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EBF comments on the draft EBA Guidelines on sound remuneration policies (second revision)

Key points:

- Gender neutral remuneration policy:
    - The EBA guidelines go further on gender neutral remuneration policies than explicitly stated in CRD V; They significantly broaden the scope gender neutral of remuneration policies: career development, succession plans, access to trainings, internal mobility are all part of Gender equality / Diversity policies but are not part of a remuneration policy. We propose to eliminate any such references and to limit the scope of guidelines to the scope of remuneration policies.
    - We further do not agree with requirements related to the Gender Pay Gap analysis, as it does not meet the purpose of Gender-neutral remuneration policies.
- Severance payments:
    - Clarification is needed regarding what is to be understood as "additional payments" (para. 164) and "additional amount due" (para. 170(b)(ii))
    - The EBA has succeeded in clarifying certain key issues (e.g., not all payments made after termination of contract are to be considered severance payments (e.g., discretionary pension benefits)), yet has introduced certain provisions that exceed its mandate (e.g., by stating that any payment made in the context of contractual termination or cease of directorship should be considered variable remuneration).
    - Concerning the newly introduced severance payment entitlements to competent authorities (paras. 171-173), effectively enabling them to decide whether severance payments can be made or not: the EBF does not understand these provisions as being within its intention to clarify the current severance payments regime nor a way to avoid circumvention, and advocates for its elimination and for the elimination of the limitation to "actual labour dispute" introduced in para 165 (e) to allow agreements between the institution and the staff members.

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EBF position:

Question 1: Are the amendments to the subject matter, scope and definitions appropriate and sufficiently clear?

Paragraph 11 (Background and rationale)
In this paragraph, you refer to reporting requirements and delegated regulations relevant for this area, we would appreciate to receive some details and clarifications about the reference of these reporting requirements and delegated regulations.

Paragraph 12 (Background and rationale)
It is suggested that the Guidelines enter into force mid-year 2021. As remuneration schemes for a performance year are normally designed at the end of the previous year, introducing new rules mid-year will be difficult to comply with in practice, particularly as the final guidelines will not be published until Q1/Q2 2021. It would be preferable that the guidelines would enter into force on 1 January 2022.

Paragraph 21 (Background and rationale)
It is clear that subsidiaries for which other specific sectoral directives include a specific remuneration framework do not have to be included into the scope of applying CRD requirements, but what about non-regulated entities? Specifically, for Fintech, advisory and corporate finance companies which are not subject to specific remuneration requirements, to ensure a level playing field, allow the correct evolution of banking services and incentivize capital light advisory activities without commitment of the Bank's capital and that do not expose banking groups to market, credit or liquidity risks, it is required to provide for an exemption from the application of the CRD.

Paragraph 22 (Background and rationale)
This first sentence referring to career perspectives, senior management representation, and diversity goes beyond the scope of remuneration policy and the definition in the CRD: "Gender neutral remuneration policy means a remuneration policy based on equal pay for male and female workers for equal work or work of equal value"; we propose to delete this first sentence.

Paragraph 23 (Background and rationale)
The equal opportunity principle "pre-condition for gender neutral pay" is not in the Article 157 of the TFEU Treaty nor in the CRR II and CRD V and goes beyond gender neutral remuneration policy. We suggest deleting the last sentence of this paragraph.

Paragraph 24 (Background and rationale)
This paragraph talks about "further measures to ensure equal opportunities". These further measures are not relevant in these specific Guidelines dedicated to remuneration which aim at clarifying the equal pay for equal work or work of equal value. Remuneration policy is only a part of the global HR Gender equality policy and cannot include it.

Paragraph 29 (Background and rationale)
The term "low variable remuneration" mentioned in this paragraph should be clearly defined in the text of the guidelines.

Paragraph 31 (Background and rationale)
The criteria applied to subsidiaries regarding the identification process of the MRTs should be further clarified.

Paragraph 53 (Background and rationale)
Further clarifications are needed in order to differentiate the pay-out of the variable remuneration among MRTs.

Paragraph 61 (Background and rationale)
We would like to suggest writing instead of the last words of this paragraph "these guidelines" the following sentence: "and the articles of these guidelines they have committed to comply with".

"*As part of this, competent authorities need to review the institutions remuneration policies and practices and their compliance with the CRD provisions and the articles of these guidelines they have committed to comply with*."

DRAFT Guidelines on sound remuneration policies under Directive

Paragraph 3
We would appreciate a clarification about the date of first application of these Guidelines. Indeed, we propose that the first application be as from 1st January 2022 as we need to have all the information on the positions of all national competent authorities in the EU (which articles they comply with and which articles the do not comply with) and we also need some time to adapt our policy and processes to the application of the changes.

Paragraph 8
The whole wording of this paragraph is not sufficiently clear.

We would like the EBA to clarify point (c). Does it mean that for example, a subsidiary of asset management or investment firm would be required to apply gender neutral remuneration policies as described in these guidelines although they do not have to apply other CRD V requirements as per Articles 92, 94 and 95?

Letter e) includes letter e) within the scope (which does not seem right).

Paragraph 11
We would suggest maintaining the definition of prudential consolidation.

Concerning the definition of gender-neutral policies, we would suggest deleting the end of the sentence "and that are assumed to affect all sexes equally", as it does not add any useful information.

Concerning gender pay gap definition, we would like to clarify that a gender pay gap is different from the equal pay for equal work or work of equal value, as Gender Pay Gap does not take into account the type of work / nor the level of responsibility / experience etc. Calculating a gender pay gap does not meet the purpose of Gender-neutral remuneration policies as defined above.

Moreover, we would suggest replacing "earnings" which is not defined in the Guidelines by "remuneration" and "hourly" which is not a common practice in financial / banking activities, by full time annual remuneration awarded to be consistent with paragraph 25.

Regarding the definition of severance payments: although not directly linked to the latest changes introduced in the Guidelines, we believe that further clarity could be introduced to the concept of "early" termination of a contract.

It would seem reasonable that the notion of "early" be interpreted as:

a) contracts with a predefined period (temporary contracts) which are terminated before their end-date.
b) indefinite contracts which are terminated before the risk taker reaches legal retirement (i.e. they are terminated before their natural finalization, which would be retirement).

However, the Guidelines are not entirely clear in this sense. Paras. 160 and 165 link early termination solely to the situation where it is the institution terminating the contract, yet section 9.3, in general, appears intended to cover the effect/requirements of all remuneration awarded after termination of contract. Should the latter be correct (i.e. section 9.3 regulates any payment made after the termination of a contract - excluding all payments related to pension which are expressly excluded as per. para 164) it would appear unnecessary to include the notion "early".

Similarly, para. 164 now refers to "regular end" of a contractual period, which raises the question of whether said paragraph would only be applicable to contracts with a specified end-date.

Question 2: Are the amendments regarding gender neutral remuneration policies sufficiently clear?

CRD V requires a gender-neutral remuneration policy for all staff, i.e. a remuneration policy based on equal pay for male and female workers for equal work or work of equal value, and equal opportunities as they are a precondition for gender neutral pay in the longer run. EBA shall issue a report on the application of gender-neutral remuneration policies by institutions within two years of the date of publication of the guidelines based on the information collected by the competent authorities. Competent authorities shall collect the information provided by institutions on the gender pay gap and shall use that information to benchmark remuneration trends and practices. The competent authorities shall provide EBA with that information.

In order to be able to use the collected information to benchmark gender neutrality of remuneration policies it is essential that criteria measure the extent to which there is equal pay for male and female workers for equal work or work of equal value and that the way of assessing this equal pay principle is objectively comparable in a way that justifies conclusions. In paragraph 63 of the EBA guidelines that institutions should determine at least the ratio between the average remuneration of male and female staff, excluding members of the management body and its development over time and separately the respective ratio for members of the management body. The calculation should be made country by country. A general ratio showing the average remuneration of male and female staff per country without reference to the nature of the job (equal work or work of equal value) does not contribute in this way and might lead to wrong interpretations and comparisons on a highly political sensitive topic. Moreover, in case of organizations which are operating internationally it could be complicated to define a pure comparison on all levels on a country by country basis and entity by entity taking into account the nature of the activities, of the jobs and the size of the entity. Indeed, for operational purpose, we would suggest some proportionality to be introduced, with for example a minimum number

of staff per legal entity to measure this potential gender pay gap (we propose 1000 members of staff as minimum; this is already the minimum number of staff used for the calculation of the 0,3% ratio at the individual level in the EBA RTS for identifying regulated staff) and a minimum number of men and women per same category of work (ex 10 men and 10 women minimum for each category) in order to be able to make a relevant analysis on potential Gender pay gaps.. In order to develop a consistent reporting line over time it is necessary to define standard reporting criteria more accurate.

The EBA guidelines go further on gender neutral remuneration policies than explicitly stated in CRD V. They touch a wider perspective of inclusivity in the value of work. Although all topics are relevant in view of inclusivity, the question is whether such a wide perspective gives the right focus on discussions on gender neutral remuneration policies with respect to CRD V.

Paragraph 23

We consider that the reference to "all related employment conditions that have an impact on the pay per unit of measurement or time rate should be gender neutral", should be deleted because it goes beyond gender neutral remuneration policies.

This second sentence broadens significantly the scope of policies and does not reflect the definition of Gender neutral remuneration policies; career development, succession plans access to trainings, internal mobility are part of Gender equality / Diversity policy but are not included in remuneration policies. We propose to delete the second sentence.

Paragraph 24

The EBA Guideline requires institutions to demonstrate that the remuneration policy is gender neutral without giving meaningful guidance on how to comply with this further administrative burden.

Paragraph 25

We propose to use "full time basis annual remuneration awarded" instead of "working time arrangements" as unit of measurement which is simpler and clearer.

Paragraph 26

The requirements may intervene with national gender equality/anti-discrimination legislation and collective bargaining agreement provisions. The criteria set out in paragraph 26 and 27 for assessing equal positions or positions of equal value, are more detailed and to some extent also contradictory to Norwegian anti-discrimination legislation. It is problematic to have detailed requirements for gender balanced remuneration in EBA guidelines for finance, when some countries, including Norway, have local regulations that regulates this, and that are well known for employers. In countries where regulations for analysing equal pay for work of equal value exists on a national level, additional requirements for determining the value of the work should not be required.

In some Member States collective bargaining identifies, in an absolutely coincidental manner for male and female, the profiles related to the determination of the classification due in relation to the tasks performed, the remuneration, the working time and the number of vacation days referred. It is therefore requested to confirm that the provision of the same classification by collective bargaining can be taken as a reference for the comparability of the different positions. In this regard, it is also requested to confirm that the consistency of company policies with the provisions contained in the collective bargaining agreement regarding the position covered by personnel and the corresponding

remuneration can be - also due to the aforementioned neutrality with respect to the gender of the remuneration provisions contained therein - evidence of the neutrality of remuneration policies by gender.

Instead of documenting job description we suggest focussing on categories of job positions in compliance with proportionality principle and in order to avoid burdensome constraints which will not have significant impact on the monitoring.

Within the statement "determine which positions are considered as equal or of equal value per unit of measurement or time rate", "per unit of measurement or time rate" is not a fully clear concept and could complicate the measurement/comparability cross Banks. Specifically, it would be very helpful if the EBA can confirm that objective methods which are commonly used in practice to measure the 'weight' of positions are sufficient methods to determine the equality of positions, e.g. the Hay method.

Paragraph 27
We suggest adding a point related to "specific skills or competences of staff".

We would suggest referring to "differentiating factors" and "individual remuneration" rather than "value of work", so that the introductory sentence of paragraph 27 reads:

"Institutions may consider in a gender-neutral manner additional aspects as differentiating factors when determining the individual remuneration and clearly document how such aspects are applied."

Also, letter h. is only focused on children and does not consider other family responsibilities. We would suggest amending as follows:

"h) appropriate benefits, including the payment of additional voluntary household and other allowances to staff with dependent family members (e.g. children, other closed relatives)."

Question 3: Are the guidelines on the application of the requirements in a group context sufficiently clear?

Paragraph 46
The second part of the sentence in paragraph (c) goes beyond the scope of equal remuneration for equal work or work of equal value as defined in the Directive. We suggest replacing it by "how the remuneration policy is gender neutral".

Paragraph 55
We understand that the reference to significant institutions should be clarified, given the implications that uncertainty would entail for institutions' remuneration committees. It has to be borne in mind that an institution may have to attend to different definitions of "significant" if different competent authorities and/or national regulations have issued different definitions.

Moreover, it is not clear whether it is the EBA's intention that any institution within a group that is considered significant by the ECB should be considered significant for the purposes of paragraph 55. The EBA should clarify that this is not the intended effect, for many small and non-complex institutions are included in the "List of significant entities directly supervised by the ECB" solely due to the fact that they are part of a group.

It does not seem appropriate to equate any institution within the ECB's definition of significance with G-SIIs and O-SIIs, precisely when many of the former would be the opposite to G-SIIs and O-SIIs, i.e. precisely those institutions to which proportionality should apply, including pertaining to their remuneration committees' composition.

Consequently, we would advocate for the elimination of "other significant institutions" within paragraph 55, given that: (i) institutions would potentially have conflicting definitions of significance when taking into account both national regulations and definitions provided by different competent authorities and (ii) it would have the effect of having to apply requirements envisaged for large and complex institutions to small and non-complex ones, which would contradict the whole rationale of the CRD V remuneration reforms.

Paragraph 57 b) and c)

Taking into account previous new paragraphs on the matter, there should be no need to include again references to gender neutrality. Why expressly mentioning this and not other features of the policies?

Paragraph 63

The overall gender pay gap is a different issue than equal remuneration for equal work or work of equal value, as it does not compare remuneration for the same work.

Some proportionality should be introduced, for example a minimum number of staff per legal entity should be introduced to measure this potential gender pay gap (we propose 1000 members of staff as minimum; this is already the minimum number of staff used for the calculation of the 0,3% ratio at the individual level in the EBA RTS for identifying regulated staff) and a minimum number of men and women per same category of work (ex 10 men and 10 women minimum for each category) in order to be able to make a relevant analysis on potential Gender pay gaps.

In countries where equal pay gap analysis exists on national level, additional analysis should not be required.

Can you please clarify the meaning of "Institutions should determine at least the ratio between the average remuneration of male and female staff, excluding members of the management body and its development over time and separately the respective ratio for members of the management body"? Does the EBA mean to compare a gap between all male and all female in the company? If so, this does not provide a sound indicator of gender-neutral pay.

We consider that materiality of differences between average pay should be defined by each institution according to its size and activity.

In a Norwegian context, the initiative to take actions in order to decrease the gender pay gap, shall actively be initiated by the company as an employer based on the local equality legislation, and not only as a result of findings in the annual internal audit. Section 63 creates uncertainty regarding the role of the independent internal audit function pursuant to the EBA guidelines and the duties the company has to work actively to avoid discrimination and promote equality pursuant to our local regulations. It also creates uncertainty regarding the employer's external gender diversity reporting obligations (including reporting on equal pay) pursuant to the local legislation.

Paragraph 71
We would like to ask for a clarification on the meaning of the following statement "Confidential aspects of the remuneration of single staff members are not subject to internal transparency." Why internal transparency is specifies, shouldn't it be also external specified? We suggest removing the word "internal".

Paragraph 73
We would request the EBA to accommodate the wording provided in the last phrase which states that *"the consolidating or subs-consolidating institutions should have* ***readily available and send to the competent authority on request*** *any information it [typo] concerning the application of these guidelines by these supervisory institutions and undertakings*".

The term "readily available" is too broad and should be avoided. Consolidated institutions cannot be expected to have information regarding their subsidiaries as if it were its own information, for they are independent legal entities with independent functioning and procedures. The EBA should acknowledge that consolidating/sub-consolidating institutions need time to request and be in disposition of presenting the information that a competent authority may ask for.

Moreover, it has to be borne in mind that an institution might not even be able to gather all the information it requests from its subsidiaries, due to national legislative restrictions. An example of a specifically troublesome regulatory area would be data protection, compliance of which imposes many restrictions on access to data. The same could be said regarding restrictions imposed by national competent authorities, which in some instances prohibit certain information from leaving the institution (subsidiary). It is thus important that the EBA amend the wording prior to final publication, in order for it to expressly account for the impediments that national laws might impose on the disclosure of information from subsidiaries.

Paragraph 75
Clarification is needed pertaining to this paragraph. Article 65(3)(a) does not award competent authorities the power to gather information directly from subsidiaries. It entitles competent authorities to require natural/legal persons to provide all information necessary to carry out the tasks of the competent authorities, but only regarding institutions (or financial holding/ mixed financial holding companies / mixed-activity holding companies) - or persons within those institutions - **in the Member State concerned** (i.e. institutions subject to CRD V).

The EBA should thus not assume that competent authorities have a legal framework within which to request information directly to subsidiaries, especially subsidiaries in third countries.

Paragraph 76.
We kindly request the EBA to clarify this paragraph, the intention of which is not clear (specific remuneration requirements will always have to be taken into account and they are independent of any gender neutrality provisions).

Question 4: Are the guidelines regarding the application of waivers within section 4 sufficiently clear?

Paragraph 86

Please eliminate “in assessing what is proportionate” - it is duplicated.

Paragraph 93
We understand that the following adjustment should be made:

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

We suggest clarifying in Article 93 point b. whether in case of a group under prudential consolidation the threshold defined in national law should be applied at the level of the institution concerned, or the whole consolidated group (i.e. clarify if at the level of the subsidiary institution the total assets are under the threshold, however, at the level of the whole group the total assets are above the threshold, whether the subsidiary institution is entitled not to apply the requirements to defer variable remuneration and to pay it out in instruments, or the group level value of total assets prevails, and they are not entitled to do so).

Furthermore, please clarify whether the mentioned rule is applicable only for credit institutions, or also in the case of non-credit institutions (i.e., leasing companies under the threshold where identified staff is employed due to quantitative criteria or because such leasing company qualifies as a material business unit on sub-consolidated level).

In relation to the Member State discretion to increase the threshold from €5 to €15 billion, it is requested to clarify whether the conditions referred to in letter i), which refer to Article 4, paragraph 1, point 145 letter c), d) and e) of the CRR must be verified jointly or if only the fulfilment of one of the conditions makes it impossible for the Member State to increase the size threshold beyond € 5 billion.

We understand that Article 94(3) of Directive 2013/36/EU limits the possibility to benefit from the exemption from the application of the requirements under points (l), (m) and second paragraph of point (o) to institutions that do not qualify as “large institutions” under point 146 of Article 4(1) of Regulation (EU) 575/2013 (provided their total assets are under the threshold defined at national level), and we also understand that the definition of “large institution” under said Article is not in the scope of this consultation. However, we think it is important to point out – also in view of the possible future revision of the regulation – that limiting the exemption to institutions that do not qualify as large institutions will have significant implications for those banks that on an individual basis would not qualify as large institutions but that belong to banking groups and on a consolidated basis qualify as large institutions.

Indeed, banks that on an individual basis would not qualify as large institutions but that are part of banking groups that on a consolidated basis have assets with a total value exceeding EUR 30 billion (for the purposes of this comment we will refer to these as “large banking groups”), due to their consolidated situation, will not be able to benefit from the exemption under Article 94(3) of Directive 2013/36/EU. We believe that, especially in light of the proportionality principle, the exemption should also be applied – albeit partially (as further specified) – to such institutions.

In this regard it is relevant to consider that, pursuant to the applicable regulation, in banking groups, risk takers must be identified both at an individual level and at group (consolidated) level. We believe that, in light of the proportionality principle, banks that on an individual basis would not qualify as large institutions but that are part of large banking groups:

- should be able to apply the exemption under Article 94(3) of Directive 2013/36/EU to the risk takers identified only at an individual level in such banks;
- should meet the requirements under points (l), (m) and second paragraph of point (o), with reference to the remuneration of the members of their staff that are identified also as risk takers at group level.

The partial extension of the exemptions under Article 94(3) of Directive 2013/36/EU to banks that on an individual basis would not qualify as large institutions but that are part of large banking groups and, specifically, to risk takers identified only at an individual level in such banks would:

- ensure a fair and proportionate regulatory treatment of institutions of equal dimension that operate in the same market;
- ensure compliance with the proportionality principle, in a way that takes into account the dimension of institutions both on an individual and on a consolidated basis, as:
  - while in institutions that are not large institutions and that are not part of large banking groups all risk takers would be able to benefit from the exemptions;
  - in banks that on an individual basis would not qualify as large institutions but that are part of large banking groups, group-level risk takers would not benefit from the exemption;
- ensure a consistent application of the remuneration regulation, duly taking into account the fact that being part of a large banking group implies that risk takers identified at an individual level in banks that are not large institutions belonging to such banking group (i.e. the only risk takers that could benefit from the exemption) have less operational autonomy and risk-taking on the part of such staff has proportionately less impact: indeed, if the exemption were not extended to such staff members:
  - a more favourable regulation would end up being applied to staff who has comparatively greater operational autonomy and whose decisions lead to taking greater risks (i.e. risk takers of banks that do not qualify as large institutions and that are not part of large banking groups); and
  - a significantly more onerous regime would end up being applied to staff with limited levels of autonomy and whose decisions have more limited impact (risk takers identified at an individual level in banks that are not large institutions belonging to a large banking group)
- allow large banking groups to take into due account also the size of each bank that is part of the group in the definition of their group remuneration policies, by providing less tight rules for the smaller banks of the group, in application of the principle of proportionality.

Paragraph 94

We would suggest deleting the reference to a specific exchange rate for converting EUR for calculating ratios, or to simply state that the rate to be used should form part of the entity's remuneration policy before the launch of each yearly exercise. This is not extremely relevant, but it would avoid creating additional confusion in subsidiaries already used to the exchange rate established by each entity when reporting their executives remuneration information at different stages of the process. Also, to our knowledge, the

system has worked correctly and no substantial issue has been raised connected with exchange rates in the past, so we do not think there is a relevant need to establish a specific exchange rate in the guidelines.

Moreover, it is confusing to combine the calculation of remuneration and the ratio considerations. It would be welcomed to make clearer that in order to calculate the FP:VC ratios, institutions should consider remuneration in relation to a Performance Year and when calculating remuneration for MRT identification purposes, the institution have the choice of remuneration awarded in relation to a Performance Year or remuneration awarded in a Performance Year.

The second part of subparagraph a. of Paragraph 94 [The following elements of remuneration should be taken into account: a. the fixed remuneration awarded for the preceding performance year, institutions may not take into account other awards that are considered fixed remuneration under paragraph 130 and 131] is not clear. Is the intention to state that only those remuneration elements may be taken into account that are considered fixed remuneration under paragraph 130 and 131, and those that are considered fixed remuneration under paragraph 132 cannot be taken into account?

Finally, using the preceding year's remuneration under Article 94(3)(b) is not in line with current proportionality arrangements in place in many jurisdictions. Existing thresholds permitted by some member states use current year's remuneration. For instance, if variable remuneration awarded for 2019 is below the national threshold, then it does not have to be deferred and paid in instruments. If variable remuneration for 2018 was used to determine whether 2019 should be deferred and paid in instrument, this could defeat the intended proportionality rationale for Article 94(3)(b). Variable remuneration awards fluctuate from year to year. A high award in the preceding year is not an indication of the current year's award. An award which is below the threshold in the preceding year means that the current year's award could be paid upfront in cash, regardless of its size. It is suggested that the same approach is adopted in paragraph 94 (a) and (b) than in paragraph 94 (c) and (d) where current year's remuneration is used.

Question 5: Is the section 8.4 on retention bonuses sufficiently clear?

Paragraph 100
We do not understand the rationale behind the obligation to document the applicable method to determine the exchange rate in the remuneration policy. Institutions should be allowed the flexibility to document their methodologies wherever they deem appropriate, be it the remuneration policy or other procedure or document. Consequently, we advocate for the wording to be adjusted in the sense that methodologies be documented, but not necessarily in the remuneration policy.

Paragraph 101
We do not support the deletion of the requirement for staff to fall under the criteria for a period of at least three months. This requirement seems appropriate to capture employees holding a material risk taker position based on qualitative criteria and allows to close the MRT perimeter in October/November, which matched correctly with the subsidiaries bonus pools confirmations in December/January, the confirmation of individual bonus amounts – and related deferrals - in January, and the preparation of the public information on remunerations in January/February, for issue during February. Accordingly, postponing the closing of the perimeter until January would lead to identify employees who would have not spent a sufficiently material period during a year to have an impact on the risk

profile of the institution and would increase considerably the operational risk connected with the above processes for all entities with financial year close of 31 December.

The reasons for the removal should be clarified. Has this been removed because supervised institutions can now set their own proportionality assessment i.e., how many months is necessary to be an MRT or is the intention not to allow any proportionality with respect to how long an individual has been in an MRT position? If there is no minimum threshold, the number of MRTs will increase significantly and so will the compliance costs associated with identifying MRTs. One of the key points of CRD V has been to introduce a more proportional approach to remuneration. The removal of the three-month threshold is going against this approach.

Paragraph 110

Would it be convenient to clarify if 110.f allows to exclude employees falling under a certain qualitative criteria based on the fact that they do not affect the risk profile, or shall we understand that they are already excluded?

Paragraph 142

With regard to the statement “Institutions should not award to a staff member multiple retention bonuses under the same event or justification or under simultaneous events or justifications”, does this mean that there can be an overlap of retention periods (e.g. an employee is awarded a retention in 2020 with a retention event in 2023; the same employee, due to strategical changes of the organization transfers into another role in 2022 and is then awarded in 2022 another retention award with a retention event in 2025).

The definition of "retention bonus" in the EBA Guidelines is broad and could include other types of emoluments in addition to the typical amounts agreed in individual stability agreements for the worker obligation to maintain the employment relationship for a certain period of time. On the basis of the definition of the EBA Guidelines, bonuses provided for in collective plans - often negotiated and agreed with the trade unions - which are addressed to categories of personnel (or even all the company personnel) and which do not have incentive purposes but are defined only for staff retention and motivation, to be paid after a specific period of time, provided that the employment relationship is still in place and in the absence of further performance conditions must be qualified as retention bonuses. There may well be justified and legitimate reasons for recognizing individual staff members already participating in such plans an additional individual retention bonus as part of a stability agreement that provides for the assumption of a specific obligation by the worker.

It is therefore requested to delete the part of par. 142 which provides for “or under simultaneous events or justifications”. Even in the event of elimination of the aforementioned part of the provision under consultation, the provisions on circumvention would prohibit any abuse of the possibility of recognizing multiple retention bonuses and, in any case, the recognition of multiple retention bonuses should take place in the compliance with the limit on the ratio between variable and fixed remuneration.

Paragraph 145

We do not agree that no pro rata retention awards should be made during the retention period and propose that the last sentence of Paragraph 145 is deleted. As an example, in case of an acquisition, the buyer typically gives retention awards to key players of the acquired firm for the time between communication of the transaction (start date of retention period) and eg., 1 year after closure (end date of the retention period), let's say overall 18 months. Typically, the buyer would structure the retention scheme to have two

payments, one after the successful closure of the transaction (e.g., 6 months after the retention start date), and the final payment at the end of the retention period. This structure allows the firm to have different performance measures for the first tranche and for the second tranche, which is key to a successful integration.

Paragraph 146
We understand that individual performance can be part of the conditions (i.e. satisfactory individual performance contribution in addition to the continued employment until the event date.) and impact the amount of the award (e.g. senior manager directly responsible for the sale of the business and the final amount of the award would be linked to the price of the sale).

Taking into account the existence of the collective retention plans above described in par. 142 (which, as mentioned, are often the result of negotiations with trade unions), we ask to eliminate the requirement referred to in par 146 for which retention bonuses must be based on individual performance criteria. Collective retention plans such as the one described above, despite the absence of individual performance objectives, pursue a legitimate purpose of motivating staff and rewarding loyalty to the entity and, indirectly, also the aim of supporting the achievement of corporate business objectives in the long term. Adding the requirement of the provision of individual performance objectives would have the consequence of eliminating the possibility of adopting retention plans such as the one described, thus further stiffening the remuneration tools in the banking sector.

Finally, we would welcome the introduction of the possibility to apply deviations from the main rule of deferred payment (similarly to severance payment) where an agreement can be reached with the local supervisory authority in those situations, where the application of the main rule would not support the realization of the retention goals.

Paragraph 147
The two methods for the calculation of the bonus ratio are clear but what we miss (and always have missed), is guidance in situations where the final amount is based on performance criteria, thus not know yet upfront. Must the potential maximum amount be taken into account when using method a.? Or do CIs need to use in such situations always method b.? Or, is it not possible at all to not set a fixed amount?

Question 6: Is the amended section 9 on severance payments sufficiently clear?

Paragraph 164
First and foremost, the EBA should clarify what is to be understood as “additional payments”, as there is no certainty as to what this concept refers to.

On another note, we welcome the clarification that not all payments made in the context of termination of contract should be considered severance payments (e.g. discretionary pension benefits), as it indeed helps clarify the regime and rules that institutions should consider when awarding/paying remuneration to risk takers.

However, we do not believe that the regime has been clarified in what concerns:

a) These “additional payments” necessarily being considered “normal variable remuneration”; nor
b) The specific inclusion of members of the management body.

Concerning a): additional payments necessarily being considered "normal variable remuneration"

We do not agree that "any" additional payment in the context of the termination of the mandate of a board member should be considered variable remuneration and it appears that the EBA has exceeded its mandate in this point. We do not believe that the way to clarify the severance payment regime is by obliging institutions to apply variable remuneration rules to any payment made after termination if these remunerations fulfil all requirements set forth in the Guidelines to be considered fixed. This would entail a conflict between paragraphs 130 (former 117) and new 164.

This paragraph is not justified under CRD V provisions. Additional payments vesting at the time of termination of a contract or a director's term of office may have been accrued and awarded as fixed remuneration over the period of employment/term of office (similarly to pension schemes). The actual moment in time in which these payments vest to their beneficiaries should not make them variable compensation per se if they meet the rest of the requirements set forth in the Guidelines for being considered fixed remuneration. Institutions should be able to assign these payments to either fixed or variable remuneration, in light of the nature of the compensation (e.g., fixed in the case of normal pensions), as provided for already in Section 7 of the Guidelines. There is thus no need for an automatic classification of these payments, and any assumption that the remuneration is variable should be able to be rebutted by the institution.

It should be remembered that the CRD regime in this point (regarding severance payments) solely requires for payments made to risk takers to "reflect performance achieved over time and not reward failure or misconduct".

In this sense, the Guidelines are already sufficiently clear as regards the rules to be applied to severance payments (paragraphs 165-173) and we do not support them further regulating that "any" payment after termination should be variable remuneration, especially as they already contain a section on "circumvention" designed to avoid institutions unduly applying its provisions.

Moreover, the effect that this new rule would have would be for payments that are not considered severance payments to be more burdensome than the regime for severance payments itself, as they would not be subject to the exceptions envisaged in para. 170 (current para. 154). Furthermore, in many countries, the termination of employment agreements is the outcome of negotiations between the employer and the employee. Applying additionally the criteria for variable remuneration to elements of the severance package will likely lead to employees refusing to accept the conditions of the termination (meaning e.g. that underperforming employees cannot terminated) or constantly having to start court proceedings to terminate employment contracts (whereas it's difficult in many member states to terminate employment agreements via court, thus the outcome of court proceedings is insecure).

Concerning b): members of the management body

If the wording is left as it stands, institutions might face important difficulties when implementing the Guidelines to non-executive directors.

This is because, notwithstanding them being risk takers by definition (both within the CRD and the draft MRT Regulation), non-executive directors usually do not have the same remuneration structures as executive directors or "ordinary" MRTs. Likewise, and crucial

in the context of termination, they perform their functions not within a contractual framework, but within a purely mercantile or commercial framework – they have an "organic" relationship with the institution, not a contractual one (at least in certain jurisdictions, e.g. Spain).

In the context of an "end of the appointment as member of the management body" (leave of directorship) the fact that the EBA Guidelines assume that any payment made or granted to a non-executive director is to be considered variable remuneration poses a problem not encountered when in the field of "normal variable remuneration". Institutions cannot apply variable remuneration provisions when non-executive directors don't have variable remuneration in their compensation packages.

To summarize the above:

- We do not welcome the insertion that, even when not treated as severance payments, payments in the context of contractual termination should necessarily be considered variable remuneration. Institutions should be able to assign these payments to either fixed or variable remuneration, in light of the nature of the compensation (e.g., fixed, in the case of normal pensions), and any assumption that the remuneration is variable should be able to be rebutted.
- We welcome the clarification regarding not all payments made after termination necessarily being severance payments, as it duly accounts for the wide array of particularities that compensation may have within the context of contractual termination.
- We understand that the reference to members of the management body in this paragraph should be deleted, as it would pose implementation difficulties for non-executive members of the management body whose remuneration structure is different to "ordinary" risk takers and whose functions are not performed on the basis of a contract.
- Additionally, it would be convenient that the EBA avoid referring to "regular end" of a contractual period. Firstly, it entails a new unregulated concept, different to that of "early" termination which is included in the definition of severance payments. Secondly, it is hard to reconcile in jurisdictions where indefinite contracts are widely used and, therefore, it is rare for contracts to have a "regular end". The EBA does not explain what is meant or should be understood by "regular end".

Considering all the foregoing, we suggest the following amendments to paragraph 164:

"Payments made to a staff member after termination of a contractual period (e.g. awarded discretionary pension benefit), should not be treated as severance payments, but as normal fixed or variable remuneration in accordance, inter alia, with the provisions of Section 7."

Paragraph 165

Sub-paragraph (b) would not be compliant with labour law that allows to conclude a non-competition clause at the moment of the early termination.

With regard to sub-paragraph (e), a court filing would be necessary for each case which is not workable. We propose to change the sub-paragraph in the following way to avoid for this mechanism to be only used when a judicial claim has been filed or immediately prior to its filing (and thus considerably reducing its effectiveness as a way to avoid judicial disputes):

"e. the institution and a staff member agree on a settlement in case of a potential or an actual labour dispute that could potentially bring an action in front of a court ~~lead to a court ruling~~, to avoid a decision on a settlement by the courts."

In accompanying documents to the guidelines, on page 96, it should be noted that the updates introduced on the subject of severance may generate costs for the potential review by the competent authorities, also highlighting that to limit the regulatory burden in any case, any review process could be limited to severance over 200 thousand euros.
In line with the above and in implementation of the principle of proportionality and simplification in the implementation of the regulations, it is requested that the application of the provisions of the guidelines referring to severance be applied with reference to amounts exceeding 200 thousand euros.

Paragraph 170
This whole paragraph raises an issue as it considers any transactional severance as variable to be integrated in the ratio, deferral and payment in shares; (i) results in capping the amount of severance, and is detrimental to the indemnity of prejudice which must be sufficient in order to secure such agreements; (ii) results in introducing a fluctuation in the value of the indemnity according to the evolution of the share price, which is contradictory to labour law, as according to labour law the prejudice is usually assessed by taking into account the economic and family situation of the employee, circumstances of the early termination, possibility to find another job and not the level of the share price. We ask for coming back to the previous wording (previous article 154). Otherwise, it would be impossible to apply transactional agreements to regulated staff (although legally permitted). The possibility to avoid going to court by transactional agreements would no longer be possible. Besides, a predefined formula on the calculation of severances is not possible in the French labour law, and many other countries. In those countries where there is no predefined formula for the calculation of severance payments, the employees still expect a fair compensation in the case of a termination initiated by the employer, especially, because in many of these countries there is no real possibility defined by the local labour law for a unilateral termination of the legal relationship by the employer. In several jurisdictions, senior executives enjoy the same protection from termination of their legal relationship as ordinary employees, meaning that the employer is forced to offer such a compensation for the termination of the legal relationship, which is generally paid in such situations according to the local labour market practices.

Clarification is sought as to why non-competition clauses have been included separately from other severance payments. New para. 165 now includes a comprehensive list of payments considered severance payments, and para. 170 covers those severance payments for which ratio, deferral and pay out in instruments is not mandatory. Under this new structure (more specifically, now that non-competition clauses are expressly conceived as severance payments), it is not clear why the EBA does not see them included under letter (b)(i) of paragraph 170.

As regards letter (b), section (ii), clarification is needed regarding what is to be understood by "additional amount due".

Should the explanation be that the EBA wants to maintain the current regime as regards non-competition clauses (i.e. that they need not be calculated through a predefined generic formula and can be excluded from those three variable remuneration requirements so long as they do not exceed the amount of the fixed remuneration which would have been paid for the non-competition period) then the current wording is preferred, for it would avoid interpreting the non-defined concept of "additional amounts due".

Lastly, we understand that the reference to "all requirements under article 94" is incorrect. Notwithstanding article 94 being entitled "variable elements of remuneration", it does not, strictly speaking, only regulate variable elements of remuneration (e.g. letter (f) refers to the balance between fixed and variable components; letter (g) contains the regime for requesting a higher ratio to AGMs; letter (i) refers to buy-outs; letter (o) refers to the pension policy, etc.). Reference to article 94 should thus either be avoided or specified to the requirements of article 94 which indeed should apply to severance payments.

Paragraph 171
We suggest deletion of this paragraph. We are not supportive of over-delaying termination related payments and do not think it is legally compliant to disclose payments negotiated with employees.

The new wording introduced in article 171 would eliminate institutions' ability and right to freely elaborate compensation packages, naturally within the legal provisions. This, in turn, poses an important problem for them to attract talent and innovate or present competitive remuneration packages vis-a-vis other institutions, or other companies out of the financial sector realm. It is thus imperative that the EBA reconsider this paragraph, that would ultimately amount to having to agree compensation packages with competent authorities.

Moreover, we do not understand that the severance payment regime has been clarified by way of paragraph 171. The current wording of the Guidelines (para. 154) envisages competent authority intervention only when severance payments do not meet the conditions of letter (a) (i.e. current letter (b)(i), which refers to the predefined generic formula). This means that it is up to an institution which does not comply with the exceptional regime to double-check appropriateness of a severance payment/framework with its competent authority. Yet the new wording could make the competent authority a de facto decider of the appropriateness of all severance payments/regimes, at least for material payments (which have not been contextualized).

If the institution has an internal policy which has a generic formula for determining severance pay, employees have the right to rely on this policy in decisions concerning their severance pay. Competent authorities' contrary decisions on individual pay can be challenged in courts. Competent authorities should focus on assessing the internal policies as part of their supervisory activities and taking up any perceived gaps with the supervised entity rather than having a say on individual pay.

This attribution exceeds the EBA's mandate and would appear to go far beyond the CRD's intention (again, the CRD regime in this point solely obliges for payments made to risk takers to "reflect performance achieved over time and not reward failure or misconduct").

Moreover, the fact that the institution would have to demonstrate compliance before the award is made would prove extremely complicated (e.g.: would a court decision necessarily be equated to an award? How would an institution comply with the requirement to inform/demonstrate before an award is made if it is upon the court to decide the amount?). Many countries operate in a jurisdiction where severance payments are negotiated, which negotiations are normally done under time pressure and potentially with various pressure means (e.g., court / seizure proceedings). If institutions have to take a 'time-out' to request the authorities for approval, this could lead to significant legal and litigation risks for the institution.

Lastly, the wording of paragraph 171 is unclear as to its scope of application: would institutions have to inform of any material severance payment or only those material payments to which it intends not to apply the ratio, deferral and payment in instruments requirements? It could be argued, on the basis of para. 173(a), that para. 171 only covers severance payments envisaged in para. 170(b)(i), yet much greater clarity would be needed. In addition, it is not clear when severance payments are deemed to be 'material'.

To sum up, newly introduced para. 171 does not provide greater clarity on severance payment regimes, but rather opens up severance payments to severe scrutiny by competent authorities, without the EBA having the corresponding mandate nor the CRD having experienced any modification on this matter. Consequently, we would advocate for this paragraph to be eliminated.

The calculation of severance payments is closely tied to the employment law practices of each jurisdiction hence financial competent authorities are not best suited to be the final arbiter of severance payments across different EEA countries.

Paragraph 172
Reference to "including cases of early retirement" should be eliminated. The purpose of the amendment is sufficiently clear and it would avoid institutions mixing severance payments with other payments made in the context of termination of contract (e.g. retirement benefits, whether early or not). Para. 182(i) already attends to the consequences of institutions labelling payments for what they are not.

Paragraph 173
In addition to the comments provided to paragraphs 171 and 172, the EBA should note the EBF's concern with the new principle included in this paragraph, in point a, as this would mean that amounts of severance would have to be pre validated by the competent authority. These amounts are negotiated with employees in order to avoid a court ruling, there would therefore be important issues if they have to be validated beforehand by the supervisor. And as these amounts depend on the negotiation (based on number of years with the company, fixed salary and other benefits), it would be impossible for the company to reduce them if they do not enter into the calculation of the ratio. Consequently, we are in favour of deleting this additional measure and keeping the preceding measure which enabled to exclude amounts issued from settlements in order to avoid a decision on a settlement by the courts.

Additionally, letters (b) and (c) of para. 173 do not seem necessary and appear to contradict the wording of revised para. 170. If severance payments that comply with para 170 are expressly excluded from the calculation of the ratio, it does not make sense for para 173 to state that they should be taken into account in the calculation of said ratio. To resume: if severance payments comply with para. 170, they will be excluded from ratio, deferral and payment in instruments; if they do not comply with para 170, they will be required to respect all three requirements.

Paragraph 185
We understand that reference to article 109(6) should instead be article 109(4).

Paragraph 258
We ask that the requirement to "defer a significant higher portion than 50% of the variable remuneration paid in instruments" for members of the management body and senior management be applied only to significant institutions or, alternatively, that it be applied to members of the management body and senior management in "institutions that do not

benefit from the waiver within Article 94(3) of Directive 2013/36/EU" only in case of particularly high amounts of variable remuneration.

Indeed, the proposed amendment is not provided in Directive 2013/36/EU which only provides that "For members of the management body and senior management of institutions that are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities, the deferral period should not be less than five years", without mentioning the portion of variable remuneration paid in instruments.

It should be also noted that the application of tighter rules on the deferral of variable remuneration for members of the management body and senior management is limited, by Directive 2013/36/EU, only to institutions that are "significant". Therefore, the application of the requirement under paragraph 258 concerning the portion of deferred variable remuneration paid in instruments – in consistency with the approach of Directive 2013/36/EU – should be only limited to "significant" institutions. If the EBA deems it necessary to extend such requirement to all "institutions that do not benefit from the waiver within Article 94(3) of Directive 2013/36/EU", then its application should at least be limited to the case of particularly high amounts of variable remuneration.

Paragraph 259
We understand that "period" should be substituted by "portion".

Paragraph 260
We require some details on the provision on "the ratio of the variable to fixed remuneration of that staff member" for the definition of the particularly high amount, considering applicability cross function in the company and also to ensure a level playing field in Europe.

Paragraph 269
It has been made possible, that in every country (within the EU as well) and at every identification level share linked instruments (i.e. synthetic shares) may be applied instead of shares. Chapter 15.4, however, does not clarify whether deferred the shares due from previous years might also be transformed to and disbursed in the form of synthetic shares. Consequently, pursuant to the current wording of Chapter 15.4, the shares outstanding after previous years should continue to be accounted for as share awards. Considering the recent modification, which makes it possible to award share linked instruments (i.e. synthetic shares) even at stock corporations, it would also be reasonable to extend this possibility for the shares outstanding after previous years.

Paragraph 274
We suggest the wording of the following sentence "Institutions should ensure that they have the awarded instruments available when the variable remuneration awarded in instruments vest." to be re-evaluated ("… available when retention period of the awarded variable remuneration ends") or provision supressed. Based on our practice, shares are not available at the moment of instruments vesting, but only after the retention period, also to consider taxation impacts.

Based on this sentence "Institutions may decide not to hold the instruments during the deferral period, but should in that case take into account the relevant market risks." it is not clear what institutions should do with the instruments. Sentence to be revised or suppressed.

Paragraph 276
In line with the comments done for the paragraph 274, with reference to the "Institutions should make sure that the awarded instruments are available for the pay out to staff at the latest when they vest." we suggest the wording to be re-evaluated ("the awarded instruments are available for pay-out to staff at the latest when retention period ends") or provision supressed.

Paragraph 291
Would it be appropriate/or not to confirm if the new drafting clawback would apply to all employees (MRT or not)? Has the Guide changed its scope at this point or is the elimination of "identified staff" in this section a technical adjustment since the provision remains in the chapter that regulates the remuneration policy for identified staff?

Annex 1
Changes to Annex 1 are not clear and do not seem to adequately fit with the annex's purpose (mapping the remuneration requirements). New articles - derived from CRD V - have been introduced but no scope of application has been included.

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