

Consultation Response

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

EBA/CP/2015/03

04 March 2015

Haarlem, May 3, 2015

4elements welcomes the opportunity to comment on the EBA's draft guidelines on sound remuneration policies and disclosures (EBA/CP/2015/03). 4elements is a boutique consultancy firm in the Netherlands and, amongst others, assists several banks and insurance companies which are Dutch-based in the implementation of and compliance with the Dutch and European remuneration governance guidelines and legislation applicable to them.

4elements made a comprehensive analysis of the EBA's draft guidelines with the intent to contribute to its clarity and consistency, and to facilitate implementation and compliance. Please find this analysis as an attachment to this letter.

For the purpose of studying this analysis, 4elements would like to highlight several matters:

1. The use of terms and definitions is not always consistent. Especially the term 'award' may need further clarification. See table 1 in the attachment with an analysis of the different use of this term 'award' throughout the guidelines.

For clarity purposes regarding long-term variable remuneration the following terminology is proposed:

- It is granted conditionally prior to the start of the performance year / accrual period.
- It is subsequently awarded after the end of the performance year / accrual period, as stated in Article 6.k, (provided performance and ex ante risk assessments warrant such); this is also sometimes referred to as 'allocation' instead of 'award'; the award is also conditional, i.e. ownership is not yet transferred to the employee.
- After awarding, it is deferred immediately.
- After the end of the deferral period, it vests unconditionally (in case of equity based compensation) or it is paid out unconditionally (in case of cash-based compensation) - provided the ex post Malus risk assessments warrant such - ; vesting results in transfer of ownership to the employee.
- After vesting, it is either immediately released, or
- subsequently retained, if a retention period is applicable; in the latter case, it is subsequently released after the end of the retention period.



For further clarification, it is proposed that the term ‘award’ may also be used in the context of any fixed remuneration in the form of equity instruments (in which case after the award is made, vesting will occur immediately without any further deferral), but that it will not be used in the context of allowances and severance in the form of fixed remuneration. In the latter instances, terms like ‘set’, ‘determine’, or ‘allocate’ are proposed instead.

In table 2. of the attachment a full list of questions, issues and comments has been provided, of which the underneath are highlighted:

2. The timing of the calculation of the ratio between fixed and variable remuneration. See e.g. comments under Article 153, 180, and 185.

It is proposed that this ratio is calculated after the end of the performance year / accrual period, taking into account only the fixed and variable remuneration related to the performance year / accrual period which has just been completed. Also, for reasons of consistency, simplicity, transparency and logic, it is proposed that the maximum levels of variable remuneration as stated in CRD IV (94)(g) apply to:

- actual awards made after the end of and related to the performance year / accrual period,
- i.e. not to the grant levels of variable remuneration made at the beginning of the performance year / accrual period,
- nor to a sum of upfront variable remuneration allocated after the end of and related to the performance year / accrual period plus any longer-term variable remuneration which happens to vest at that same moment, but not related to the same performance year / accrual period.

3. Regarding subsidiaries who are in themselves not subject to CRD IV, but to specific sectorial guidelines (such as AIFMD / UCITS), and who are a subsidiary of an institution which is subject to CRD IV, the proposed options for the application of the specific sectorial guidelines and / or CRD IV and the related EBA guidelines as presented in Annex 2 - point 38 will increase the administrative burden for the remuneration governance significantly, because there is often not so much a conflict as well as non-alignment. Under the current draft guidelines this would result in the required application of Option A, i.e. apply both sets of guidelines. This is e.g. the case when having to identify Identified Staff where the sectorial guidelines under e.g. AIFMD and UCITS and the EBA RTS not so much conflict but differ. See also the comments under Article 106 as well as Annex 2 – points 38, 41 and 50.

Worse, being required to still apply CRD IV and these EBA guidelines can lead to a distortion of the level playing field between these subsidiaries and companies which are not part of a group on which CRD IV is applicable. See comments under Article 63. Therefore, it is proposed that in all cases such subsidiaries may choose between the options i, ii, and iii as stated under Option B. of point 38 in Annex 2, as long as they are able to demonstrate the rationale for their choice to the national competent authority or EBA.

4. In Article 64, EBA seems to propose the use of the so-called ‘Host Country’ principle to the remuneration of internationally mobile staff. This is highly disadvised. International diversity is an essential element in the longer-term risk management and success of internationally operating financial institutions. This can only be sustained by remuneration approaches based on the so-called ‘Home Country’ principle. Only, in those instances in which beforehand it is intended that a non-national will remain in the Host Country, and not return to his / her Home Country or elsewhere,



a Host Country principle is appropriate. Otherwise, inappropriate distortions of the remuneration packages of internationally mobile staff will creep in over time, eventually resulting in a loss of these staff members, when there will no longer be a job available for them in the Host Country while they have become too expensive for their Home Countries.

This is for instance the case, when senior staff is moved from countries outside the EEA into the EEA. Under the Host Country principle their remuneration packages would need to be converted to high-fixed-based packages in order to meet the lower maximum levels for variable remuneration. Their absolute level of fixed remuneration will be difficult to revert when returning to their country outside the EEA due to employment legislation barriers. Also, under the Host Country principle, senior staff from EEA countries going to countries outside the EEA will become eligible to higher variable remuneration percentages when on international assignment, which will require a similar conversion into fixed remuneration, i.e. higher costs, upon return. Likewise, international talent management programs require a remuneration approach based on the Home Country principle, in order to attract staff to these programs, and just as important, to allow them to go back to their country of origin.

If an institution has sound remuneration policies in place, as well as a thorough remuneration governance framework, the risk associated with the appliance of the Home Country principle can be mitigated sufficiently. The 'costs' of such risk mitigation are much more preferable and manageable than the costs of the application of the Host Country principle.

5. Regarding the disclosure of data, EBA is advised to take into account that national legislation may prevent institutions to report the data that is required under these guidelines. E.g. in Spain, individual staff members need to provide their consent to the disclosure of their remuneration and other personal data before these can be disclosed, even if such personal data is included in aggregate data only. If such consent is withheld by an employee, the institution cannot comply with these guidelines / Article 450 of CRR; nor can it enforce these guidelines upon the employee. It is proposed that such instances based on national law are also considered as an acceptable '*exceptional case*'.
6. Regarding the aim of EBA to '*prevent regulatory arbitrage opportunities*' (Annex 2 – point 12), it would be helpful if additionally these guidelines would set out the procedure for appeal and arbitration, in case in first instance an institution cannot agree with decisions taken by the national competent authority and / or EBA.

For a full list of questions, issues and comments reference is made to table 2, which has been included as an attachment.

Please do not hesitate to contact 4elements, if EBA would like to deliberate further on this input.

Warm regards,

Annette Huiberts
Director
annette@4elements.pro
+31 (0) 6 212 567 49



Table 1. Definition and use of the term ‘award’

EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term ‘award’		
Background & Rationale Page 16	<p>Ex ante risk adjustments are applied when the remuneration is awarded to consider current and future risks and have an immediate effect on the variable remuneration awarded and on staffs’ risk taking behaviour.</p> <p>Ex-post risk adjustment should ensure that staff is rewarded in line with the sustainability of the performance in the long term, which is the result of decisions taken in the past. Ex post risk adjustment is always necessary, also in case of multi-year accrual periods, because at the time remuneration is awarded the ultimate performance cannot be assessed without uncertainty.</p>	Agree with the way the term ‘award’ is used here; however, the use of the term ‘award’ here conflicts with the definition of the term ‘award’ in Article 6.e.
Background & Rationale Page 17	<p>The <u>awarded</u> instruments are subject to retention periods. At least 40 % of variable remuneration is subject to deferral arrangements.</p> <p>.....institutions should carefully design the instruments used for the award and the deferral and retention scheme in order to ensure that needed ex-post risk adjustments are reflected, e.g. in price changes of the instruments.</p>	<p>The use of the term ‘award’ in the first sentence is in line with the definition of the term ‘award’ in Article 6.e, e.g. taking place after the deferral. Please see comments there.</p> <p>Last sentence suggests the award takes place before the deferral period. Agree, however, the use of the term ‘award’ here conflicts with the definition of the term ‘award’ in Article 6.e.</p>
Art. 6.e	‘Long term incentive plans’ are variable remuneration components, where a part of the remuneration is awarded at one point of time and under the same plan additional awards are made at future points in time subject to conditions, including e.g. the retention of staff within the institution.	<p>Confusing use of the term ‘award’ here. This art. 6.e. is also not in line with art. 6.m and 6.o.</p> <p>For clarity purposes regarding long-term variable remuneration the following terminology is proposed:</p> <ol style="list-style-type: none"> 1. It is <u>granted</u> conditionally prior to the start of the performance year / accrual period.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
		<ol style="list-style-type: none"> 2. It is subsequently <u>awarded</u> after the end of the performance year / accrual period, as stated in Article 6.k, (provided performance and ex ante risk assessments warrant such); this is also sometimes referred to as 'allocation' instead of 'award'; the award is also conditional, i.e. ownership is not yet transferred to the employee. 3. After awarding, it is <u>deferred</u> immediately. 4. After the end of the deferral period, it <u>vests</u> unconditionally (in case of equity based compensation) or it is <u>paid out</u> unconditionally (in case of cash-based compensation) - provided the ex post Malus risk assessments warrant such - ; vesting results in transfer of ownership to the employee. 5. After vesting, it is either immediately released, or 6. subsequently <u>retained</u>, if a retention period is applicable; in the latter case, it is subsequently released after the end of the retention period.
Art. 6.f	A retention bonus is variable remuneration awarded on the condition that staff <u>stays</u> in the institution for a pre-defined period of time.	Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Article 6.e. (otherwise the Article should have read 'has stayed').
Art. 6.l	The 'award' of variable remuneration means the granting of the amount of the variable remuneration for a specific accrual period, independently of the actual point in time where the amount is paid.	<p>Unclear definition due to the use of the terminology 'granting for a specific accrual period'. Seems to suggest that the award takes place prior to the start of the performance period. In any case, the use of the term 'award' here conflicts with Article 6.e. and with Article 209.</p> <p>See Article 6.e for proposed use of the terms 'grant' and 'award'.</p>
Art. 6.e & 6.l		Definitions re 'award' seem incomplete as the term 'award' is also used in the context of allowances and severance in the form of fixed



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
		<p>remuneration and any fixed remuneration in the form of equity instruments in these guidelines.</p> <p>For clarity purposes, it is proposed that the term 'award' may also be used in the context of any fixed remuneration in the form of equity instruments, but will not be used in the context of allowances and severance in the form of fixed remuneration (obviously, in these instances, the award is followed immediately by vesting without the preceding of any deferral period). In the latter instances, terms like 'set', 'determine', or 'allocate' are proposed instead.</p>
Art. 6.o	The 'deferral period' is the period after the award of the variable remuneration and before the vesting of the variable remuneration during which staff is not the legal owner of the remuneration awarded.	<p>Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Article 6.e. and 6.l.</p> <p>In combination with Article 6.l this definition seems to suggest an overlap between the accrual and deferral period, which is undesirable.</p>
Art. 111	<p>..... In addition to the restrictions on distributions defined in Article 141 of CRD, the institution should consider these requirements when determining:</p> <p>a. the overall pool of variable remuneration that can be awarded for that year; and</p>	<p>Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Article 6.e. and 6.l.</p> <p>Please note that the overall bonus pool of variable remuneration that can be awarded cannot be established in an effective way which – at the same time - is also clear, simple, and transparent to staff and other stakeholders, if long-term variable incentives from earlier performance years also need to be taken into account, as suggested per Article 6.e. and art. 120.</p>
Art. 120	Remuneration awarded under long term incentive plans, where parts of the remuneration are <u>awarded at a certain point of time</u>	Disagree with the use of the definition of the term 'award' here, see also under Art. 6.e.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
	<p>based on the discretion of the institution <u>and other parts are awarded at a later stage</u>, based on the condition that staff remains with the institution or other conditions, is variable remuneration. For the calculation of the ratio between the variable and the fixed component of remuneration the following should apply:</p> <p>a. the parts of long term incentive plans that are awarded at a later staged and are only awarded if the underlying conditions are met should be taken into account <u>in the accrual period when the remuneration is awarded</u>;</p> <p>b. all upfront parts and <u>parts to which no condition applies</u> should be taken into account <u>in the performance year where the long term incentive plan is awarded</u>.</p>	<p>Unclear what is meant under a. by '<i>in the accrual period when the remuneration is awarded</i>'. Deferred parts of long-term incentive plans are awarded conditionally at a single point in time, <u>after the end of the accrual period</u>, see also under Art. 6.e.</p> <p>It is proposed that at that specific moment they are taken into account in the calculation of the ratio between the variable and the fixed component of remuneration, together with all upfront parts which are awarded at the same time, i.e. not at the time of grant, nor at the time of vesting or release after retention.</p> <p>Any mix-up of upfront parts at the time of pay-out with vested parts of long-term incentive plans in the calculation of the ratio between the variable and the fixed component of remuneration, will lead to a distorted view of this ratio, as performance results of multiple performance years will become mixed up. Any ratio in any year thus calculated will be less meaningful, more difficult to explain or understand, not in the least because these will be greater fluctuations from year on year. On the other hand, it will also open the possibility to 'play the system' by increasing or decreasing the upfront part in order to match the vested parts of the long-term incentive plans in order to achieve the maximum ratio allowed.</p> <p>Under b. it is unclear as to why any parts to which no condition applies, needs to be taken into account as variable remuneration for the calculation of the ratio between the variable and the fixed component of remuneration, as these would typically be fixed remuneration due to the fact that no condition applies.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
		<p>Under point b. it is also unclear what is meant by <i>'in the performance year where the long term incentive plan is awarded'</i>. Any upfront variable remuneration is conditionally granted at the beginning of the performance year and awarded unconditionally after the end of the performance year (subject to a financial soundness check and ex ante risk assessments); see also under Art. 6.e; if the terms 'grant' and 'award' are used in this way, is the moment of grant or award meant here?</p> <p>Under point b. a single moment of 'award' of the long-term incentive plan is implied. (Otherwise it would become very confusing as to when to include the upfront part in in the calculation of the ratio between the variable and the fixed component of remuneration!). However, this is in contrast with what is stated under point a. where multiple moments of the award of the long-term incentive plan is assumed, in line with the definition in Art. 6.e. If the definition under 6.e would be maintained, it is unclear here at what moment of award the upfront parts should be taken together with the matching long-term parts in order to calculate the ratio between the variable and the fixed component of remuneration.</p>
Art. 171 & 178 & 180	171. Institutions must have a fully-flexible policy on variable remuneration, in accordance with Article 94(1)(f) of CRD for identified staff. <u>The amount of variable remuneration awarded should appropriately react to changes of the performance of the staff member, the business unit and the institution.</u> The institution should specify how the variable remuneration reacts to performance changes and the performance levels where variable remuneration decreases down to zero. Unethical or non-compliant behaviour should lead to a significant reduction of staff member's variable remuneration.	<p>Use of the term 'award' here is in line with Article 6.l. Seems to suggest that the award takes place prior to the start of the performance period. This conflicts with Article 6.e.</p> <p>Disagree with the use of the term 'award' here. See comments to Art. 6.e for proposed use of the terms 'grant' and 'award'.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
	<p>178. The amount of fixed remuneration should be sufficiently high in order to ensure that the reduction of the variable remuneration down to zero would be possible. Staff should not be dependent on the award of variable remuneration as this might otherwise create incentives for excessive risk taking or the mis-selling of products where without such short term measures the performance of the institution or staff would not allow for the award of variable remuneration.</p> <p>180. The ratio set is the ratio between the variable remuneration that could be <u>awarded as a maximum for the following performance period</u> and the fixed remuneration of the following performance period.</p>	
Art. 185	<p>185. The ratio should be calculated as the sum of all variable components of remuneration that could be <u>awarded as a maximum in a given performance year</u>, including the amount to be taken into account for the retention bonus, divided by the sum of all fixed elements of remuneration to be awarded in the same performance year.</p>	<p>A new definition of the term 'award' is introduced here. This article seems to suggest that the award takes place <u>in</u> the performance period. This conflicts with Article 6.e and 6.l. Also in this way not used anywhere else in the guidelines.</p> <p>Disagree with the use of the term 'award' here. See comments to Art. 6.e for proposed use of the terms 'grant' and 'award'.</p>
Art. 209 & 213 & 214 & 218 & 224 & 230	<p>209. Variable remuneration should be awarded after the end of the accrual period unless payments during the accrual period are required by national law.</p> <p>213. After the accrual period, the institution should determine the individual staff members' variable remuneration by translating the performance criteria and risk adjustments into actual remuneration awards. <u>During this award process</u> the institution should adjust remuneration for potential adverse developments in the future ("ex-ante risk adjustment").</p>	<p>Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Articles 6.e and 6.l.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
	<p>214. Institutions should define one or more bonus pools <u>for the period for which variable remuneration is awarded</u> and calculate the overall institution wide bonus pool as a sum of these bonus pools.</p> <p>218. Where institutions use a top-down approach, they should set the amount of the bonus pool at the level of the institution, which is then fully or partially distributed among the business units and control functions after the evaluation of their performance. <u>The individual awards should subsequently be based on the assessment of the individual's performance.</u></p> <p>224. Institutions should determine the bonus pool and <u>variable remuneration to be awarded based on performance and risk indicators and apply ex-ante adjustments to ensure that the variable remuneration awarded is fully aligned with the risks taken.</u> The criteria used for the ex-ante risk adjustment should be sufficiently granular as to reflect all relevant risks.</p> <p>230. The institution should pay the variable remuneration partly upfront and partly deferred and in an appropriate balance between equity, equity-linked and other eligible instruments and cash. Before paying out the deferred part of cash or the vesting of deferred instruments, a reassessment of the performance and, if necessary, a risk adjustment should be applied to align variable remuneration to additional risks that have been identified or materialised <u>after the award.</u> This applies also where multi-year accrual periods are used.</p>	
Art. 233 & 240	Institutions should take into account <u>within the deferral schedule the form in which the deferred variable remuneration is awarded</u> (section 17.4) and should, where appropriate, differentiate their de-	Disagree with the use of the definition of the term 'award' here, see also comments under Art. 6.e.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
	<p>ferral schedules by varying these components for different categories of staff. The combination of these components should lead to an effective deferral schedule, in which clear incentives for long-term oriented risk taking are provided by transparent risk alignment procedures.</p> <p>240. Where the general principles of national contract and labour law prevent that variable remuneration can be considerably contracted where subdued or negative financial performance of the institution occurs, <u>institutions should apply a deferral scheme and use instruments for the award of variable remuneration</u> that ensures that ex post risk adjustments are as far as possible applied.</p>	
Art. 253	<p>Instruments should be priced at the market price or their fair value on the date of the award of these instruments. <u>This price is the basis for the determination of the initial number of instruments and for later ex-post adjustments to the number of instruments or their value. Such valuations should also be done before the vesting and before the retention period ends respectively to ensure that ex post risk adjustments are applied correctly.</u> Small and non-complex institutions that are not listed may establish the value of the ownership rights and ownership right linked instruments based on the last annual financial results.</p>	<p>Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Articles 6.e and 6.l.</p> <p>Per Article 6.e, an award is made at the moment of vesting. However, applying this definition would render the second sentence of this Article 253 meaningless. The second sentence of this Article and the word 'also' in the third sentence only make sense if the award takes place at the time of allocation (i.e. after the performance year has ended – as proposed under Article 6.e).</p>
Art. 254	<p>Institutions may award a fixed number or nominal amount of deferred instruments using different techniques, including trustee depot facilities and contracts, provided that in every case the number or nominal amount of the instrument <u>awarded is provided to staff at vesting</u>, unless the number or nominal amount is reduced by the application of malus.</p>	<p>This Article suggests that when the method of establishing a fixed number of shares is applied, this would be awarded not at the time of vesting, i.e. not in line with the definition of Article 6.e. Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Articles 6.e and 6.l.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Definition and use of the term 'award'		
		Also, if the nominal amount of shares under an award is established only at the time of vesting, AND the definition of 'award' under Article 6.e is maintained, the suggested choice in the technique of establishing the number of shares in this Article then falls away, i.e. both techniques will lead to the same number of shares.
Art. 263	<u>For awarded instruments</u> a retention period of at least one year should be set. Longer periods should be set in particular where ex post risk adjustments mainly rely on changes of the value of instruments <u>which have been awarded</u> .	Agree with the way the term 'award' is used here; however, the use of the term 'award' here conflicts with the definition of the term 'award' in Articles 6.e and 6.l



Table 2. Questions / issues / comments in order of appearance in the draft EBA Guidelines of March 4, 2015

EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Executive Summary Page 7	For institutions the guidelines apply on an individual, consolidated and sub-consolidated basis. Competent authorities shall ensure the application accordingly at all levels.	<p>Please clarify what is meant by ‘institutions’ in the context of a large multinational with a group company in an EEA country and subsidiaries in that same EEA country, in other EEA countries and in countries outside the EEA (‘third countries’), i.e. when do these guidelines need to be applied by:</p> <ul style="list-style-type: none"> - the group company only, i.e. on a consolidated level only; - subsidiaries established in the same country as the group company on a solo level; - any of the other subsidiaries of the group company, established in another country on a solo level, also if outside the EEA; - sub-subsidiaries of the above stated subsidiaries; - on sub-consolidated levels; please clarify how to determine these sub-consolidated levels for the purpose of the application of these guidelines. <p>When it is established which entities within a large multinational have to apply the guidelines at which level (solo, sub-consolidated, or consolidated) does this apply to all of the guidelines or does this vary per guideline? I.e. do some guidelines only need to be applied at a consolidated level, while others need to be applied at all three levels (solo, sub-consolidated and consolidated)?</p>
Background & Rationale Page 10	Variable remuneration should be based on performance or in exceptional cases other conditions.	<p>For clarification purposes, could EBA provide examples of ‘other conditions’ that are referred to here?</p> <p>E.g. do conditions of being alive and in service qualify as such and would attaching those to a remuneration element result in the remuneration element at hand to become variable remuneration? Or</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
		can these be viewed as a particular type of claw back criteria for fixed remuneration? See also comment under Art. 117.
Background & Rationale Page 10	... the development of a remuneration policy needs to be supported by internal control functions and corporate functions...	Is Finance considered a control function or a corporate function? While an important function in the context of remuneration governance, Finance is not mentioned anywhere in this consultation paper (unlike in the 2010 CEBS guidelines).
Background & Rationale Page 11	Background & Rationale Page 11 : where requirements refer to the 'consolidated basis' or 'consolidated situation' <u>the responsible EU parent institution</u> , EU parent financial holding company or EU parent mixed financial holding company <u>is responsible for the compliance with the respective CRD provisions and guidelines, this includes also subsidiaries which are not in the scope of the prudential consolidation and subsidiaries for which other specific sectorial directives (e.g. AIFMD and UCITS V) apply.</u>	See comments under Annex 2 – point 38 & 41.
Background & Rationale Page 12	However, more complex and larger institutions need to comply to a greater extent (e.g. by deferring more than 40% over 5 years or more and paying a higher part of variable remuneration in instruments).	Please clarify the definition of 'more complex and larger' institutions.
Background & Rationale Page 13	To ensure a complete and harmonised identification of staff, the guidelines set out how institutions should apply the criteria set out in the Commission Delegated Regulation (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile ('RTS on identified staff') within their self-assessment process, the relevant gov-	See comments under Article 106, and 106 & Annex 2 – point 41 & 50.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	ernance arrangements and how the criteria set in the RTS are applied on a consolidated and sub-consolidated level and in subsidiaries which are not themselves subject to the CRD.	
Background & Rationale Page 17	The ratio of deferred remuneration and the deferral period needs to be tailored to the long term impact of the category of identified staff throughout the business cycle and therefore arrangements may differ between different categories of identified staff and will also depend on the institutions business model.	Please clarify which different categories of Identified Staff, other than Executive Board members and senior management of subsidiaries, are implied here.
Art. 5 & Annex 1	These Guidelines set out requirements applicable to all staff of institutions and specific requirements that institutions have to apply to the remuneration policies and variable elements of remuneration of identified staff. Institutions may also apply these specific requirements to additional categories of staff or to all staff. Annex 1 to these guidelines indicates the requirements for which an institution-wide application to all staff in line with the additional guidelines provided is required, recommended or voluntary.	For clarification purposes, would it be possible that EBA adds to art. 5 and / or Annex 1 the numbers of those EBA guidelines that are applicable to all staff and identified staff respectively, as in the earlier CEBS guidelines? See also CEBS 2010 guidelines - Introduction, point 6.
Art. 6.b	b. 'Fixed remuneration' are non-discretionary payments or benefits which do not depend on performance <u>or other contractual criteria</u> , unless they form part of routine employment packages for staff, ⁶ and which comply with all the requirements of paragraph 117 or the requirements of paragraphs 118 or 119.	What other contractual criteria are meant here? E.g. conditions of being alive and in service? See also comments under Art. 117.
Art.6.d	Routine employment packages are ancillary components of fixed remuneration that are obtainable for a wide population of staff or <u>staff in specified functions based on predetermined selection criteria</u> , including e.g. healthcare, child care facilities or proportionate regular pension contributions. ⁷	Please clarify what is meant by ancillary components of fixed remuneration for "staff in specified functions based on predetermined selection criteria"; can these be non-monetary benefits or perks which are provided to a only small group of selected staff on the rationale or status or market practice?
Art. 6.h	Identified staff' are staff whose professional activities have a material impact on the institutions risk profile.	Compared to the CEBS 2010 guidelines, this definition seems incomplete: category of staff whose remuneration takes them into the same brackets as material risk takers is missing.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 12	The remuneration policy should make a clear distinction with regard to the variable remuneration and the performance assessment between the operating business units, corporate and control functions.	Please clarify what is meant here.
Art. 14	The <u>remuneration policy for all staff</u> should contain: a. the performance objectives, b. the methods for the measurement of performance, including the performance criteria; c. the structure of variable remuneration, including the instruments in which parts of the variable remuneration are awarded; d. where appropriate, the ex ante and ex post risk-adjustment measures of the variable remuneration.	It is proposed to add the word 'variable' here: "The <u>variable</u> remuneration policy for all staff", as not in every financial institution all staff are eligible for variable remuneration.
Art. 20	The remuneration policy should ensure that conflicts of interests with regard to the remuneration policy and remuneration awarded are identified and appropriately mitigated, <u>including by establishing objective award criteria based on the internal reporting system, appropriate controls and the four eyes principle.</u>	See underlined part of the Article. Please clarify what is meant here, how this is supervised by the national supervisor, and whether there is any related disclosure requirement.
Art. 33	If the approval of the remuneration of individual members of the management body or other identified staff is assigned to shareholders, shareholders should also explicitly approve the payments that can be awarded to those persons at the termination of their contracts. In this context, shareholders should expressly approve ex-ante the maximum amount of payments that can be awarded in case of an early termination of a contract, without prejudice to any applicable national labour law.	It is assumed here that internal shareholders are meant. Please clarify. See also comments under Art. 36.
Art. 34	In order that shareholders can make informed decisions, the supervisory function should ensure that the institution provides them with adequate information regarding the remuneration policy designed to help them to assess the incentive structure and the extent	Please clarify whether this must be disclosed in the Annual Report or can be disclosed elsewhere



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>to which risk-taking is being incentivised and controlled as well as the overall cost of the remuneration structure. Such information should be provided well in advance of the relevant shareholders' meeting. Detailed information on remuneration policies and on their modifications, on procedures and decision-making process to set a remuneration package should be provided and include the following:</p> <ul style="list-style-type: none"> a. the remuneration components; b. main characteristics and objectives of the remuneration packages and their alignment with the business and risk strategy, including the risk appetite and corporate values of the institution; c. How the points under (b) are taken into account in ex-ante/ex-post adjustments in particular for identified staff. 	
Art. 36	<p>Where shareholders are requested to approve a higher maximum level of the ratio between the variable and fixed component of remuneration of up to 200 %, the following should apply:</p> <ul style="list-style-type: none"> a. Shareholders who have the right to vote on a proposed higher maximum level of the ratio between the variable and the fixed components of remuneration are those of the institution where the identified staff concerned by the higher maximum levels of variable remuneration, operates. For subsidiaries, the subsidiary's general assembly of shareholders is competent to decide and not the general assembly of the consolidating institution. b. Where an institution exercises its voting rights as a shareholder of its subsidiary with regard to the approval of a higher maximum level of the ratio between variable and fixed remuneration within a subsidiary, one of the following conditions should be met: 	<p>CRD IV art. 94(2), last requirement reads as follows: <i>'staff who are directly concerned by the higher maximum levels of variable remuneration shall not be allowed to exercise directly or indirectly any voting rights they may have as shareholders'</i>.</p> <p>Meeting this requirement when the subsidiary's general assembly of shareholders decides on a proposed higher maximum level of the ratio between the variable and the fixed components of remuneration, is sufficient from a risk management perspective. In practice, it will be administratively very burdensome for institutions to assure that their staff who own shares, by virtue of the institution's remuneration plans or otherwise obtained, abstain from voting on a proposed higher maximum level of the ratio between the variable and the fixed components of remuneration on their AGMs (also when it concerns proposals regarding b.i and b.ii). It is therefore proposed</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>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;</p> <p>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.</p> <p>c. In accordance with the first indent of Article 94(1)(g)(ii) of CRD, when approving a higher maximum level of the ratio between the fixed and variable components of remuneration, the shareholders' meeting shall act upon a detailed recommendation which provides in particular the reasons, the number of identified staff concerned and their functions within the institution as well as the explanation of how such higher maximum level of the ratio may affect the requirement to maintain a sound capital base. This information should be provided to shareholders well in advance of the shareholder's meeting.</p> <p>d. Any approval of a higher maximum level of the ratio must be carried out in accordance with the provisions of Article 94 (1) (g) (ii) of CRD; the 50% threshold for the quorum, and the 66% and 75% majority thresholds required for the vote, as mentioned in that Article, should all be calculated taking into account the voting rights attached to the shares or other equivalent ownership rights in the institution.</p> <p>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</p>	<p>that in principle the subsidiary's general assembly of shareholders is competent to decide and not the general assembly of the consolidating institution, unless it concerns staff of the group company. I.e. the criteria under b. do not need to be fulfilled.</p> <p>Please clarify whether the policy approval for clusters of functions / roles (rather than for specific amounts awarded to individuals for specific roles) recently sought needs to be re-obtained each year, if the policy nor the roles to which this approval applies have not changed? See also comments under Annex 2 – point 21.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>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.</p> <p>f. In accordance with the last indent of Article 94(1)(g)(ii) of CRD, staff who are directly concerned by the higher maximum levels of variable remuneration must not be allowed to exercise, directly or indirectly, any voting rights they may have. Accordingly, their voting rights shall be disregarded when calculating the percentages, both in the nominator and the denominator.</p> <p>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.</p>	
Art. 39	Subsidiaries, which are regulated by specific sectoral legislation (e.g. AIFMs or UCITS managers) should follow the rules set out in the specific sectoral legislation applying to them in order to determine whether or not they are required to establish a remuneration committee.	Apparently here, the sectorial regulations override these EBA guidelines on the topic of establishing a REMCO. Agree with this Article, but this is not in line with what is stated under 'Annex 2 – points 38 – 41', as Option A is applicable rather than Option B.ii. Please clarify.
Art. 42	The remuneration committee should be composed of members of the supervisory function ¹² who do not perform executive functions. The chair and the majority of members of the remuneration committee should qualify as independent ¹³ . If employee representation on the management body is provided for by national law, it must include one or more employee representatives. Where there are not a sufficient number of qualified independent members the institutions should implement other measures within the remuneration policy to limit conflicts of interest in decisions on remuneration issues.	Please clarify whether this also applies to REMCOs of significant subsidiaries.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 44	<p>The remuneration committee should:</p> <p>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 <u>and the ex-ante risk adjustment based on the actual risk outcomes.</u></p> <p>ii. 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 <u>and the ex-ante risk adjustment based on the actual risk outcomes.</u></p>	<p>Please clarify whether this also apply to REMCOs of significant subsidiaries.</p> <p>See underlined text; verb seems to be missing.</p>
Art. 45	<p>Where the institution has established a remuneration committee, the remuneration of <u>the senior officers</u> 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 <u>the senior staff members</u> in the control functions.</p>	<p>Unclear who are meant by ‘the senior officers’:</p> <ul style="list-style-type: none"> - the most senior end responsible role for the control function concerned (i.e. 1 person per control function), or - is it expected that more than one senior officer per Control Function is identified for the purpose of this Article? <p>Also unclear whether in this Article ‘the senior officers’ and ‘the senior staff members’ are different wordings for the same roles or whether a different population is meant.</p>
Art. 59	<p>The remuneration policy <u>should</u> provide incentives for staff in control functions to deliver the best performance in their role. The remuneration policy should ensure that no <u>material</u> conflicts of interest arise for staff in control functions.</p>	<p>Please clarify whether it is a requirement that the remuneration packages for control functions staff contain a variable component?</p> <p>Please clarify whether it is allowed that control functions staff may participate in bonus pools which are funded on the basis of financial performance indicators of the unit they directly oversee, as long as their own variable remuneration is established on other parameters not related to financial performance indicators of the unit they directly oversee?</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
		Please clarify whether this Article implies that control functions staff may receive variable remuneration based on financial performance indicators of the unit they directly oversee, as long as the weight of these parameters is not material (e.g. less than 20%)?
Art. 63	<p>In accordance with Articles 92(1) and 109 of CRD the consolidating institution must ensure that subsidiaries within the group which are not themselves subject to the CRD, apply the group-wide remuneration policies to all staff and the requirements of Article 92(2), 93 and 94 of CRD at least to those staff members whose professional activities have a material impact on the group's risk profile. <u>This also applies to specific requirements of CRD, which have not been included in other sectoral legislation (e.g. staff within entities that fall within the scope of the AIFMD¹⁹ and UCITS Directive²⁰ and are part of a group have to comply with the limitation of the variable components of remuneration to 100 % (if applicable, up to 200 % with shareholders' approval) of the fixed components of remuneration if their professional activities have a material impact on the group's risk profile on a consolidated basis.²¹</u> Where specific CRD requirements conflict with the sectorial requirements (e.g. under the AIFMD or UCITS Directive), the remuneration policy should set out for the concerned identified staff which requirements should apply within the entity on an individual basis, taking into account the specific sectoral legislation (e.g. entities subject to the AIFMD or the UCITS Directive should pay the variable remuneration in the alternative investment funds instruments or UCITS instruments (Annex II (1) (m) of AIFMD and Article 14(b)(m) of UCITS V).</p>	<p>The requirement that the bonus caps of CRD IV should be applied to subsidiaries to which by the nature of their activities specific sectorial legislation such as AIFMD or the UCITS Directive apply, yet are part of a group to which CRD IV applies, will result in the situation whereby there is no longer a level playing field between these subsidiaries (subject to bonus caps) and other companies with the same activities but not part of such group, and to which no bonus caps are applicable (e.g. independent investment firms or investment firms of a group company established outside the EEA).</p> <p>From a market competition and governance perspective this is undesirable, as it leaves the most risky companies with uncapped bonuses (as AIFMD / UCITS allow for uncapped variable compensation at the moment).</p> <p>Also, regulations that create an inequivalent level of conditions for competition between the same categories of institutions, seem not to be in line with Article 79, at least not the spirit of it.</p>
Art. 64	Staff seconded from a parent undertaking in a third country to an EU subsidiary or branch who, were they employed directly by the EU subsidiary or branch, would fall into the scope of identified staff	Why does EBA not support the Home Country principle w/r to the remuneration of staff seconded internationally? This Home Country



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	and therefore should also be subject to the provisions of Articles 92, 93 and 94 of CRD and applicable Regulatory Technical Standards as they are implemented in the Member State where the subsidiary or branch is established. For the purposes of short term secondments, for example where a person is only residing in a Member State for a few weeks to carry out project work, that person should be subject to such provisions only if the person would be identifiable under the applicable RTS, taking into account the remuneration awarded for the time period of and the role and responsibilities during the secondment.	principle is vital for a longer-term oriented and sustainable international mobility program within financial institutions. International diversity is an essential element in the longer-term risk management and success of internationally operating financial companies.
Art. 71	Before remuneration requirements are applied in a proportionate way, the identification of staff, based on the criteria provided in the RTS on identified staff ²³ and additional internal criteria, should be performed ² .	See comments under Article 106, and 106 & Annex 2 – point 41 & 50.
Art. 72	In any case, the limitation of the ratio between the variable components of remuneration and the fixed components to 100 % (200 % with shareholders' approval) is not subject to proportionality principle. It should be applied to all identified staff in the institution and its subsidiaries, <u>even if they are not themselves subject to the CRD, in line with the guidelines in section 7.</u>	See comments under Article 63.
Art. 74	Where an institution is a subsidiary of a significant institution, all requirements are applied to these subsidiaries on solo level as they apply on the consolidated level.	Which requirements are meant here, only those under Title II, Section 8. Proportionality, or all requirements in these EBA guidelines applicable to significant institutions? Please clarify whether this applies only to subsidiaries within the EEA? Please clarify whether this applies also to sub-subsidiaries of a significant institution?



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 80 & 81	<p>Art. 80: According to the above, large (including significant), and more complex institutions should have more sophisticated remuneration policies and risk measurement approaches, while small and less complex institutions may implement simpler remuneration policies and approaches.</p> <p>Art. 81: In assessing the application of the requirements in a proportionate manner, institutions and competent authorities should consider a combination of all the following criteria: the size, the internal organisation and the nature, scope and complexity of the institution's activities.</p>	Is it required / allowed to apply the guidelines for smaller and less complex organizations also to smaller subsidiaries within a group of companies? See also comment under Executive Summary - Page 7.
Title II Section 9 (art. 83 – 91)	<Title II Section 9 in its entirety is not copied here>	For clarity purposes, it is proposed that the guidelines in this Section which are a clarification of the RTS on the Identification of Identified Staff will be included in this RTS, rather than in these EBA guidelines.
Art. 85	The self-assessment should be based on the qualitative and quantitative criteria provided for in the RTS on identified staff and should include, where needed to ensure a complete identification of all staff whose professional activities have a material impact on the institutions risk profile, additional criteria set forth by the institution that reflect the levels of risk of different activities within the institution and the impact of staff members on the risk profile.	See under Background & Rationale - Page 13.
Art. 87	Where the quantitative criteria are met, staff is identified staff, unless the institution applies Article 4(2) of the RTS on identified staff. In relation to the criteria (a), in respect of staff who was awarded total remuneration of EUR 750 000 or more in the preceding financial year, or (b) of Article (4)(1) of the RTS, <u>the application of paragraph (2) of Article 4 of the RTS is subject to the prior approval of the competent authority.</u>	<p>Please clarify what criteria may competent authorities use to reject the application?</p> <p>Will EBA serve as an institution for appeal / arbitration against decisions of national competent authorities? See also comments under Annex 2 – point 12.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 92	<p>Where the institution determines according to Article 4(2) of the RTS on identified staff that the professional activities of the staff member do not have a material impact on the institution’s risk profile and notifies the competent authority or applies for a prior approval, the following should apply:</p> <p>a. the management body should decide based on the performed analysis within the annual identification process if the staff has in fact no material impact on the institutions risk profile, and the supervisory function should review the decision taken ;</p> <p>b. any notification should be made without delay, but at the latest within six months after the end of the preceding financial year as to ensure that the competent authority has sufficient time for analysing the exclusions made and that the institution can take into account any objections raised by the competent authority and adjust the identification outcome accordingly;</p> <p>c. any application for prior approval should be made without delay, but at the latest within six months after the end of the preceding financial year. The competent authority should assess the application and approve or reject the application, to the extent possible, within a three-month period after receiving the complete documentation;</p> <p>d. where the staff member was awarded total remuneration of 1 000 000 euro or more in the preceding financial year the competent authority should immediately inform the European Banking Authority about the application received and provide their initial assessment. On request the competent authority should immediately submit all information received by the institution to the EBA. The EBA will liaise with the competent authority to ensure that the criteria of</p>	<p>In case of institutions in subsidiaries which are established in another country than the group company and which are required to perform an Identification of Identified Staff based on the RTS on a solo level, it is unclear whether the national competent authority in the country where the group company resides or in the country where the subsidiary resides is intended here.</p> <p>What criteria may competent authorities use to reject the application?</p> <p>Will EBA serve as a an institution for appeal / arbitration against decisions of national competent authorities? See also comments under Annex 2 – point 12.</p> <p>Please clarify what the EBA will do to ensure alignment between the evaluation outcomes in this respect of the various national competent authorities.</p> <p>The period of six months after the end of the preceding financial year as stated under b. and c. will not be feasible for institutions in the case that new roles are created in the second half of the calendar year, e.g. due to reorganization, restructuring, merger or takeover, or growth.</p> <p>The period of three months for assessment by the competent authority is much too long, in case a new staff for an existing role is hired who would earn a total remuneration exceeding EUR 500,000. In this situation, under c., national competent authorities should be</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	the RTS are applied in a consistent way before the decision regarding the approval or rejection of the application is taken by the competent authority.	able to guarantee a response within the required timeframe applicable to the recruiting process, which in some cases need to be closed within a few working days, rather than use a three-month period for reply, in order for financial institutions to be able to timely offer the correct (IS or non-IS) remuneration package and close the deal; or, alternatively, financial institutions should be allowed to obtain approval from the national competent authority after the recruitment process of an external hire has been completed.
Art. 93	The prior approval under Article 4(5) of the RTS on identified staff regarding exclusions of staff identified in relation to the criterion in point (b) of Article 4(1) of this RTS should be granted <u>only for a limited time period</u> . The request for prior approval under Article 4(5) of the RTS on identified staff should be made each year. With respect to staff for whom a decision on the application is taken for the first time, the prior approval should only concern the financial year in which the prior approval was requested and the following financial year. For staff where the application of Article 4(2) of the RTS has already been approved for the ongoing financial year, the prior approval should only concern the following financial year.	Please clarify what would be considered 'a limited time period'?
Art. 95	Where identified staff would be excluded in subsidiaries which are not themselves subject to the CRD, the competent authority is the competent authority of the parent institution.	Please clarify that in case certain staff in subsidiaries which are not themselves subject to the CRD would be labelled as non-IS under the applicable sectorial guidelines, competent authorities will not be able to deny this status on the basis of the CRD IV/ EBA guidelines. See also comment under Article 106 & Annex 2 – point 41 & 50.
Art. 100	The criteria included in the RTS on identified staff and those additionally set by the institutions should be applied both by institutions on a solo basis, using the figures and considering the situation of the	See comments under Executive Summary – Page 7.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	individual institution, and in addition by the consolidating institution on a consolidated basis, including also all subsidiaries not subject to CRD, using the consolidated figures and considering the consolidated situation and the impact on the institutions' risk profile on a consolidated basis. The same applies for the sub-consolidated level.	
Art. 101	When applying the qualitative criteria in Article 3 of the RTS on identified staff at consolidated or sub-consolidated level, staff members in a subsidiary are only captured if they are responsible for the functions referred in these criteria on a consolidated or sub consolidated basis. E.g. a staff member in a subsidiary who is a member of the management body of such subsidiary should be captured by the criterion set out in Article 3(1) of the RTS on identified staff (<i>'the staff member is a member of the management body in its management function'</i>) only if he or she is also a member of the management body of the EU parent institution.	Please clarify when consolidation on a sub-consolidated basis is allowed / required. See also comments under Executive Summary – Page 7.
Art. 102	The quantitative criteria within Article 4 of the RTS on identified staff apply to all staff <u>on a consolidated basis, including all subsidiaries</u> . E.g. staff in a subsidiary earning 500 000 euro or more is therefore considered identified staff, unless staff would be excluded under Article 4 (paragraphs 2 to 5) of this RTS.	Please clarify. The example would suggest that the quantitative criteria should be applied on a solo basis.
Art. 106	Institutions falling within the scope of the CRD (credit institutions and investment firms) should conduct their own self-assessment for the identification of staff on the solo level. Small and less complex institutions which are included in an identification process on a consolidated basis may delegate the practical application of the identification process on a solo level to the consolidating institution.	See also comments under 'Executive Summary Page 7 re the use of the term 'institution'. Please clarify whether 'small and less complex institutions' refers to non-material business units, as per these RTS?
Art. 106 & Annex 2 – point 41 & 50	Subsidiaries that are not themselves subject to the CRD are not required to perform an identification process on the solo level. For	This guideline, interpreted on the basis of Annex 2 points 41 (i.e. Option A applies in this case) and 50, seems to suggest that subsidiaries that are not themselves subject to the CRD need to perform



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>those subsidiaries the assessment should be performed by the consolidating institution, based on information provided by the subsidiary.</p> <p>Annex 2 – point 41: Option A and Option B(ii) are retained.</p> <p>Annex 2 – point 50: Additional guidelines were provided for the assessment process on the solo and the consolidated levels and in particular for the assessment within subsidiaries which are only covered by the CRD provisions in a group context. As the consolidating institution is responsible for the compliance on the group level and as the CRD does not apply to all subsidiaries on an individual basis there is no other option than to require that the consolidating institution does the assessment. This must be based on the consolidated situation; hence it must be based on the consolidated figures, consolidated organisation and risk impact, but must consider all the subsidiaries (even if not included in the scope of prudential consolidation). The situation as if all the entities would form one institution has to be taken into account. For this purpose it is mandatory that all subsidiaries cooperate and provide the required information. Also here no alternative options exist.</p>	<p><u>AND</u> an Identification of Identified Staff process according to the respective EBA RTS guidelines as part of the group’s consolidated Identification of Identified Staff process <u>AND</u> a second Identification of Identified Staff process according to the applicable sectorial regulations. Because these two identification processes would be done with a different scope (EBA: group; sectorial guidelines: solo or sub-consolidated level), this (almost) doubles the administrative burden for such subsidiaries, especially as this would also require two sets of disclosures.</p> <p>It is proposed that such subsidiaries are allowed to only use the sectorial guidelines, e.g. the AIFMD guidelines, for identifying IS instead and report these to the respective national competent authority, while the group establishes their overall group Identified Staff <u>exclusive</u> of the Identified Staff of such subsidiaries <u>OR</u> while the group establishes their overall group Identified Staff <u>inclusive</u> of the Identified Staff in such subsidiaries and the latter based on the criteria of the sectional requirements.</p>
Art 117	<p>Remuneration is fixed where the conditions for its award and its amount:</p> <ul style="list-style-type: none"> a. are predetermined; b. are non-discretionary; c. are transparent to staff; d. are permanent i.e. maintained over a period tied to the specific role and organisational responsibilities; 	<p>Please clarify whether all of these criteria need to be met before a remuneration element can be labelled as fixed remuneration, or whether meeting one criteria is already sufficient?</p> <p>Please clarify:</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>e. are non-revocable; the permanent amount is only changed via collective bargaining or following renegotiation in line with national criteria on wage setting;</p> <p>f. the payments cannot be reduced, suspended or cancelled by the institution;</p> <p>g. do not provide incentives for risk assumption; and</p> <p>h. do not depend on performance.</p>	<ul style="list-style-type: none"> - criteria c.: is it sufficient that the fixed remuneration is transparent to the staff member eligible for it, or do all fixed remuneration elements be made transparent to all staff? - criteria e: what if the fixed remuneration of staff or certain categories of staff is not subject to collective bargaining or based on national law or practice regarding wage setting? E.g. base pay increases based on (international) market practice or negotiated by a Works Council rather than a union? - criteria e./f.: in certain instances fixed remuneration such as reimbursement allowances or even base pay can be subject to claw back, e.g. in case of fraud; is such claw back excluded from the definition of non-revocability / reduction / suspension / cancellation here? <p>Regarding criteria f. and h., any remuneration element, whether fixed or variable, is at least suspended but usually cancelled when the employee leaves service or dies. So these two criteria for eligibility for remuneration (being alive and in service) should not be seen as a performance or other condition leading towards categorization as variable remuneration. Neither can it be considered a performance-related achievement that a staff member is still alive and in service at a certain point in time. Hence remuneration elements with only those conditions attached should be considered as fixed remuneration. Please confirm.</p>
Art. 118	<p><u>Remuneration components that are either part of a general, institution-wide policy where they are awarded in a non-discretionary way to staff</u>, do not depend on performance and do not pose incentive effects in terms of risk assumption, or payments based on legal obligations, i.e. mandatory under national law, are considered as fixed</p>	<p>Unclear how Article 118 relates to Article 117, i.e. does Article 118 contain simply more criteria, in addition to Article 117. What if the criteria in Article 117 are met, but not Article 118?</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>remuneration. This includes payments which form part of routine employment packages, as mentioned by recital 64 of CRD, and which are solely linked to the family or personal situation like child-care, proportionate regular pension contributions on top of the mandatory regime, travel allowance, and health insurance.</p>	<p>Please clarify the concept of ‘institution-wide policy’ in the context of a multinational group of financial institutions, with the group company established in the EEA, and subsidiaries established in and outside of the EEA. See also comment under ‘General – Executive Summary Page 7’.</p> <p>Please clarify whether the underlined part implies that all staff should be eligible for such remuneration components, or whether it is acceptable to have certain fixed remuneration components only available to specific groups of staff, as long as these are described in a policy which forms part of the set of remuneration policies operated within the group.</p>
Art. 126	<p>A retention bonus should be taken into account within the calculation of the ratio between the variable and the fixed remuneration as variable remuneration <u>consistent over time with its actuarial value in line with the applied accounting standards or on a linear pro rata basis.</u></p>	<p>From Annex 2 it is noted that EBA have considered the option that the full amount is taken into account when the retention bonus is awarded and rejected it. If retention bonuses are subject to cliff vesting, please clarify whether in such case it is still allowed to take the retention bonus into account on a linear pro rata basis within the calculation of the ratio between the variable and the fixed remuneration during the deferral period.</p> <p>Please explain why retention bonuses need to be valued on an actuarial basis in line with the applied accounting standards or on a linear pro rata basis while these valuation requirements do not apply to other deferred variable remuneration? Has the EBA considered that the IFRS calculation methods may lead to different – i.e. lower - valuation outcomes than when done on standard remuneration calculation methods used for disclosure purposes and / or calculating the employee value of variable remuneration, due to different discounts to be applied?</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 136	Institutions should only award once to the same single staff member guaranteed variable remuneration. This requirement should apply in the scope of consolidation and includes situations where staff receives a new contract from the same institution or another institution within the scope of consolidation.	Please clarify: does this Article imply that it is allowed to use sign-on bonuses for transfers within a group, whereby the employee leaves the employment of one group entity and joins another, as long as this instrument is used once only? I.e. sign-on bonuses are not just limited to external hires from outside the group?
Art. 137	Institutions and competent authorities should not include the amount of guaranteed variable remuneration in the calculation of the ratio between variable and fixed remuneration for the first performance period, where the guaranteed variable remuneration is awarded <u>when hiring new staff before the first performance period starts.</u>	See underlined text. Please clarify what is meant here. Any performance period for a new hire does not start until at the start of his / her employment with the company. If, however, the start of the regular performance period which applies to all existing staff is meant here, this means that one should include the amount of guaranteed variable remuneration in the calculation of the ratio between variable and fixed remuneration for the first performance period in case of any new hire who starts during any performance period, which is valid for most new hires. In both cases, what is the point EBA wishes to achieve with this Article?
Art. 139	For remuneration packages to compensate the beneficiary or buy the beneficiary out from a contract in previous employment, all requirements for variable remuneration apply, including deferral, retention, pay out in instruments and clawback arrangements.	Please clarify. Does this Article imply that such buy-out arrangements are not considered <u>guaranteed</u> variable remuneration, i.e. hence not subject to the guidelines on <u>guaranteed</u> variable remuneration?
Art. 147 and Art. 148	Art. 147: Where institutions award severance pay as part of a settlement <u>with staff</u> under point (c) of paragraph 146, they should be able to demonstrate the prudential reasons for the settlement, the appropriateness of the amount of severance pay awarded and that it does not reward failure or misconduct. Art. 148: Institutions should, in any case, be able to explain to competent authorities the criteria used to determine the amount of severance pay.	Please clarify whether staff as underlined in Article 147 is referring to all staff or whether this obligation of demonstration is limited to e.g. Identified Staff or to staff receiving severance payments above a certain amount only? This in light of the administrative burden versus risks. Ditto Article 148.
Art. 149	When determining the amount of severance payments to be made, the institution should take into account the performance achieved	See underlined text. Implementing this guideline would result in a serious infringement on national collective bargaining rights and



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>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:</p> <p>a. Failures of the institution should be considered when the total amount of the severance payments for staff is determined, taking into account the capital base of the institution; <u>such severance payments should not be higher than the reduction of costs achieved by the early termination of contracts;</u></p> <p>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.</p>	<p>processes, as well as national legislation, in case of failure of the institution, and, as a result, in practice not tenable.</p>
Art. 151	<p>Failure of the identified staff should be assessed on a case-by-case basis, and includes the following situations:</p> <p>a. Where a member of the management body is no longer considered as of good repute or as sufficiently experienced and knowledgeable;</p> <p>b. Where the identified staff participated or is responsible for conduct which resulted in significant losses for the institution, as defined in the institutions' remuneration policy;</p> <p>c. Where a member of staff acts contrary to internal rules, values or procedures based on intent or gross negligence.</p>	<p>Please clarify under point a. the criteria for '<i>as of good repute or as sufficiently experienced and knowledgeable</i>'.</p> <p>Also, how to apply Article 151.a, in case the institution is (partly) to blame for the insufficient repute or experience and knowledge?</p>
Art. 153 & Annex 2 – point 85 & 88 & 89	<p>Article 153: When calculating the ratio between the variable and the fixed remuneration the following amounts of severance pay should be taken into account as variable remuneration <u>for the purpose of the calculation of the ratio between the variable and fixed components of remuneration for the last performance period:</u></p>	<p>Please clarify how Article 146.c. relates to this Article 153?</p> <p>Please also clarify how this Article 153 relates to Article 180 and 185? This Article 153 seems to suggest a calculation of the ratio in relation to awards for the last performance year, i.e. to be calculated after the end of the performance year. I agree to this way of</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>a. The sum of any higher amounts than the basic salary for the future periods under point (b) of paragraph 152; b. Any other severance pay not contained in paragraph 152.</p> <p>Annex 2 – point 85: The following Options were considered: a. Option A: the severance payment has to be considered as variable remuneration; b. Option B: the severance payment is not considered in the bonus cap where national labour or contract law makes such payments mandatory, the GL should the situations in which this is applied; c. Option C: the severance payment, when it is considered as mandatory or is in line with the fixed remuneration which would have been paid for future periods, should be considered to not fall into the last performance period and therefore not considered when the ratio is calculated for the former staff member. Other elements would be considered in the calculation. Variable elements of severance pay would be specified and be taken into account in the calculation of the ratio for <u>the last performance period</u>.</p> <p>Annex 2 – point 88: Option C would be effective as it would specify the amounts that are considered as fixed severance pay and the amounts to be considered as variable severance pay. The option provides for sufficient flexibility of severance pay awards, while not increasing the amount of variable remuneration which could be awarded and ensuring that the bonus cap is applied. Such fixed mandatory payments have more the character of compensation than remuneration.</p> <p>Annex 2 – point 89. Option B and C were retained.</p>	<p>calculating the ratio. However, this is not in line with Article 180 which requires that this ratio is set prior to the start of the performance year. Article 185 refers to the calculation to be made in relation to awards made in a given performance year, i.e. establishing the ratio during a performance year. Please align and clarify the way this ratio needs to be calculated.</p> <p>Also, this Article 153 and Annex 2 point 85.c seem to suggest that a recalculation of this ratio is required as soon as any severance is awarded during a calendar year. Please clarify that if any severance payment is (partially) variable in nature and this is assigned to '<i>the last performance period</i>', this is the current, running performance year rather than the performance year just finished (i.e. the previous calendar year).</p> <p>Assigning it the past performance year instead of the current, running performance year seems odd, especially for any severances awarded after 1 July in any calendar year, and would lead to unduly limitations of such severance if the sum of all variable remuneration paid in relation to the prior performance year and which was awarded before the severance was set in motion is already close to or meeting the applicable bonus caps.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 162	<p>Circumvention takes place among other:</p> <ul style="list-style-type: none"> a. where variable remuneration is considered as fixed remuneration in line with the wording of these guidelines, but not with its objectives; b. where variable remuneration is awarded or vests although effectively: <ul style="list-style-type: none"> i. there is no positive performance by the staff member, business unit or institution; ii. there is no effective risk alignment (i.e. ex-ante or ex-post risk adjustment); or iii. the variable remuneration is not sustainable according to the institution's financial situation; c. where staff receives payments from the institution or an entity within the scope of consolidation which do not fall under the definition of remuneration, but are vehicles or methods of pay that contain an incentive for risk assumption or provide disproportionate returns on investments on instruments of the firm that are significantly different from conditions for other investors who would invest in such a vehicle; d. where fixed remuneration components are awarded as a fixed number of instruments and not as a fixed amount; e. where staff is awarded remuneration in instruments or is able to buy instruments which are not priced at the market value or the fair value in the case of non-listed instruments and the additional value received is not taken into account in the variable remuneration; f. where adjustments to fixed remuneration components are frequently negotiated and adjustments are in fact made to align the remuneration with the performance of staff; 	<p>Regarding point b.ii in this Article, please clarify whether any variable remuneration awarded or vested or paid out / released may be deemed to be a circumvention in retrospect if in individual cases the national competent authority deems an ex ante or ex post risk adjustment should have taken place if the latter have not (or not sufficiently in the opinion of the national competent authority).</p> <p>If yes, then please clarify during what period of time after vesting / pay-out / release national competent authorities can still label a variable remuneration amount as circumvention (irrespective of whether the adjustment has failed to take place at award, vesting or pay-out/ release).</p> <p>Also, please clarify what actions of the institution towards individual employees the national competent authority can require from the institution? E.g. can the national competent authority enforce a claw back of variable remuneration already vested / paid out / released from individual employees on the institution on the grounds of circumvention?</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	g. where allowances are awarded at an excessive amount that is not justified for the underlying reason.	
Art. 169	Where the supervisory function in exceptional cases is awarded variable remuneration, the variable remuneration and risk alignment should be strictly tailored to the assigned oversight, monitoring and control tasks, reflecting the individual's authorities and responsibilities and the achievement of objectives linked to their functions.	Please clarify whether (any) variable remuneration to members of the management function in its supervisory function is subject to all of the requirements for variable remuneration in these EBA guidelines, including the funding through bonus pools, caps, ratio between fixed remuneration and variable remuneration, deferral and retention, and any ex ante and ex post risk adjustments?
Art. 171	The remuneration of staff in the independent control functions should allow the institution to employ qualified and experienced personnel in these functions. The remuneration of independent control functions should be predominantly fixed as to reflect the nature of their responsibilities.	Please clarify whether the guidelines in this Section 14.1 only apply to staff in Control Functions who are involved in any remuneration governance activities, or to all staff in the institution's Control Functions. Please clarify what ratio of fixed remuneration to variable remuneration is considered to meet the criterion of ' <i>predominantly</i> '.
Art. 172	The methods used for determining the variable remuneration of control functions, i.e. risk management, compliance and internal audit function, staff should not compromise their objectivity and independence and consider their advisory role to the remuneration committee.	Please clarify whether this implies that staff in Control Functions who have an advisory role to the remuneration committee cannot have any performance criteria related to this advisory work for the establishment of their variable remuneration?
Art. 177	The fixed remuneration of identified staff should reflect the professional experience and organisational responsibility taking into account the level of education, the degree of seniority, the level of expertise and skills, the constraints (e.g. social, economic, cultural or other relevant factors) and job experience, the relevant business activity <u>and</u> remuneration level of the geographical location.	Please clarify how many of the mentioned factors should be met in the determination and rationale for any fixed remuneration (it says AND, not AND / OR).



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 178	The amount of fixed remuneration should be sufficiently high in order to ensure that the reduction of the variable remuneration down to zero would be possible. Staff should not be dependent on the award of variable remuneration as this might otherwise create incentives for excessive risk taking or the mis-selling of products where without such short term measures the performance of the institution or staff would not allow for the award of variable remuneration.	Please clarify whether this Article implies that any compensation on a commission-basis or like, or any other pay mix whereby the variable component exceeds the fixed component significantly is not allowed under these guidelines?
Art. 180	<p><u>Institution should set in advance in their remuneration policy the appropriate level of the ratio between the variable and fixed components of remuneration for identified staff, in line with the limits and procedures provided in Article 94(1)(g) of the CRD and national law, taking into account the business activities, risks and the impact on the risk that different categories of staff have on the risk profile. Institutions may set different ratios for different jurisdictions, geographical locations, business units, corporate and internal control functions and different categories of identified staff.</u></p>	<p>See also comment under Article 153 regarding the calculation of this ratio.</p> <p>Please clarify whether the fact that the appropriate level of the ratio between the variable and fixed remuneration needs to be set in advance in the institution's remuneration policy, also imply that EBA does not allow for hard capping, i.e. that the actual awards after the end of the performance year are capped to meet the bonus caps of Article 94(1)(g) of CRD IV? If the bonus caps should already be met at the time of grant (see also under 'Definitions and use of terms – Art. 6.e), then the actual awards will lower than the bonus caps allow for in most cases, as very few people would normally achieve a performance at maximum (approx. 5%, if a Bell-curve is applied to the performance distribution).</p>
	<p><u>The ratio set is as the ratio between the variable remuneration that could be awarded as a maximum for the following performance period and the fixed remuneration of the following performance period.</u></p>	<p>The way the ratio is described here is not in line with the definition of award under Art. 6.e.</p> <p>In addition this seems to suggest that the ratio is calculated at the time of grant (i.e. at the start of the performance period) rather than at the end, at the time of award. Although this is in line with Art. 6.l,</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
		it is proposed to use a different moment in time calculate this ratio, see above.
Art. 185	The ratio should be calculated as the sum of all variable components of remuneration that could be awarded as a maximum <u>in a given performance year</u> , including the amount to be taken into account for the retention bonus, divided by the sum of all fixed elements of remuneration to be awarded <u>in the same performance year</u> . 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.	<p>See also comment under Article 153 regarding the calculation of this ratio.</p> <p>Please clarify whether payments that form part of routine employment packages, as referred to under Article 118 as well as those stated under Article 119, 123 and 124 should / may be included in the calculation of the sum of all fixed remuneration components.</p> <p>Please clarify what criterion is used to establish materiality of fixed remuneration components.</p>
Art. 189	<p>Where judgmental approaches are used, institutions should ensure a sufficient level of transparency and objectivity when judgements are made by:</p> <ul style="list-style-type: none"> a. setting a clear written policy outlining parameters and key considerations on which the judgment will be based; b. providing clear and complete documentation of the final decision regarding the risk and performance measurement or applied risk adjustments; c. involving relevant control functions; d. considering the personal incentives of the staff making the judgment and any conflicts of interest; e. implementing appropriate checks and balances, including e.g. making such adjustments within a panel involving staff from business units, corporate and control functions, etc.; 	Please clarify whether this implies that any variable remuneration approach which includes any management judgment, e.g. by allowing line managers to determine the variable remuneration amounts for their subordinates on the basis of pay-out ranges / bandwidths for each performance score / level in order to differentiate between staff with similar performance scores, is not allowed, unless criteria c. – f. are met? I.e. a manager cannot be allowed any freedom of decision within a certain range, e.g. plus and minus 5%?



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	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.	
Art. 190	Institutions should make the risk alignment process transparent to staff, including any judgmental elements.	<p>Is the process as described in Article 189 meant by the 'risk alignment process' as referred to here in this Article?</p> <p>If yes, has EBA considered here that such transparency levels may have adverse effects on the longer-term performance of the institution in certain cultures, e.g. in Asia, where enhanced transparency has negative side-effects such as 'loosing face'? Please allow in this Article and Article 189 for a more tailored approach in order for an institution to be able to overcome those effects.</p>
Art. 202	Quantitative criteria should cover a period which is long enough to properly capture the risk taken by staff members, business units and the institution and should be risk adjusted and include economic efficiency measures. Examples of performance criteria are risk-adjusted return on capital (RAROC), return on risk-adjusted capital (RORAC), economic profit, internal economic risk capital, net economic contribution, risk-adjusted cost of funding, risk figures derived from the internal capital adequacy assessment process or financial figures which relate to the budget of functions (e.g. for corporate function, including legal and human resources) or to their operational risk profile, or pure accounting adjustments.	Please clarify why quantitative criteria related to the budget of a team / department / business unit or pure accounting adjustments should be considered a risk-adjusted performance criterion rather than an operating efficiency indicator as referred to under Article 203?
Art. 203	Operating efficiency indicators (e.g. profits, revenues, productivity, costs, and volume metrics) or some market criteria (e.g. share price and total shareholder's return) do not incorporate explicit risk adjustment and are very short term and therefore not sufficient to	Please clarify whether such performance criteria would always require additional risk adjustments or whether these are allowed in an unadjusted form, as long as they are balanced with other, sufficiently risk-adjusted performance criteria



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	capture all risks of the staff member's activities. <u>Such performance criteria require additional risk adjustments.</u>	
Art. 204	Qualitative criteria (such as the achievement of results, compliance with strategy within the risk appetite and compliance track record) should be relevant at an institution, business unit or individual level. Examples of qualitative criteria are the achievement of strategic targets, customer satisfaction, adherence to risk management policy, compliance with internal and external rules, leadership, team work, creativity, motivation and cooperation with others business units, internal control and corporate functions.	Why does EBA allow for the use performance criteria such as adherence to risk management policy, compliance with internal and external rules, team work, motivation and cooperation with other business units, internal control and corporate functions for the award and pay-out of variable remuneration? Is this not considered to be a part of one's regular job, for which one is already rewarded with fixed remuneration, i.e. does this not contradict the spirit of e.g. Art. 177 and the guidelines in general? Reference is made here to numerous publications on intrinsic motivation versus extrinsic motivation.
Art. 205	Where control functions' staff receive variable remuneration, it should be appraised and the variable part of remuneration determined separately from the business units they control, including the performance which results from business decisions (e.g. new product approval) where the control function is involved.	<p>This guideline is clear when it comes down to setting and assessing individual performance criteria for Control Functions staff. However, it is unclear how these guidelines relate to the use of bonus pools (see Article 208, 211, 215 and 218!), whereby business performance is used to fund such pools, a necessary mechanism to ensure the institution is sufficiently financially sound when granting / awarding / paying out variable remuneration. If Control Staff cannot participate in a bonus pool funded by business performance, then effectively this may result in unsound funding of variable remuneration to Control Functions staff. Please clarify.</p> <p>Neither is it clear why these guidelines have been changed compared to CEBS 2010 to exclude qualitative or non-financial quantitative performance criteria regarding the business units they oversee from the use for the determination of the variable part of the remuneration of Control Functions staff. Please explain.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 206	The criteria used for assessing the performance and risks should be exclusively based on the internal control functions' objectives. Variable remuneration for control functions should exclusively follow from control objectives, e.g. the Tier 1 ratio, the non-performing loan ratio, the non-performing loan recovery rate, or audit findings. Their variable remuneration should not be based on market-oriented business objectives, e.g. earnings, return on equity, loan or balance sheet growth. The institution should consider to set a significant lower ratio between the variable and the fixed components of remuneration for control functions compared to the business units they control.	<p>See also under Art. 205.</p> <p>Unclear how in this Article and in the previous Article 205 the effects of Article 171 are taken into account, under which the variable remuneration component to Control Functions staff is not significant anyway, i.e. poses no risk.</p> <p>Please consider that the ability of Control Functions staff to take hard measures and yet not lose credibility in the longer term with the line managers of the business units they oversee, which often are also their superiors, largely depends on them also having <u>some</u> 'skin in the game', i.e. experiencing the negative effects of these hard measures, like other staff.</p>
Art. 207	In case that the head of the risk management function is also a member of the management body the above principles should also apply to his remuneration.	See comments under Article 205 and 206.
Art. 208	Institutions should set a bonus pool.	<p>Does EBA imply here that any variable remuneration always needs to be funded through a bonus pool? Or is funding through budgeting also allowed?</p> <p>It is assumed here that also multiple bonus pools are allowed. Correct?</p>
Art. 211	The variable remuneration awarded to control functions staff should be based on performance criteria that are independent from the performance of the business areas and the institutions they control. The bonus pool allocated to the control function should take into account the institution's ability to pay out variable remuneration to staff.	See comments under Article 205 re bonus pools for Control Functions staff.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 237 & 238	<p>237. Institutions should set an appropriate portion of remuneration that should be deferred for a category of identified staff or a staff member at or above the minimum proportion of 40% <u>or respectively 60% for particular high amounts.</u></p> <p>238. <u>Institutions should define what level of variable remuneration constitutes a particular high amount</u>, taking into account the average remuneration paid within the institution, the EBA remuneration benchmarking report and where available, national and other remuneration benchmarking results and the thresholds set by competent authorities. When implementing the guidelines, the competent authority should set an absolute or relative threshold, considering the above criteria. Remuneration at or above that threshold should always be considered as being of a particular high amount.</p>	Will EBA coordinate the absolute or relative threshold of a ' <i>particular high amount</i> ' by national competent authorities to safeguard a level playing field within the EEA, e.g. these absolute or relative thresholds to be in line with the EBA RTS thresholds for applying quantitative criteria?
Art. 248	<p>The availability of instruments under Art 94(l)(i) of the CRD depends on the legal form of an institution:</p> <p>a. Shares, for institutions in the legal form of a stock corporation; for non-listed stock corporations, in addition share-linked instruments are available; <u>listed stock corporations must not use share linked instruments</u> in line with the above mentioned article.</p> <p>b. For institutions which are non-stock corporations, ownership rights which are equivalent to shares, depending of the legal form of the institution, or non-cash instruments that are equivalent to share-linked instruments are available for the award of variable remuneration in instruments.</p>	Please clarify whether subsidiaries of stock listed group companies which are not listed in themselves may apply ownership rights which are equivalent to shares, or non-cash instruments that are equivalent to share-linked instruments, as is suggested by Article 252, and if yes, whether this is allowed to all subsidiaries of a stock listed group company or only to those who need to apply these EBA guidelines on a solo level (see also comments under 'General – Executive Summary – Page 7).
Art. 253 & 254	253. Instruments should be priced at the market price or their fair value on the date of the award of these instruments. This price is the basis for the determination of the initial number of instruments and for later ex-post adjustments to the number of instruments or	Regarding the requirement that ' <i>Such valuations should also be done before the retention period ends respectively to ensure that ex post risk adjustments are applied correctly</i> ', the only ex post risk assessment that effectively can be carried out during the retention



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>their value. <u>Such valuations should also be done before the vesting and before the retention period ends respectively to ensure that ex post risk adjustments are applied correctly.</u> Small and non-complex institutions that are not listed may establish the value of the ownership rights and ownership right linked instruments based on the last annual financial results.</p> <p>254. Institutions may award a fixed number or nominal amount of deferred instruments using different techniques, including trustee depot facilities and <u>contracts, provided that in every case the number or nominal amount of the instrument awarded is provided to staff at vesting, unless the number or nominal amount is reduced by the application of malus.</u></p>	<p>period is the claw back, and this will only be done so in light of a claw back trigger. In case of the absence of such triggers a claw back risk measure cannot be executed.</p> <p>It is not desirable to establish that no claw back triggers have been identified during the retention period, because this may lead to a legally valid 'free pass' against any claw backs based on triggers found after the retention period has ended. So it is suggested to remove the wording '<i>before the vesting and before the retention period ends respectively to ensure that ex post risk adjustments are applied correctly</i>' and replace by '<i>at the time of the applicable ex post risk adjustments</i>'.</p> <p>Establishing the number of equity instruments to be transferred at vesting instead of at the time of allocation removes the indirect risk adjustment mechanisms via share price fluctuations of the value of such award during the deferral period. Effectively this means that when a company performs worse during the deferral period than at the time of allocation, but not bad enough to warrant a malus adjustment at the level of the institution, hence a lowered share price, or, alternatively, future prospects of the institution have lowered the share price at the time of vesting compared to the time of allocation, the result will be a <u>higher</u> number of shares than at the time of allocation. This will not incentivize staff to keep improving performance during the deferral period, but rather during the retention period, when the only risk measure available is the claw back, i.e. a minimal risk.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
		This requirement effectively removes one of the main reasons for variable remuneration in equity instruments, namely alignment with shareholder interests: it breaks this alignment, which is undesirable.
Art. 263	For awarded instruments a retention period of at least one year should be set. Longer periods should be set in particular where ex post risk adjustments mainly rely on changes of the value of instruments which have been awarded. Where the deferral period is at least five years, a retention period of at least six month should be imposed for identified staff other than members of the management body and senior management.	Please clarify whether a retention period of at least one year should also be applied to instruments awarded to non-Identified Staff.
Art. 264	Large (including significant) and complex institutions should at least for the management body and senior management consider at least one of the following in order to align the variable remuneration to the risk taken: a. setting for the upfront awarded instruments a retention period at the length of the combined deferral and retention period for deferred instruments; b. defer a significant higher portion of the variable remuneration paid in instruments for these staff members.	When introducing this guideline, please clarify how EBA has considered the average tenure of such staff in those roles (especially Board members)? This requirement will likely lead to the situation where the effectiveness of both any ex ante as well as any ex post risk measure for this group of staff will be seriously eroded, as many key senior Identified Staff will have moved roles and have renegotiated buy-out arrangements with their next employers before more than even one deferred variable remuneration award will have vested (i.e. start with a clean performance slate, including guaranteed sign-on package, with their next employer).
Art. 284	Article 432 (1) and (2) of CRR does not allow for omitting an item of information from Article 450 of the same Regulation for proprietary or confidentiality reasons. The disclosure requirements in Article 450 should nevertheless be complied with without prejudice to the requirements of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Where institutions omit <u>in exceptional cases</u> items of information to be reported based on Directive	This guideline does not take into account national legislation, e.g. in Spain, where individual staff members need to provide their consent to the disclosure of their remuneration and other personal data before these can be disclosed, even if such personal data is included in aggregate data only. If such consent is withheld by an employee, the institution cannot comply with these guidelines / Article 450 of CRR. It is proposed that such instances based on national law are also considered as an acceptable 'exceptional case'.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	95/46/EC, this fact should be duly documented and disclosed. Wherever personal data is not disclosed following this Directive, institutions should disclose wherever possible aggregated information.	
Art. 287	In accordance with paragraph (3) of Article 6 and Article 13 (1) CRR, disclosures are to be made on an individual basis by institutions unless they are a parent undertaking, or a subsidiary or included in the consolidation pursuant to Article 19 CRR, and at consolidated level by the consolidating institution and by significant subsidiaries of EU parent institutions on an individual or sub-consolidated basis. Subject to the condition on Article 13(3) being met, EU parent entities consolidated by a third country parent may not have to provide disclosures required by Article 450 CRR.	See comment under Executive Summary – Page 7.
Section 19.1 – Art. 290 - 308	<Section 19.1 in its entirety is not copied here>	Please clarify per requirement where these disclosures must be presented, i.e. in the Annual Report or is it also allowed to disclose elsewhere?
Art. 298.b & 302 & 309	<p>Art. 298.b: The information that institutions must disclose on the design and structure of their remuneration system should include:</p> <ul style="list-style-type: none"> a. a description of the main quantitative and qualitative performance and risk metrics used for the assessment of performance of the institution, the business unit and for individuals, how different metrics were combined and how current and future risks are taken into account; <p>Art. 302: Where not covered by the previous disclosure requirements, institutions must disclose <u>information on the specific performance indicators used to determine the variable components of remuneration</u> and criteria used to determine the balance between different types of instruments awarded, including shares, equivalent</p>	Disclosure of a description of the main quantitative and qualitative performance and risk metrics used for the assessment of performance all of the institution’s business units as well as for individuals is far too sensitive in terms of competitive information, if done in a meaningful way. Also the requirement for <u>external</u> disclosure of the main quantitative and qualitative performance and risk metrics used for the assessment of performance for individuals seems to be at odds with the underlined statement in Article 308, which allows for <u>internal</u> non-disclosure of such information. If such information is disclosed externally, then it is also available internally.



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>ownership rights, share-linked instrument, equivalent non cash-instruments, options, and other instruments under the RTS on instruments.</p> <p>Art. 309: The remuneration policy of an institution should be internally disclosed to all staff and accessible for all staff at all times. In addition institutions should ensure that information regarding the remuneration policy which is disclosed is available internally. <u>Confidential non-public quantitative aspects of the remuneration of single staff members are not subject to internal disclosure.</u></p>	<p>It is proposed that EITHER only the main quantitative and qualitative performance and risk metrics used on a group level need to be disclosed OR EBA provides additional guidelines with respect to the nature of such disclosure if done without any competitor-sensitive information which is still considered to be compliant with these guidelines.</p> <p>Please clarify the term ‘individuals’ in Article 298.b. Is this Identified Staff only or all staff?</p>
Art. 299	<p>Institutions should provide a tabular disclosure of the different ratios between the variable and fixed remuneration implemented at the consolidated level, <u>separate for the management body and where relevant by business area, corporate and internal control functions, with at least a breakdown between senior management and other identified staff, entities and geographical locations</u> taking into account the business areas defined within the EBA Guidelines on the Remuneration Benchmarking Exercise.</p>	<p>This breakdown could lead to the disclosure of data on individual Identified Staff or such small groups that the aggregated data can be analysed into individual data. Please confirm that the required breakdown should not have to applied to groups smaller than e.g. 20 individuals.</p>
Art. 310	<p>Staff should be informed about the characteristics of their variable remuneration, as well as the process and criteria that will be used to assess the impact of their activities on the risk profile of the institution and their variable remuneration. <u>In particular the appraisal process with regard to the individual’s performance should be properly documented and should be transparent to the staff concerned.</u></p>	<p>Please clarify that the required transparency is required at an individual level, i.e. transparent to the staff member concerned, and not at a generic staff level.</p> <p>This is because any such transparency at a generic staff level may have adverse effects on the longer-term performance of individuals in certain cultures, e.g. in Asia, where enhanced transparency has negative side-effects such as ‘loosing face’.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Art. 318	<p>With regard to specific forms of remuneration under sections 13 and 14 of these guidelines, competent authorities should, without prejudice to section 20:</p> <ul style="list-style-type: none"> 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. 	<p>Regarding Article 318.a, please clarify whether this encompasses any individual guaranteed variable remuneration arrangement, or whether this encompasses the policies of the institution with regard to guaranteed variable remuneration and (potentially) any individual material guaranteed variable remuneration arrangements (level of materiality to be defined).</p> <p>Regarding Article 318.c, see comments under Article 205, 206 and 211.</p>
Annex 2	<Annex 2 in its entirety is not copied here>	<p>Please clarify what the status of the information provided in Annex 2, in particular 6.1.3., is, especially where this information is not incorporated in the guidelines.</p> <p>Example: point 41 re the application of sectorial guidelines versus these EBA guidelines by subsidiaries who not themselves fall under the scope of the CRD on an individual basis is not incorporated in these EBA guidelines themselves.</p> <p>In Annex 2 on several occasions the term ‘on an individual basis’ is used. Please clarify whether ‘on an individual basis’ means the same as ‘on a solo basis’ as used in the guidelines themselves.</p>
Annex 2 – point 12	<p>The EBA aims for the maximum possible harmonisation as a means to</p> <ul style="list-style-type: none"> (a) reach a level playing field; (b) prevent regulatory arbitrage opportunities; (c) enhance supervisory convergence; and (d) achieve legal certainty. 	<p>Please clarify in these guidelines the appeal / arbitration procedures available to institutions in case of disagreement with decisions by the respective national competent authorities and / or EBA. See also comments under Articles 87 and 92.</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
	<p>In addition, the development of common procedures and practices is expected to reduce the compliance burden on the institutions and contribute to efficient and effective cooperation among competent authorities.</p>	
Annex 2 – point 21	<p>An annual review (Option D) involving the shareholders or owners is efficient to ensure that the remuneration policy is and remains aligned with a sound capital basis; this is consistent with the requirement to review annually remuneration policies. In the draft Shareholders’ Rights Directive it is proposed that listed companies will have to involve their shareholders annually in the remuneration process (say on pay). Such an involvement is considered as best practice also for other firms. The additional costs for an annual involvement of the shareholders or owners are low to medium as the process is integrated with the processes to be performed anyway under the applicable company law. However, additional costs evolve for the preparation of documents and additional voting procedures and the notification of voting results. Where the ratio is just to be confirmed an annual process might be received as increasing the uncertainty about the remuneration package paid to staff. However, shareholders and owners in any case have the right to put this topic on the agenda and to review their approval made. The approved higher ratios are anyway subject to disclosure. The costs and created uncertainties for staff outweigh the benefits of an increased oversight of remuneration policies.</p>	<p>Please clarify whether shareholder approval of any variable remuneration exceeding 100% (and with a maximum of 200%) needs to be (re-)obtained annually, or whether approval for multiple years in a row may be requested if there will be no change in policy and roles affected in those years. See also comments under Article 36.</p> <p>At their 2015 AGM and / or internal shareholder meeting, various European financial institutions have applied for (and obtained) shareholder approval of variable remuneration exceeding 100% (and capped at 200%) for either all of their current Identified Staff roles or for groups within their total Identified Staff population, and for several years in a row or even for an unlimited period of time, i.e. only if in the future new Identified Staff roles would be created that would fall beyond the scope of the Identified Staff population for which currently approval has been obtained, for those specific roles shareholder approval needs to be sought.</p> <p>This point would suggest that those shareholder approvals would need to be re-obtained. However, under corporate law applicable to those shareholders approvals this is not required as they are still valid in 2016 and beyond, i.e. after the suggested limited time period. Will EBA render these approvals, especially if unlimited, invalid and if yes, on what grounds?</p>



EBA guideline no.	EBA Guideline - content	Questions / Issues / Comments
Questions / issues / comments in order of appearance in the draft guidelines		
Annex 2 – point 38 & 41	<p>Annex 2 – point 38: For situations where the CRD requirements and requirements under other directives (e.g. UCITS and AIFMD) differ the following options were considered for subsidiaries who do not themselves fall under the scope of the CRD <u>on an individual basis</u>:</p> <p>a. Option A: where different requirements are not contradicting each other, but e.g. one requirement is more specific, both requirements should apply;</p> <p>b. Option B: where different requirement are contradicting each other in a way that only one requirement can be applied, different options exist which regulation could be applied. <u>Institutions could be asked to apply:</u></p> <ul style="list-style-type: none"> i. the requirement under the CRD; ii. the requirement under the specific sectorial directive; iii. one of the requirements under (i) or (ii) above. <p>Annex 2 – point 41: Option A and Option B(ii) are retained.</p>	<p>In case both these EBA guidelines and the applicable sectorial guidelines address a certain topic, and are not so much in conflict but simply differ, the application of Option A will lead to a significant increase in the administrative burden for subsidiaries who do not themselves fall under the scope of the CRD on an individual basis.</p> <p>See for an example of such increased burden the comments under Article 106 & Annex 2 – point 41 & 50.</p> <p>It is proposed that Option A and Option B lead to the same three options I, ii, and iii as stated under Option B.</p> <p>Please clarify that ‘Institutions could be asked to apply’ means that institutions may choose between these three options themselves, and may be asked by the national competent authority or EBA to provide their rationale / underpinning of their choice.</p>
Annex 2 – point 59	<p>Where variable remuneration is awarded, the respective requirements apply. Already the CRD (recital 64) explains that routine remuneration elements (e.g. mobile phones, etc) do not form part of the variable remuneration, the guidelines provide additional clarity. <u>Other options which are in line with the CRD requirements were not identified.</u></p>	<p>Please clarify whether the underlined sentence is intended to mean which of the following options:</p> <ul style="list-style-type: none"> a. Only the routine remuneration elements than explained in the CRD recital 64 and these guidelines do not form part of the variable remuneration. b. EBA has not identified any other routine remuneration elements than explained in the CRD recital 64 and these guidelines, yet institutions may identify those, as long as these meet with these guidelines.