ABI Associazione Bancaria Italiana

Response from the Italian Banking Association
to the EBA consultation paper

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

January 2021

POSITION PAPER

2021

Subject matter, scope and definitions

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

In **Definitions**: Gender Pay Gap: "*means the difference between the average gross hourly earnings of men and women expressed as a percentage of the average gross hourly earnings of men*".

In Section 2.5 **Review of the remuneration policy** "*The review should include an analysis if the remuneration policy is gender-neutral. As part of the review, the overall gender pay gap and its development should be monitored. 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. Where material differences between the average pay between male and female staff or male and female members of the management body exist, institutions should document the main reasons, take appropriate actions where relevant or should be able to demonstrate that the difference does not result from a remuneration policy that is not gender neutral and that the institution provides for equal opportunities for all genders.*"

We request a single methodology for calculating the differential by gender.

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With regard to the process for identifying material risk takers, the consultation paper eliminates the minimum period of 3 months in a financial year as a reference for positioning individuals within the category of identified staff.

Paragraph 101 of the consultation paper establishes "*The self-assessment should be clear, consistent, properly documented and periodically updated during the year at least with regard to qualitative criteria under Article 92(3) of Directive 2013/36/EU, the RTS on identified staff and where appropriate in addition based on institutions' criteria.*".

Paragraph 89 of the guidelines on sound remuneration policies of 2015, instead settled "*The self-assessment should be clear, consistent, properly documented and periodically updated during the year at least with regard to the criteria under Article 3 of Commission Delegated Regulation (EU) No 604/2014. Institutions should ensure that staff that fall or are likely to fall under the criteria in Article 3* ***for a period of at least three months*** *in a financial year are treated as identified staff.*"

ABI requests restoration of the reference to the minimum period of 3 months in a financial year, in order to avoid including within the perimeter

of identified staff those individuals falling under the criteria for a very limited period of time, without having any opportunity to take significant risks for the institution. Furthermore, this minimum reference period makes it possible to simplify the management and administrative burdens placed on the institutions that have to maintain an updated list of material risk takers.

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With regard to application of the guidelines, the document provides that they will apply from 26 June 2021 and, therefore, it is necessary to clarify that national authorities should comply by including them in their regulatory frameworks in order to allow their concrete application from the remuneration policy for 2022.

It should be considered that, for many institutions, the approval processes for the 2021 remuneration policies will begin before publication of the Guidelines and that, on the date of application currently envisaged (26 June 2021), the annual meeting of shareholders will have already given the related approval. It should also be considered that, in some member states, CRD V was not adopted by the deadlines set in the directive and will probably not enter into force before definition of the 2021 remuneration policies.

TITLE I – REQUIREMENTS REGARDING REMUNERATION POLICIES

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

ABI fully agrees with the principle of gender neutral remuneration policies - which is also expressly enshrined in the Italian Constitution - according to which men and women must be remunerated equally for equal work or for work of equal value.

National collective bargaining in the banking sector has always operated in full compliance with the principle of gender neutrality, including in relation to remuneration profiles.

In fact, to favour the concrete implementation of this principle, it is desirable to identify criteria that allow the phenomenon to be examined in a homogeneous manner at European level.

Considering this, it is appropriate to summarize the specific attention paid by ABI to the issue of equal treatment.

First of all, recognizing the value of gender diversity as a key resource for development, sustainable growth and value creation in all companies, and intending to enhance - in line with recital no. 60 of the CRD - equal treatment and opportunities between genders within each company, the Association approved the "Women in Bank: enhancing gender diversity" Charter in June 2019, inviting its Associates to adhere to the "Charter" in the hope that associated and non-associated banking and financial companies would show broad support by sharing the principles.

Specifically, in line with its own characteristics, size and business model, each institution undertakes to enhance its corporate policies inspired by the following principles for equal opportunities:

a) promote constantly a work environment that is inclusive and open to the values of all forms of diversity, including gender diversity;

b) strengthen suitable selection and development methods that promote equal gender opportunities throughout the institution, not least to identify additional qualified female candidates if there are not enough of them already;

c) spread the full and effective participation of women, especially for the highest positions, in an institution oriented at all levels to ensuring equal role opportunities and equal treatment;

d) undertake to promote gender equality outside the bank as well, for the benefit of the reference communities;

e) implement appropriate initiatives to direct and enhance corporate policies on gender equality – partly through testimony and activities to raise awareness about the reasons and expected benefits - under the responsibility of high-level management.

The considerable attention paid and sensitivity of banking and financial institutions to the issue of gender equality are reflected in the broad adherence to the "Women in Bank" Charter, as expressed by companies representing 90% of sector employees in December 2020, as well as by the constant increase over the years in the presence of women among banking personnel.

In addition, the centrality of gender equality within the collective bargaining process is confirmed:

- by the Protocol of 16 June 2004 on the sustainable and compatible development of the banking sector, which envisages that effective equal opportunities for professional development represent a prerequisite for the enhancement of human resources and the common commitment of the signatory Parties to oppose any form of

discrimination; more recently, the "Joint declaration on harassment and gender-based violence" was agreed on 12 February 2019;

- by the establishment, in the National Collective Labour Agreement of 19 December 2019, of a National Commission for inclusion policies, whose tasks include "stimulating the culture of equal opportunities and inclusion in the sector, through the promotion of initiatives aimed at implementing Community and national legislation". This Commission joins the already established National Commission on Equal Opportunities and Company/Group Commissions;
- in the recommendation to institutions in the sector, as adopted in the recent renewal of the National Collective Labour Agreement, to promote equal gender opportunities throughout the company, not least in order to spread the full and effective participation of women with particular reference to higher positions.

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Observations and requests for clarification relating to the consultation paper are provided below.

Paragraph 23 "*Without prejudice to any measures adopted by Member States to prevent or compensate for disadvantages in professional careers of the underrepresented gender, the remuneration policy and all related employment conditions that have an impact on the pay per unit of measurement or time rate should be gender neutral. This includes, but is not limited to remuneration, recruitment policies, career development and succession plans, access to training and ability to apply for internal vacancies.".*

ABI asks if the supervisor has any indications for parameters, including examples, that might be useful for assessing compliance with the neutrality of remuneration policies with regard to the profiles listed in paragraph 23.

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

ABI asks how the supervisor believes institutions would be able to demonstrate that their remuneration policies are gender neutral.

* * *

Referring to paragraphs 25 and 26, in order to monitor the application of gender neutral remuneration policies – in addition to determination of the pay per unit of measurement or time, duly considering the remuneration awarded, working time arrangements, annual leave periods and other financial and non-financial benefits - institutions should document job descriptions for all their staff members and determine which positions are considered as equal or of equal value per unit of measurement or time rate,

taking into account at least the type of activities, tasks and responsibilities assigned to the position or staff member.

National sector collective bargaining identifies *inter alia* profiles for determining the classification of tasks performed, the related remuneration, working time and number of vacation days in an absolutely identical manner for male and female personnel. ABI therefore requests confirmation that the collective bargaining classification can be used as a reference when comparing different positions. In this regard, confirmation is also requested that the consistency of remuneration policies with the provisions contained in the collective bargaining agreement regarding the positions held by personnel and the corresponding remuneration represents evidence of the neutrality of the gender remuneration policies adopted, not least due to the aforementioned gender neutrality of those provisions.

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With regard to the mapping of job positions to determine the value of individual positions (paragraphs 26 and 27), it is hoped that uniform criteria can be established at European level in order to guarantee the homogeneity of the information collected, perhaps by requiring, for example, an assessment by bands that simplifies the mapping of staff within the company.

Proportionality in applying the discipline is also requested, in order to limit the economic burden (for example, the use of consultants), management and administrative costs incurred to map positions in smaller companies. Moreover, the small number of observed positions in those companies could provide a distorted view of the actual gender pay gap. In this regard, we request the establishment of a minimum number of men and women for the calculation of the differential (at least 10 people).

In general, job mapping involves economic, managerial and administrative burdens for all institutions and, therefore, ABI requests an evaluation of the cost/benefit of this proposal, considering use of the framework contractual categories identified in the national collective agreement for banking institutions. In fact, the professional declarations defined in the national collective agreement describe the content of the various tasks, linking the related contractual classification and consequent gender neutral remuneration to the latter.

In any case, taking into account the proportionality criterion, ABI requests the identification of a minimum company size for introduction of the job mapping methodology, suggesting banks with at least 1,000 employees, as proposed in the simplification of the quantitative criteria for identifying material risk takers reported in EBA *Draft regulatory technical standards on criteria to define managerial responsibility and control functions, a material business unit and a significant impact on its risk profile, and categories of staff whose professional activities have a material impact on an institution's risk profile* of 18 June 2020, already presented to European Commission

(criterion of 0.3% of the highest paid personnel, limited solely to companies with at least 1,000 employees).

Pursuant to the CRDV, within two years of publishing the guidelines on gender neutral remuneration policies and on the basis of the information collected by the competent authorities, the EBA will publish a report on the application of the gender neutral remuneration policies for the institution (Article 74). From this commitment it is necessary to define homogeneous criteria for evaluating and reporting on remuneration information by gender.

Again in order to ensure homogeneity at European level, ABI requests clarification on how to calculate the gender pay gap referred to in paragraph 63. *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.*

Clarification is requested about what information should be provided to management bodies, shareholders, public and competent authorities concerning *"how it is ensured that the remuneration policy is gender neutral and that equal opportunities for all genders exist"* (paragraph 46, letter c).

Again with regard to disclosure, it must be considered that some member states already have regulations that required the disclosure of information to the public about the gender pay gap, such as non-financial statements. It will be important to avoid publishing the same information calculated using different methods, which would inevitably lead to different indicators and create confusion in the market.

2. GOVERNANCE OF REMUNERATION

3. Remuneration policies and group context

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

(article 109, CRD) In relation to the scope of application, the companies subject to specific remuneration requirements will not subject to the CRD, except for members of staff of subsidiaries that are not subject to this Directive on an individual basis where:

(a) the subsidiary is either an asset management company, or an undertaking that provides the investment services and activities listed in points (2), (3), (4), (6) and (7) of Section A of Annex I to Directive 2014/65/EU; and

(b) those members of staff have been mandated to perform professional activities that have a direct material impact on the risk profile or the business of the institutions within the group.

The document explaining the provisions of the Directive clarifies that the application of the discipline must be considered from a consolidated group perspective. In particular, as requested by the banking sector several times in discussions with the European Regulators, the CRD discipline only applies to companies in the group consolidation that are not subject to specific remuneration requirements, except in the case of members of staff who work in asset management or investment companies, if they have been mandated to perform professional activities with a direct material impact on the risk profile or the business of the institutions within the group.

The exception included in the discipline is intended to guarantee competitive equality between independent companies and companies belonging to a banking group that, individually, are not subject to CRD and operate in the same market.

All this without prejudice to a different national discretion requiring application of the CRD discipline to companies subject to specific remuneration requirements. It is hoped that this will not materialize, since it would generate competitive disparity within a single member state: companies would find themselves competing in the internal market with similar companies subject to different and generally less restrictive regulations, or in the European market with companies to which the CRD do not apply.

Regarding competition between companies operating in the same market, whether or not belonging to banking groups, ABI deems it necessary to pay attention to Fintech, advisory and corporate finance companies that, as they are not subject to specific remuneration requirements, will apply the CRD if they belong to a banking group. In order to guarantee a level playing field with Fintech, advisory and corporate finance companies not belonging to banking groups and, therefore, allow the proper evolution of banking services and encourage capital-light advisory activities, without the commitment of bank capital or exposing banking groups to market, credit or liquidity risks, ABI requests an exception from the application of the CRD for these companies.

Waivers of the variable remuneration pay-out process

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

With regard to the proportional application of the legislation according to the size and complexity of the institution, the category of identified staff, and the amount of variable remuneration, we observe that variable remuneration of € 50 thousand - albeit required by the Directive - is excessively low and, therefore, should be reviewed and adjusted according

to - among other things - the local market, the business activities of the institutions and the category of personnel (for example, financial advisors), thus providing not only for national discretion, currently contained in the regulations, which allows reduction of the amount, but also for the possibility of increasing it up to a maximum of € 100,000.

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In relation to the possibility of not applying the more detailed rules on the variable remuneration of identified staff, depending on the size of the company and its complexity, it should be noted that - as provided for in the directive - this right is limited just to non-significant institutions (i.e. companies not qualified as "large institutions" that meet the size criteria referred to in art. 94, para. 3, CRD, as amended by CRD V).

Taking into account that many companies belonging to significant banking groups are small and not complex and, on an individual basis, could benefit from the exemption from application of the rules on payment in financial instruments, deferral and pension policy, it would be preferable to apply the same exemption to them as well, thus simplifying management costs and guaranteeing equal treatment for similar size companies operating in the same market.

In any case, it should be considered that the above extension of the exemption would be consistent with the spirit and principles of the CRD. In fact, in accordance with the applicable European legislation, banking groups are required to identify their risk takers both at group level and on an individual basis.

If the exemption is extended to entities that - although belonging to larger groups – would on an individual basis comply with the size criteria referred to in art. 94, para. 3 (hereinafter referred to as "smaller entities" for the sake of simplicity), the outcome would be that:

- any staff of the smaller entity classified by the parent company as identified staff at group level would still be subject to the most stringent rules applicable to the parent company;

- the staff identified as material risk takers exclusively at the level of the smaller entity could, under the principle of proportionality, benefit from the exemptions regarding payment in financial instruments, deferral and pension policy.

Extension of the exemption in favour of smaller entities, even if they belong to significant banking groups:

- would allow for the simplification of management burdens;

- would guarantee equal treatment for companies of the same size operating in the same market;

- would respond to a proportionality criterion that addresses both the individual size of the bank and the consolidated size of larger groups since, unlike smaller banks not belonging to larger groups, the identified

staff at group level would be subject to the most stringent rules applied to the parent company;

- would ensure overall consistency in the application of the legislation, taking into account that material risk takers at individual level - the only one to which the exemption would apply - in banks belonging to a larger group, enjoy less operational autonomy than the identified staff of smaller banks not belonging to a large group, and the risk taking by them has a proportionately lower impact: if the exemption were not extended to such personnel, the regime would favour those persons with comparatively greater operational autonomy and whose decisions result in the acceptance of greater risks, with respect to those belonging to a larger group that applies a significantly more onerous regime to staff with limited levels of autonomy, whose decisions may have a limited impact;

- would allow larger groups to take appropriate account of the size of each bank in the group, applying remuneration policies that establish a graduated discipline that takes account of this characteristic in application of the principle of proportionality.

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In article 94, CRDV, para. 4:

4. *By way of derogation from point (a) of paragraph 3, a Member State may lower or increase the threshold referred to therein, provided that:*

(a) the institution in relation to which the Member State makes use of this provision is not a large institution as defined in point (146) of Article 4(1) of Regulation (EU) No 575/2013 and, where the threshold is increased:

(i) the institution meets the criteria set out in points (145)(c), (d) and (e) of Article 4(1) of Regulation (EU) No 575/2013;

(c) it is not subject to any obligations, or is subject to simplified obligations, in relation to recovery and resolution planning in accordance with Article 4 of Directive 2014/59/EU;

(d) its trading book business is classified as small within the meaning of Article 94(1);

(e) the total value of its derivative positions held with trading intent does not exceed 2% of its total on- and off-balance-sheet assets and the total value of its overall derivative positions does not exceed 5%, both calculated in accordance with Article 273a(3) and

(ii) the threshold does not exceed EUR 15 billion;

(b) it is appropriate to modify the threshold in accordance with this paragraph taking into account the institution's nature, scope and

complexity of its activities, its internal organisation or, if applicable, the characteristics of the group to which it belongs.

In relation to the individual Member State's discretion to increase the threshold from € 5 to € 15 billion, ABI requests to confirm that it is possible to benefit of the derogation if the institution meets only one of the criteria for raising.

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In paragraphs 257 and 258:

"*257. (…) The minimum requirement of a four-year deferral period and five year deferral period for members of the management body and senior management in significant institutions applies in any case.*

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

ABI requests clarification that the provision requiring more than 50% of the deferred portion to be in financial instruments only applies to significant institutions and, in a subordinated position, to non-significant banks only if the amount of variable remuneration is material.

In fact, the amendment made to the EBA Guidelines is not based on CRD V, which merely provides that the variable remuneration paid to "members of the management body and senior management of significant institutions" is subject to a deferral period of at least five years, with no provision for the pay out of the deferred portion.

It should be considered that CRD V limits to significant institutions the application of more stringent rules for deferring the variable remuneration of the aforementioned personnel: application of the requirement for the composition of the deferred portion - in compliance with the approach adopted in CRD V - should therefore also be limited to significant institutions (and not extended - as proposed in the EBA Guidelines - to all institutions other than those enjoying the exemptions pursuant to Article 94 (3) CRD V), or at least limited to the case of material variable remuneration if extended to non-significant institutions.

8.4 Retention Bonuses

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

Paragraph 142. *Institutions should be able to substantiate their legitimate interest in awarding retention bonuses to retain an identified staff member and document the event or justification for the retention bonus that exist*

during a certain point in time or within a set period (meaning that there should be a starting date and an end date). ***Institutions should not award to a staff member multiple retention bonuses under the same event or justification or under simultaneous events or justifications****. For example, retention bonuses may be used under restructurings, in wind-down or after a change of control, including e.g. initial public offerings of shares that lead to a change of control or specific projects within an institution.*

The definition of "retention bonus" reported in the EBA Guidelines is broad and could include other types of emoluments, in addition to the typical amounts agreed in individual stability agreements that obligate the worker to maintain the employment relationship for a certain period of time.

In particular, based on the definition in the EBA Guidelines, bonuses provided for in collective plans - often negotiated and agreed with the trade unions - which address specific categories of personnel (or even all company personnel) must be qualified as retention bonuses – without incentive purposes, but 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 without further performance conditions. There may well be justified and legitimate reasons for recognizing to individual staff members, already participating in such plans, an additional individual retention bonus as part of a stability agreement that provides for the acceptance of a specific obligation by the worker.

ABI therefore requests deletion of that part of paragraph 142 which states "*or under simultaneous events or justifications*". If this element is eliminated, the circumvention provisions would still prohibit any abuse of the possibility of recognizing multiple retention bonuses and, in any case, such recognition would have to take place in compliance with the limit on the ratio of variable to fixed remuneration.

Always taking into account the existence of these types of collective retention plan (which, as mentioned, are often the result of negotiations with trade unions), ABI requests elimination of the requirement in paragraph 146 under which retention bonuses must be based on individual performance criteria. Despite the absence of individual performance objectives, collective retention plans, such as the one described above, pursue a legitimate purpose of motivating staff and rewarding loyalty to the entity and, indirectly, supporting the achievement of long-term corporate business objectives. Adding a requirement for individual performance objectives would result in eliminating the ability to adopt retention plans of the type described, thus further restricting the remuneration tools available to the banking sector.

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Par. *145. Institutions should set the retention period as the point in time of the event or as the period between the start date and the end date of the*

event when the retention condition should be met. The retention bonuses should be awarded after the retention period ends. No pro rata awards should be made during the retention period.

Without prejudice to the variable remuneration nature of retention bonuses, it would be worth evaluating the possibility of allowing the payment of a retention bonus, not only at the end of the retention period but also during the retention period. This request is supported by the provisions of paragraph 147, which allows payment of the retention bonus as a lump sum at the time the retention condition is met or pro rata over the retention period. Paragraph 147 reads in fact "*A retention bonus must be taken into account within the calculation of the ratio between the variable and the fixed remuneration as variable remuneration. Independent of the fact that the retention bonus will be awarded only after the end of the retention period, the retention bonus should be taken into account in the calculation of the ratio between the variable and the fixed part of remuneration following one of the methods specified below:*
a. the retention bonus is split into annual amounts for each year of the retention period calculated on a linear pro rata basis. Where the exact length of the retention period is not known upfront, the institution should set and duly document a period considering the situation and measures taken that justify the payment of a retention bonus. The calculation of the ratio should be based on the period set, or
b. the full amount of the retention bonus is considered in the year when the retention condition is met."
In addition, the payment, for example monthly, of a retention bonus represents a sort of down payment against the total value of the retention bonus. From the point of view of planning company costs, payment represents a "certain" burden. Should the employee resign before the end of the retention period, not only will this charge no longer apply, with a reduction in the related company costs, but the employee will have to pay a predetermined penalty in relation to the retention period not respected, thus generating unexpected income.

9.3 Severance payments

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

For the purposes of interpreting correctly the provisions of paragraph 165, point *e. the institution and a staff member agree on a settlement in case of an actual labour dispute that could potentially lead to a court ruling, to avoid a decision on a settlement by the courts,* ABI requests clarification that the intention of the provision is to contain the risk, actual or potential, of disputes or litigation in court.

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Page 96 of the document accompanying the guidelines indicates that the updates made on the subject of severance payments may generate costs linked to potential reviews by the competent authorities, also highlighting that, to limit the regulatory burden, any review process could be limited to severance amounts over 200 thousand euros. In line with the above and in implementation of the principles of proportionality and simplification in the implementation of the discipline, ABI requests that application of the severance provisions in the guidelines be limited to amounts exceeding 200 thousand euros, perhaps also requiring compliance with the additional conditions mentioned below:

- the amounts solely reflect the need to contain company costs and rationalize staff levels

- inclusion of claw-back mechanisms that at least cover cases of fraudulent behaviour or gross negligence to the detriment of the bank.

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Paragraph 171 *In particular for the cases referred to in paragraph 170 (b)(i) (severance payments calculated through an appropriate predefined generic formula set within the remuneration policy) the competent authority may require for payments that are material that institutions inform the competent authority and demonstrate that such payments comply with the requirements under Article 94 of Directive 2013/36/EU and these guidelines taking into account the reasons of such severance payments before such awards are made.*

For the purposes of uniform application at European level, ABI requests specification of the criterion for identifying the significant amount that may lead the National Authority to request inclusion of the emolument in the calculation of the ratio between variable and fixed remuneration, as specified in paragraph 173, letter a)

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

a. any severance payment under point (b) of paragraph 170 where the competent authority following its assessment e.g. under paragraph 171 is not satisfied that the reasons justify the payment of the severance payment or that the amount would be disproportionate.