therefore cannot be known upfront: should the potential maximum amount be taken into account when using the method described in point (a) or should credit institutions always use the method described in point (b) or is it not possible to set a fixed amount?	To ensure that the maximum ratio between the variable and fixed remuneration is respected, the maximum that is subject to a retention condition should be used under the method described in point (a).	GL amended
Para. 148 and 164 Discretionary pension benefits	One respondent objected to the consideration that discretionary pension benefits are not severance payments, even if the employee decides to retire early, given that this would close the door to agreements about job losses which compensate losses in other pension schemes because of the early retirement and are not paid as a lump sum. In this case, it is proposed to add that 'this would not be the case where pension benefits are part of agreements mentioned in para. 170' (considering that this paragraph would be amended accordingly).	Severance payments are payments in situations where the employer terminates the contract early. Discretionary pension benefits means enhanced pension benefits granted on a discretionary basis by an institution to an employee as part of that employee's variable remuneration package, which do not include accrued benefits granted to an employee under the terms of the company pension scheme. If there is a general agreement for certain staff categories on conditions for early retirement, top-ups of the pension under	No change

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		such schemes are not discretionary and therefore not considered variable remuneration.	
Para. 155	One respondent queried why the new paragraph 155 refers to 'institutions and competent authorities'. According to the view expressed, the reference to competent authority should be deleted.	The aspect commented on has not been changed and therefore has not been consulted on.	No change
Question 6: Is the amended section 9 on severance payments sufficiently clear?			
Section 9	As a general comment, one respondent noted the lack of legal basis to propose changes to the existing GL on severance payments. A few respondents requested that application of the severance payment provisions be limited to amounts exceeding EUR 200 thousand, perhaps also requiring compliance with additional conditions, for instance: the amounts solely reflect the need to contain company costs and rationalise staff levels; and the inclusion of clawback mechanisms that at least cover cases of fraudulent behaviour or gross negligence to the detriment of the bank.	Article 16 of the EBA founding regulation empowers the EBA to issue guidelines in its scope of action. This includes updates to existing guidelines. Guidelines cannot provide for waivers in addition to the ones provided under the CRD. Severance payments are a form of variable remuneration and therefore the corresponding requirements, including requirements on variable remuneration in the context of the early termination of contracts, must be observed.	No change
Para. 164	Some respondents had concerns or raised objections on the following issues: (i) The meaning of 'additional payments' and its consideration as variable remuneration (which could contradict paragraph 130), even if the termination payment is agreed upfront or is legitimate given the circumstances at hand or even based on a predefined general formula set within the remuneration policy; in particular, one respondent considered that the GL do not make sufficient distinction between pension benefits, transition allowances and severance payments, and	Where discretionary pension benefits are agreed when entering into a contract and the determination of the amount and conditions are predefined, they are not discretionary pension benefits. Where there are predefined payments at the end of the term, they may fall under the definition of fixed remuneration, where they meet all the respective requirements.	GL amended

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	highlighted that discretionary pension benefits are related to the termination of the contract although agreed at the beginning of the relationship and should not be subject to the special rules for variable remuneration or severance payments. According to the legal analysis provided by another respondent, institutions should be able to assign these payments to either fixed or variable remuneration in light of the nature of the compensation and there is no need for an automatic classification of these payments. (ii)The specific inclusion of members of the MB, given that non-executive members have a remuneration structure different from other MRTs and which does not operate on a contractual basis, but within a purely mercantile or commercial framework. Thus, the new wording would pose implementation difficulties for non-executive members at the end of the appointment as member of the management body. (iii) The reference to 'regular end' of a contractual period without additional explanations, as it would result in a new unregulated concept, different from 'early termination', and with non-applicability in case of indefinite contracts (since they would not have a 'regular end').	Contracts with an indefinite period end when there is legal retirement or early retirement based on an early retirement plan available for categories of staff.	
Para. 165	A few respondents noted that non-competition clauses may be negotiated as part of an employment contract, or at the point of termination, thus to keep the flexibility it has been proposed to delete 'in the contract' within letter (b) of paragraph 165. Another respondent pointed out that transitional payments under the same letter (b) should not be subject to the special rules for variable remuneration or severance payments (same comment made for discretionary pension benefits).	The first comment has been accommodated. It has been clarified that the payments under point (b) are only severance payments if the contract has already ended. In cases where staff are still employed, but are requested to stay away from work, the continued payment of remuneration is not considered a severance payment.	GL amended

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Para. 165	Many respondents recommended amending point (e): firstly, to mention again the 'potential labour disputes' since the intention should be to contain the risk, actual or potential, of disputes or litigation in court; in this case, the drafting proposed would be the following: 'The institution and a staff member agree on a settlement in case of a potential or an actual dispute that could potentially bring an action in front of a court, to avoid a decision on a settlement by the courts', which would avoid troublesome and expensive court proceedings.	Where there is no dispute between staff and institution, there is no need to file a case in front of the court and an agreement e.g. under point (b) can be made. A dispute should not be understood as a situation where a court ruling would be the only way to come to a resolution of an existing issue. The point has been clarified.	GL amended
Par,. 165(e)	One respondent called on the EBA to consider at least the possibility that compensation for the loss of notice period would not be treated as severance payment and, secondly, to clarify that the subparagraphs are examples of severance payments and not intended to be an exhaustive list.	By definition, a severance payment is a payment made for the early termination of a contract. A different issue is the calculation of the bonus cap. The list provided in the guidelines is not exhaustive.	No change
Para. 170	Several concerns arose from the new wording of this paragraph, namely: (1) The consideration of transactional agreements on severance payments (agreed at the beginning of the contract and in certain cases intended to allow a 'cooling-off') as variable remuneration, which would entail the non-applicability of them to regulated staff (although legally allowed). (2) New conditions could lead to individuals to be less inclined to settle and, on the contrary, may increase litigations as individuals would seek court awards that are unrestricted. In addition, the cap on the amount of severance payments would	(1) The GL have been amended to allow for pre-agreed gardening leave payments or such payment under the policies of the institution, which would not be subject to the requirements of the variable remuneration where compatible with national law in situations where the staff member cancels the contract. Such payments could be made where the staff member is not allowed to take up an occupational activity that would cause conflicts of interests. Such payments should not be used to circumvent requirements on severance payments.	GL partly amended

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	be detrimental to the indemnity of the prejudice (which must be sufficient to secure such agreements); and it may result in introducing a fluctuation in the value of the indemnity according to the evolution of the share price, which could contradict labour laws in some MS. Thus, it has been recommended allowing institutions to pay severance payments above the amount pre-determined (in accordance with letter (b) point (i)) if the institution is able to demonstrate the reasons and appropriateness of the severance payment. (3) The reason for including amounts corresponding to non-competition clauses separately from other severance payments. In this regard, it has been suggested including the comprehensive list of payments from paragraph 165 within paragraph 170 letter (b) point (i). (4) Reference to Article 94 of the CRD. It has been considered that such reference should be deleted or limited to the requirements of Article 94 which should apply to severance payments. (5) The meaning of 'appropriate' in point (i); it has been considered that some examples should be included in this regard. (6) It is believed that the strict use of predefined generic formula is not justified (and in some jurisdictions not possible) and could entail the risk that it will become the new 'normal'. To allow for some flexibility, it has been suggested to clarify that (i) multiple redefined generic formulas are permitted; and (ii) within such predefined generic formula, an institution may use a discretionary factor or multiple as long as the institution can continue to demonstrate the appropriateness of and the reasons for an increase above a neutral application of such	(2) The CRD requires that payments for the early termination of contracts by institutions are based on performance. Hence, they are variable remuneration and must be subject to ex post performance adjustments and partly be paid out in instruments, unless the waivers under Article 94(3) of the CRD are applied. GL cannot create additional waivers. . (3) Where the competent authorities agree on the appropriateness of severance payments, they do not need to be taken into account in the calculation. (4) The CRD is clear that there are specific requirements on the variable remuneration of identified staff. The reference has been retained as adding a reference does not change the application of requirements. (5) The appropriateness has to consider the individual case; therefore examples have not been added. (6) In any case, Member States may impose stricter requirements than set out in the guidelines regarding the supervisory involvement in such processes. Indeed, there may be different formulas for different categories of staff. (7) The additional amounts are the amounts that would exceed the fixed remuneration for such a period.	

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	formula; or at least (iii) that no ex ante information of the CA is required, but the institution must at any time be in a position to demonstrate, on request, the appropriateness of the payment. (7) The meaning of 'additional amounts due' in point (ii). Other amendments proposed to this paragraph are: clarify that severance payments should not be counted when calculating the thresholds under Art 94(3) of the CRD; and insert an additional letter (c) excluding severance payments which are part of an agreement between the institution and employee representatives under national law.		
Para. 171	Several respondents objected to this paragraph (and proposed its deletion) for a number of reasons: it would go against the institution's capacity to elaborate compensation packages (resulting in a reduction of its ability to remain competitive and retain talent and lengthening the time needed for the management to terminate the employment contract, when in some jurisdictions the severance payment has already been approved by the board of directors) and also it seems to imply that the CA would decide on the suitability for at least material payments of all severance payments, which would go beyond the objectives of the CRD and it is likely to cause challenges of CAs supervising institutions with subsidiaries and branches in several locations across the world, since these authorities would not have the necessary expertise to determine what constitutes a material severance payment in all applicable jurisdictions (and also if the CA denied the institution's decision, it could lead to proceedings against the CA). In addition, some respondents suggested elaborating on the meaning of 'material' payments (taking into account that the	Institutions' remuneration and severance packages must be in line with applicable laws. The CA would not set the severance payment, but supervise the institutions' compliance with applicable laws. The previous GL already included provisions that foresaw the involvement of competent authorities. The possibility of ex ante involvement, if implemented by competent authorities, ensures appropriate supervision of the compliance with the requirements on variable remuneration by institutions awarding severance payments. Ex post controls would be less effective as in cases of non-compliance the only option would be taking supervisory measures towards the institution. The text of the previous GL on this issue has been reinstated. However, in any case, Member States may impose stricter requirements than set out in the guidelines regarding the supervisory involvement in such processes.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	concept could overlap with the existing requirement to set maximum amounts of severance payments); clarifying whether institutions have to inform of any material severance payment or only those material payments to which it intends not to apply the ratio, deferral and payment in instruments; and on the criteria which may be used by CAs in application of paragraph 173(a).		
Para. 172	One respondent advised clarifying why the last sentence has been added, and linking paragraph 172 to paragraph 170(b)(ii) in the following terms: 'Only those amounts of the settlement specifically identified in the contract as a compensation for the non-competition clause would comply with paragraph 170(b)(ii). Where national legislation limits the length of non-competition clauses, any payment made beyond those time limits cannot be considered as a "settlement made for a non-competition clause" and therefore cannot be excluded from the ratio of variable to fixed pursuant to paragraph 170(b)(ii)'.	Last sentence has been added according to a Q&A published by the EBA.	No change
Para. 172	Another respondent proposed to remove the reference to 'including cases of early retirement' since paragraph 182 already attends to the consequences of labelling payments for what they are not.	The comment has been accommodated.	GL amended
Para. 173	One respondent suggested removing letter (a), for the same concerns raised in relation to paragraphs 170 and 171. Another respondent expressed doubts about the combination of the notification requirement under paragraph 171 with the assessment power given to CA by virtue of paragraph 173(a), as follows: firstly, the assessment power would imply an approval	See comments above.	GL amended

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	process, which may significantly delay the agreement of the severance pay (increasing the number of court claims); secondly, if the CA exercises its power and the severance pay is reduced by the 100/200% bonus cap, the likelihood of litigation and settlement cost increases; and finally, there is a possibility that the individual could successfully challenge the decision through the courts. Therefore, it is deemed as more appropriate for CAs to focus their supervisory work on reviewing the internal policies of institutions on severance payments. Finally, it has also been appreciated that letters (b) and (c) would not be needed and could contradict paragraph 170: if severance payments comply with paragraph 170, they will be excluded from bonus cap, deferral and payment in instruments; if they do not comply with paragraph 170, they will be required to respect all requirements.		
Para. 185	One respondent pointed out that the reference to Article 109(6) should instead be to Article 109(4).	The reference is correct: it refers to the ability of Member States to apply on a consolidated basis all remuneration requirements to identified staff in subsidiaries that are subject to a specific remuneration framework.	No change
Para. 258	A few respondents provided their legal assessment, by virtue of which the requirement to ‘defer a significantly higher portion than 50% of the variable remuneration paid in instruments’ should be applied only to significant institutions, or alternatively, to members of the management body and senior management in ‘institutions that do not benefit from the waiver within Article 94(3) of the CRD’ (since the application of tighter rules on the deferral of variable remuneration for members of the MB and senior management is limited, by the CRD, only to ‘significant’ institutions).	The deferral period in the CRD refers to the significance of the institution, the guidelines have been amended accordingly also regarding the portion of instruments to be deferred. The members of the management body and senior management have the highest decision-making powers and therefore risk alignment measures, e.g. deferring a higher portion of the variable remuneration, are of particular importance. The guidelines already explicitly refer to the waivers under Article 94(3) of the CRD.	GL amended

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Para. 259	One respondent proposed to replace 'period' with 'portion'.	The comment has been accommodated.	GL amended
Para. 260	One respondent requested to elaborate on the meaning of 'the ratio of the variable to fixed remuneration of that staff member' for the definition of the particularly high amount, considering the applicability of cross function in an institution and to ensure a level playing field in Europe. However, other respondents suggested deleting the reference to the relative threshold, as otherwise small amounts of variable remuneration could be subject to stricter rules (deferral of 60%), which seems excessive, or even employees with lower total variable remuneration exceeding the relative threshold (but not the absolute amount) could be subject to stricter rules than employees with higher total variable remuneration (but with lower relative threshold).	Payment levels differ between Member States. As the requirement is applied to variable remuneration, it is appropriate to consider separately the variable and fixed remuneration components. The GL have been amended as this could also be based on the absolute amounts.	No change
Para. 269	Although it is possible to award share-linked instruments, it is noted that section 15.4 does not clarify whether deferred shares due from previous years might also be transformed to and disbursed in the form of synthetic shares, which seems reasonable.	Many Member States have already in the past provided for the possibility to award remuneration in share-linked instruments also in listed companies. Institutions need to respect the agreement regarding the type of award with staff, unless there is consent to amend the agreement and such amendment is possible under national law. The GL have not been changed as there is neither the possibility to force such an agreement nor the need to forbid it.	No change
Para. 274 and 276	It has been suggested reassessing the sentence 'Institutions should ensure that they have awarded instruments available when the variable remuneration awarded in instruments vests' given that shares are only available to staff after the retention period.	Staff become the legal owner of the shares when they vest. Any different regime would interfere with the rights of staff, e.g. in the case of resolution and voting rights as shareholders.	No change

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Para. 291	One respondent asked for confirmation on the scope of application of clawback (to all employees or just to MRTs), since it would not be clear if the deletion of 'identified staff' in this section is due to a technical adjustment or not.	Article 94 applies with regard to the variable remuneration of identified staff. The guideline has been clarified.	GL amended
Para. 293	One respondent argued that the specification on clawback set in this paragraph (its application in any case, independent from the size of the actual bonus award) would tighten the application rules in a way that could contradict the local labour market or the administrative rules in some jurisdictions, in addition this could negatively impact the attractiveness of the financial institutions and eventually mean that all existing MRT contracts have to be amended again. As a consequence, it has been proposed to provide local regulators with the necessary flexibility to reflect the principle of proportionality as it stands in the current GL.	The clarification provided in the guidelines is not changing the substance of the CRD provisions. Institutions must be able to reduce the variable remuneration of identified staff down to zero by the application of malus or clawback. The principle of proportionality determines how a rule is applied in a proportionate way. This principle or GL cannot create additional waivers on top of the waivers included in the CRD.	No change
Annex 1	A few respondents highlighted that the changes proposed are not clear and do not map remuneration requirements, since new articles have been introduced without any scope of application associated.	The Annex has been clarified.	Annex amended