FMA CIRCULAR

regarding Article 39 para. 2, Article 39b and Article 39c BWG

PRINCIPLES OF REMUNERATION POLICIES AND PRACTICES¹

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I. INTRODUCTORY REMARKS

1. This FMA Circular is intended to provide credit institutions with guidance regarding the application of the provisions set forth in Article 39 para. 2 in conjunction with Article 39b of the Austrian Banking Act (BWG; Bankwesengesetz). This circular has been drawn up in consultation with the Oesterreichische Nationalbank (OeNB).

2. Article 39 para. 2 in conjunction with Article 39b BWG including its annex form the legal basis for designing remuneration policies and practices in credit institutions and groups of credit institutions. The quoted provisions transpose Article 74 in conjunction with Articles 92-95 of Directive 2013/36/EU (CRD IV) into Austrian law.

3. False incentives in the remuneration structure of a credit institution may undermine an efficient and sound risk management. If the realisation of profits in the short-term is rewarded and if employees are induced to continue to pursue activities that are associated with unreasonably high risks, then credit institutions are exposed to higher potential risks in the long-term as a result. The purpose of the provisions on remuneration in the BWG is therefore that credit institutions establish remuneration policies and practices that motivate their employees to act in a sustainable and long-term manner, and that bring their personal objectives into line with the long-term interests of the credit institution.

4. Pursuant to Article 39 para. 2 BWG credit institutions and groups of credit institutions must have in place administrative, accounting and control mechanisms for the capture, assessment, management and monitoring of risks arising from banking transactions and banking operations, as well as risks arising from their remuneration policy and practices. These mechanisms must be commensurate to the type, scope and complexity of the banking transactions conducted.

5. Article 39b BWG and its Annex state more precisely how systems of remuneration are to be designed: when defining and applying remuneration policies and practices, credit institutions and groups of credit institutions are required to take into account, depending on the categories of staff and taking into account the principle of proportionality, the principles outlined in the Annex to Article 39b BWG.

6. The remuneration provisions of the BWG cover remuneration policy and practices in credit institutions in their entirety, and therefore cover in principle all employee remuneration. For the purpose of the remuneration provisions, namely for managing the risk-taking behaviour of employees, as well the observance of standards of (most)

2 If is necessary to differentiate between the provisions set out in Articles 34 et seq. WAG 2007 in relation to the avoidance of conflicts of interest in the case of remuneration systems with sales targets (see the FMA’s "Circular letter on the problem of conflicts of interest in relation to certain systems of remuneration").

3 See explanatory remarks to the government bill (ErlRV) no. 922 in the supplements to the stenographic protocols of the National Council (BlgNR) for the 24th legislative period, SP 1-3.

4 Cf. Article 30 para. 7 BWG
principles on remuneration of the Annex to Art. 39b BWG it is apparent that the focus of the provisions for regulating the types of variable remuneration.\(^5\)

7. The remuneration provisions in the BWG therefore oblige credit institutions and groups of credit institutions, on the one hand to address the risks arising from remuneration policies and practices as part of the general controlling of risks pursuant to Article 39 para. 2 BWG, while on the other hand also defining in Article 39b BWG and its Annex how remuneration policies and practices are specifically to be designed.

8. This circular explains a selection of questions in relation to the application of the provisions on remuneration: the general scope of application of the provisions in credit institutions and groups of credit institutions, the ban on circumventing of legal provisions, the definition of categories of staff, the principle of proportionality, the applicability of nos. 11 and 12 of the Annex to Article 39b BWG as well as the transitional rules. On the basis of these statements the credit institutions’ independent assessment should be simplified regarding how, and in what manner, the principles on remuneration in the Annex to Article 39b BWG are to be implemented.

9. Pursuant to Article 69 para. 5 BWG, the FMA is required to apply, in its enforcement of the BWG, to apply the Guidelines, Recommendations and Standards adopted by the European Banking Authority (EBA). The EBA addresses the remuneration conditions contained in Directive 2013/36/EU (CRD IV) in detail in the “Guidelines on sound remuneration policies”\(^6\). Pursuant to Article 69 para. 5 BWG mentioned previously, the BWG is set out by the FMA within the meaning of these Guidelines. The “Guidelines on sound remuneration policies” are therefore to be also to be consulted by the banking industry as an interpretation aid, in particular with regard to the remuneration principles that are not addressed in this circular.

10. This circular constitutes the legal view of the FMA. The legal basis in any case remains unaffected by this FMA circular. No rights and obligations extending over and above the provisions of the law can be derived from this circular.

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\(^5\) For the precise differentiation between fixed and variable remuneration, see MNs 115 and 117 of the EBA Guidelines on remuneration policies of 21.12.2015 (EBA/GL/2015/22). See also no. 2 of the Annex to Article 39b BWG, the principle of which also applies for fixed remuneration and non-performance-related remuneration: for example it is also of "long-term interest" that the total staffing costs (both fixed and variable) do not grow to an amount that is capable of undermining sustainable financial development.

\(^6\) “Guidelines on sound remuneration policies under Articles 74 (3) and 75 (2) of Directive 2013/36/EU and disclosure under Article 450 of Regulation (EU) No 575/2013” of 21.12.2015 (EBA/GL/2015/22).
II. SCOPE OF APPLICATION

A. CREDIT INSTITUTIONS AND GROUPS OF CREDIT INSTITUTIONS

11. Article 39 para. 2 and Article 39b BWG and the latter’s Annex apply exclusively to credit institutions on an individual institution basis.

12. Superordinate credit institutions pursuant to Article 30 para. 7 BWG\(^7\) are however required to implement the risk control process pursuant to Article 39 para. 2 BWG for the entire group of credit institutions\(^8\). Moreover, pursuant to no. 13 of the Annex to Article 39b BWG, credit institutions must apply the principles listed therein both on the level of the parent undertaking, as well as the subsidiaries and branches, including those that are located in offshore financial centres.

13. Superordinate credit institutions ultimately must ensure that entities within the group, that themselves are not credit institutions (financial institutions\(^9\), investment firms and ancillary services undertakings\(^10\)), are incorporated into the group’s risk controlling pursuant to Article 39b BWG as well as remuneration policies and practices existing in such entities, that are in line with the Annex to Article 39b BWG as well as the group’s remuneration policy that builds upon the Annex to Article 39b BWG.

14. It should be noted that the principle of proportionality set out in Article 39b BWG also applies to group entities that are not credit institutions\(^11\).

15. A superordinate Austrian credit institution is responsible for ensuring compliance with the principles on remuneration set out in the Annex to Article 39b BWG within the complete group of credit institutions, i.e. for subordinate institutions in Austria and abroad (in EU Member States and third countries). Divergent national remuneration provisions of a subordinate institution with its registered office in another Member States however take precedence over the Austrian provisions. The observance of remuneration provisions in other jurisdictions is the responsibility of the respective (local) institution.

16. Pursuant to Article 9 para. 7 BWG, the BWG’s remuneration provisions also apply to the branches of credit institutions from other Member States. The branches of credit institutions from third countries are also required to apply the remuneration provisions.

\(^7\) Cf. Article 30 para. 5 BWG
\(^8\) Cf. Article 30 para. 1 BWG
\(^9\) Cf. Article 4 (1) 26 CRR
\(^10\) Cf. Article 4 (1) 18 CRR
\(^11\) See below "III.D. Application of the principle of proportionality".
B. COMPETENT BODIES IN THE CREDIT INSTITUTION

17. Pursuant to no. 3 of the Annex to Article 39b BWG the supervisory board or the competent supervisory body as defined under law or the articles of association is responsible for approving the remuneration policy, reviewing it on a regular basis as well as the monitoring of its practical implementation. In this way the supervisory board is standards as the primary competent body for the monitoring of observance of the remuneration provisions. Both the legal conformity of the remuneration policy in terms of its content as well as its full and correct implementation in the credit institution falls under its responsibility.

18. If a remuneration committee has been established pursuant to Article 39c BWG, and if the decision-making powers of the supervisory board have been conferred to the remuneration committee, then the state commissioner and their deputy are required to be invited to the meetings of the remuneration committee pursuant to Article 76 para. 4 BWG.

19. In the case that the remuneration committee has not been granted decision-making powers, its reports or draft decisions for subsequent supervisory board decisions must be subject to material discussions that allow the state commissioner attending the meetings of the supervisory board to be aware of their content as well as to be able to issue a statement.

20. The general responsibility of the members of the management board to ensure compliance with the provisions in the BWG remain unaffected.

C. BAN ON CIRCUMVENTING OF LEGAL PROVISIONS

21. Pursuant to no. 12 point d of the Annex to Article 39b BWG, variable remuneration is not allowed to be paid using instruments or processes that allow the requirements set out in the BWG to be circumvented. The cited provision standardises a general ban on circumventing legal provisions. The phrase "using instruments or processes" should be understood in a broad sense. Any (legal) construction shall not be allowed, which help to circumvent compliance with a remuneration provision, even though they would be required to be applied in accordance with the principle of proportionality and the affected category of staff.\(^{12}\)

\(^{12}\) See also paragraphs 162 to 169 of the EBA Guidelines on sound remuneration policies.
D. CATEGORIES OF STAFF

1. GENERAL AND SPECIFIC PRINCIPLES OF THE REMUNERATION POLICY

22. It is necessary to differentiate between the general and specific principles of the remuneration policy in the principles set out in the Annex to Article 39b BWG. While the general principles apply to the entire credit institution or all staff members, the specific principles only apply to the categories of staff listed in Article 39b BWG (also known as "identified staff" or "risk takers in a broad sense").

23. The general principles 1-6a, 7 points b to d, 10, 12 point d and 13 apply for the institution as a whole and all staff members. In addition the specific principles in 7 (para. 1), 7 point a, 8 – 8b, 9 – 9a and 11, 12 (para. 1), 12 points a – c only apply for specific categories of staff.

2. DEFINITION OF THE CATEGORIES OF STAFF

24. Pursuant to Article 39b BWG the categories of staff for whom the specific principles apply consist of the management, risk takers, employees with a controlling function and employees who are in the same remuneration group as the management and risk takers and whose activities have a material effect on the risk profile. Commission Delegated Regulation (EU) No. 604/2014 standardises on a compulsory basis the qualitative and quantitative criteria to be used to identify the specific categories of staff.

3. IDENTIFICATION OF THE CATEGORIES OF STAFF

25. Where Commission Delegated Regulation (EU) No 604/2014 permits a certain degree of discretion, it is the responsibility of the individual credit institution to perform a self-assessment of which staff members are specifically to be identified as risk takers in a broad sense and which are to be assigned to other staff members. The outcome must be documented in a transparent, justifiable and well-founded manner.

26. It should be noted that the allocation of all staff member as risk takers in a broad sense and other staff members partially anticipates the proportionality test to be undertaken among staff members, and consequently is also significant with regard to any neutralisation of principles on remuneration.

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13 These terms used in the Guidelines on sound remuneration policies originate from the circumstance that certain staff members must be "identified" from the staff as a whole (pursuant to Article 39b BWG), which is why they are also called "identified staff".

14 See also Annex I of the EBA Guidelines on sound remuneration policies.

15 Cf. therein Article 3 (Qualitative criteria) and Article 4 (Quantitative criteria).

16 See below "III.C.2. Proportionality between staff members".
III. PRINCIPLE OF PROPORTIONALITY

A. GENERAL

31. Pursuant to Article 39b BWG, when defining and applying the remuneration policy and practices, credit institutions are required to apply the principles of the Annex to Article 39b BWG in an appropriate manner and extent, for their size, internal organisation, the nature, scope and complexity of their business, categories of staff, the type and amount of their remuneration as well as the effect of their activity on the credit institution's risk profile. Article 39b BWG therefore defines a principle of proportionality (as already defined in Article 39 para. 2 BWG)\(^\text{17}\).

32. The principle of proportionality contained in Article 39b BWG applies to both the general and the specific principles in the Annex to Article 39b BWG. The principle of proportionality works both ways: a few institutions will be required to establish more demanding standards due to their increased complexity or for their staff members that are most relevant in terms of risk, while other credit institutions will be able to prescribe more simple rules on the basis of their less complex nature, or for their less relevant staff members in terms of risk, or even both\(^\text{18}\). The manner and extent of the application of the remuneration principles must always be adequate for the individual risk situation\(^\text{19}\).

B. NEUTRALISATION

33. Within the context of proportionality it is permissible to "neutralise" certain principles, i.e. not to apply them at all, if doing so is compatible with the risk profile, risk appetite and the strategy of the bank. The principles set out in nos. 11, 12 and 12 point (a) may be neutralised\(^\text{20}\). The remaining principles may only be applied in a diluted form on the basis of the principle of proportionality, but may not be fully dispensed with.

34. With regard to the percentage rates and timeframes contained in the principles on remuneration that may be neutralised, it should be noted that they are minimum thresholds, which cannot be reduced. Therefore these thresholds are either not to be applied at all (neutralisation) or must be implemented fully.

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\(^{17}\) For the application of the principle of proportionality in conjunction with the organisations provisions in the Securities Supervision Act 2007 (WAG 2007; Wertpapieraufsichtsgesetz 2007) please see the "regarding the organisational requirements set out in the Austrian Securities Supervision Act 2007 with regard to compliance, risk management and internal audit (Chapter II)".

\(^{18}\) See below "III.D. Proportionality between institutions and between categories of staff".

\(^{19}\) See also re: Article 39 BWG: Höller, Puhm in Dellinger, BWG, Article 39, MN 34.

\(^{20}\) No. 12 point a may only be neutralised with regard to the taking into account of risk on an ex post basis ("Malus"). i.e. the restriction on variable remuneration shall not be allowed to fully removed in the case of an adverse earnings and financial situation.
35. The neutralisation or merely diluted application of the principles contained in the Annex to Article 39b BWG is never an automatic or blanket process, but must always be justified on a case-by-case basis in a transparent, justifiable and well-grounded manner.21

C. PROPORTIONALITY BETWEEN INSTITUTIONS AND BETWEEN CATEGORIES OF STAFF

36. According to the wording of Article 39b BWG, it is necessary to differentiate between the proportionality between credit institutions (size, internal organisation and the nature, scale and complexity of their activities) and proportionality between the staff members (categories of staff, the type and amount of their remuneration, as well as the effect of their activity on the risk profile).

1. PROPORTIONALITY BETWEEN INSTITUTIONS

37. Credit institution shall be required to perform a self-assessment in accordance with the size, internal organisational structure, and nature, scale and complexity of their activities. Institutions of medium complexity are able to apply certain individual principles on remuneration, while non-complex institutions may either neutralise principles on remuneration for the entire institution (nos. 11 to 12 point (a)) or apply them to a lesser extent. This neutralised or simplified application is then possible for all staff members of the institution, regardless of whether they are managerial staff, risk takes or other staff members.

38. The transition from complex to non-complex institutions is a floating one. "Highly complex" institutions are required to fully adhere to the principles set out in nos. 11, 12 and 12 point (a) of the Annex to Article 39b BWG. Some credit institutions of medium complexity may be permitted to neutralise individual principles, while for non-complex institutions the neutralisation of all of these requirements may be possible.

39. To aid understanding the concept of proportionality between institutions is explained below in a very schematic form:

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21 See below "III.D. Application of the principle of proportionality".
22 In this instance it is necessary to differentiate between the "complexity" of a credit institution as an umbrella term for the overall assessment of proportionality between institutions ("complex and non-complex institutions") and the "complexity" (in its narrow meaning) of the activities conducted as a sub-question in the proportionality test.
23 See also MN 57.
**Complex credit institutions**: highly complex or medium complexity institutions

- **Highly complex institutions**:
  - Full application of nos. 11 to 12 point (a)
  - Detailed application of the remaining principles

- **Medium complexity institutions**:
  - Neutralisation of individual principles in nos. 11 to 12 point (a)
  - Partial simplified application of the remaining principles

**Non-complex credit institutions**:

- Neutralisation of individual principles in nos. 11 to 12 point (a)
- Simplified application of the remaining principles

40. Credit institution of any legal form that are classified as being of significant relevance as per the definition in Article 5 para. 4 BWG\(^{24}\), in any case qualify as complex institutions (medium to highly complex) as per the definition of the principle of proportionality in Article 39b BWG\(^{25}\). Full neutralisation (non-application) of all the principles on remuneration in nos. 11, 12 and 12 point (a) of the Annex to Article 39b BWG is therefore not permissible in such institutions and even further reaching application of these principles on remuneration may also be necessary\(^{26}\).

41. The requirement to conduct a detailed review for assessing the correct classification of a credit institution (non-complex; low, medium or high complexity) remains unaffected by the above delineation. The criteria to be applied in particular indicate increased complexity in the following instances:

**Size**:

- Total assets\(^{27}\):
  - in the case of institutions with total assets of less than EUR 5 billion: the total assets are less than EUR 5 billion, but not by much.
  - and/or

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\(^{24}\) This means in particular institutions, the total assets of which have reached EUR 5 billion at the cut-off point in the last three completed business years.

\(^{25}\) Cf. the values fixed by the legislator in the BWG in Articles 29, 63a para. 4 and in particular Article 39c para. 1 BWG in the applicable version of 03.01.2018.

\(^{26}\) For example, highly complex institutions that have issued tradable shares, that completely apply nos. 11 to 12 point (a), and which where necessary also prescribe higher standards in their application (e.g. a higher deferred proportion, longer deferral period and longer holding period etc.).

\(^{27}\) Despite the threshold of EUR 5 billion mentioned in paragraph 40, in the detailed test it is far more relevant whether the total assets are precisely EUR 5 billion or substantially exceed this amount, or whether the total assets as just shy of this mark or considerably below it.
in the case of institutions with total assets of over EUR 5 billion: if the total assets exceed EUR 10 billion, as a rule the institution is a highly complex institution.

- the relative size: the institution is small in international comparison, but is significant within the national market.
- the risk-weighted assets are high (in particular in comparison to the peer group)
- the institution has a large branch network and a lot of branches (in particular in comparison to the peer group)
- the institution has a high number of staff members (in particular in comparison to the peer group)

Internal organisation:

- Legal form of a joint stock company (Aktiengesellschaft) (in particular capital market oriented) rather than that of a savings bank (Sparkasse) or a cooperative society (Genossenschaft) (in particular those on a decentralised primary level)
- Usage of advanced approaches for the calculation of the minimum own funds requirement (AMA, IRB)
- A multiple sector and/or multiple level internal organisational structure

Nature, scale and complexity of business activities:

- **Nature:**
  
  - Not only typical retail banking business (deposit-taking business, current account business and lending business), but also typing investment banking and wholesale banking business:
    
    - Trading on one's own account pursuant to Article 1 para. 1 nos. 7 and 7a BWG (in particular with derivative-based instruments [futures, options, swaps etc.] and structured products)
    - Guarantee business (in particular CDS trading on one's own account)
    - Third-party securities underwriting in the case of a takeover guarantee
    - Capital market financing and participation-based business (a large number of non-bank participations)
  
  - the conducting of other non-banking business

- **Complexity:**
  
  - the activities performed are extensive, connected to one another and it is difficult to captured risks directly.

However, the mere holding of the required authorisation to conduct such activities or only conducting them occasionally or on a subordinated basis, is not as a rule sufficient in its own right for a credit institution to be classified as a complex institution. In addition the scale of activities must also be considered:

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28 credit institutions are meant of a similar size, business model and belonging to similar sectors.
• Scale:
  o a large proportion of investment banking business, complex transactions and non-banking business in proportion to the total business activities (in particular in comparison to the peer group)
  o the international activity rather than only national or regional activity of the credit institution

42. The aforementioned criteria should be viewed holistically within a flexible system rather than individually. If however a specific criterion is particularly exaggerated (e.g. size), then this may be assigned a greater or even decisive weighting.

2. PROPORTIONALITY BETWEEN CATEGORIES OF STAFF

43. Following the proportionality test for the credit institution ("complex or non-complex"), in a second subsequent stage a proportionality test is conducted within the credit institution among the staff members. It must therefore particularly be considered whether individual or even all the principles set out in nos. 11, 12 or 12 point (a) may be neutralised (on whether in contrast more demanding standards must be prescribed), as well as whether the other principles are to be applied in a more simple manner or in greater depth. In so doing, in accordance with the wording of the law, the criteria such as the type of the category of staff, the type and amount of their remuneration as well as the effect of their activity on the risk profile are required to be explained.

44. A significant part of the proportionality test between staff members is already done by splitting staff members into staff members pursuant to Article 39b BWG ("identified staff", "risk takers in a broad sense") in accordance with the criterion "type of category of staff" and other staff members. Regarding the identification of a staff member as a risk taker pursuant to Article 39b BWG, a credit institution must determine that this employees influences the institution's risk profile.

45. If a plausible proportion of staff members pursuant to Article 39b BWG are initially identified within a credit institution, and then the principles set out in nos. 11, 12 and 12 point a are subsequently fully neutralised with reference being made to the proportionality between staff members for all of, or most of these staff members, then this would should be considered as an indication of a inadmissible construction for circumvention pursuant to no. 12 point (d) of the Annex to Article 39b BWG.

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29 In particular with regard to the effect of a staff member on the risk profile, it is not possible to completely separate the proportionality between staff members from the proportionality between institutions: in the case that the credit institution as a whole is only of medium complexity, then the activity of a staff member may in certain circumstances be more likely to be qualified as not being risk-relevant, than if the staff were working in a highly complex institution (cf. footnote 30). The individual case in hand must always be considered within a flexible system.
D. APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

46. It is the responsibility of every individual credit institution to identify its risk profile, and subsequently to decide on the nature and manner of the application of the principles on remuneration\(^{30}\). The credit institution must undertake a self-assessment and document it in a transparent, justifiable and well-grounded manner. The more principles that are neutralised (i.e. are not applied at all), the greater the amount of detail required for justifying this. The neutralisation of all principles set out in nos. 11 to 12 point (a) of the Annex to Article 39b BWG necessitates a particularly detailed explanation, in particular where the members of the management board are affected.

47. As previously mentioned, when assessing the risk profile of a banking activity, not only must the nature of the activity be examined, but also how it is conducted (scale and complexity). For example, "simple" lending business can be conducted either conservatively or riskily (i.e. in a very expansive manner).

48. Even if some activities in accordance with the BWG (e.g. investment fund, real estate fund or corporate provision fund business) or in accordance with other laws (e.g. WAG 2018, ZaDiG and E-Geldgesetz 2010) in themselves only generally pose a limited risk to the solvency of an institution, then potential operational, legal and reputational risks are also to be considered when assessing the risk attached to them.

SIDE NOTE: MATERIALITY THRESHOLD

49. The term "materiality threshold"\(^{31}\) is used to describe an amount of variable remuneration that is so low that the principles set out in nos. 11, 12 and 12 point (a) of the Annex to Article 39b BWG may be neutralised where the variable remuneration is below this threshold\(^{32}\). Although the legislator has refrained from the explicit standardisation of a materiality threshold, the use of such a threshold in accordance with the principle of proportionality ("the nature and amount of remuneration") is generally permissible.

50. As in the case of the self-assessment regarding the complexity of the credit institution, the decision regarding the introduction of a materiality threshold must also be documented in a transparent, justifiable and well-grounded manner. A reasoned statement must be supplied regarding why, in the opinion of the competent body, there is no incentive below the chosen threshold to take inappropriate risks.

51. The setting of a materiality threshold in purely relative terms (e.g. up to 20% of the fixed annual salary) is not a satisfactory solution, because in the case of high fixed salaries, the amount of variable remuneration is also commensurately higher. From a certain absolute amount, the variable remuneration considered in its own right may not be

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\(^{30}\) See re: Article 39 BWG: Höller, Puhm in Dellinger, BWG, Article 39, MN 39.

\(^{31}\) Also known as a de minimis threshold.

\(^{32}\) See also footnote 23.
considered to be insignificant, purely on the basis that it is low in relative terms to the total remuneration. Any well-reasoned materiality threshold set must therefore not only be formulated in relative terms (as a percentage of the fixed annual salary), but also in the form of absolute amounts.

52. An allotted variable remuneration, which exceeds 25% of the fixed annual salary or EUR 30,000 (gross), may therefore not be qualified under any circumstances to be "insignificant" or "negligible". In the case that a bonus or incentive exceeds one or both of the stated limits in a single financial year, then the principles on remuneration are applicable in full to the entire amount of this variable remuneration. Whether variable remuneration below the aforementioned thresholds may be qualified as being "insignificant", must be assessed and decided upon by every credit institution independently in accordance with its specific risk situation.

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33 Only the effective allotted variable remuneration, rather than the (contractually arranged) maximum possible variable remuneration is decisive regarding the applicability of any materiality threshold.

34 This applies unless the staff member is not a staff member identified pursuant to Article 39b BWG but any other staff member and/or the principles on remuneration have already been neutralised either in part or in full for the entire credit institution (cf. "II.D.1. General and specific principles of the remuneration policy" and "III.D.1. Proportionality between institutions").
IV. PAYMENT USING INSTRUMENTS

A. APPLICABILITY

53. According to the wording of the first sentence no. 11 of the Annex to Article 39b BWG a substantial portion, which amounts to at least 50% of the variable remuneration components, either in the form of instruments pursuant to point (a) (in particular shares or equivalent ownership interests) or pursuant to point (b) (in particular capital instruments pursuant to Article 52 or 63 CRR).

54. The principle in no. 11 of the Annex to Article 39b BWG is one of the specific principles on remuneration. Its application is restricted to the categories of staff listed in Article 39b BWG. Furthermore, the cited principle is also to be applied in accordance with the principle of proportionality. In the case of very low risk, complete non-applicability (neutralisation) of no. 11 may occur, although this must be justified transparent, justifiable and well-grounded manner.

55. The application of no. 11 is subject to such instruments having been issued, and their being securitised and transferable. In accordance with the provisions of the BWG credit institutions are therefore not required to issue their own instruments, in order to apply no. 11. This applies for non-complex and complex institutions alike.

56. The credit institution is free to decide whether to assist such capital items or to develop other innovative solutions within the meaning of no. 11 (e.g. “phantom plans”). For example in credit institutions belonging to a group of credit institutions, it might be considered to remunerate staff members with shares in parent or subsidiary undertakings.

57. It should also be considered, that in the event of no. 11 not being applied, that this does not constitute a case of neutralisation, even in the event where the outcome is the same. The dilution or neutralisation of other principles in the remuneration policy (e.g. the deferral pursuant to no. 12 of the Annex to Article 39b BWG) as a result requires a more detailed explanation.

B. VESTING PERIOD/RETENTION PERIOD

58. If 50% or more of the variable remuneration is paid out in the form of instruments, then the instruments must be subject to a suitable deferment policy pursuant to no. 11 of the Annex to Article 39b BWG. A deferment policy in this case means the agreement on

35 The term "vesting period" which is frequently used in specialist dialogue should be understood as a synonym for "retention period", cf. paragraphs 263ff of the EBA Guidelines on sound remuneration policies.

36 Cf. Article 94 (1) point I CRD IV.
a vesting or retention period, i.e. the period of time, in which the staff member is already the owner of the instruments, but is not yet allowed to dispose of the instruments.

59. The "deferment policy" (often used synonymously instead of vesting policy or retention period policy) mentioned in no. 11 differs from the term deferral period pursuant to no. 12 of the Annex to Article 39b BWG:

In the case of the five year deferment pursuant to no. 12 the staff member’s claim to the deferred portion of the variable remuneration is only a contingent one: if the performance that has been rewarded proves to not be sustainable or if the financial and earnings situation deteriorates, then the deferred remuneration may be partially or fully cancelled (explicit ex post risk adjustment). On the contrary, during the retention period pursuant to no. 11, the staff member is already the owner of the instruments, but is not yet allowed to sell them. The staff member continues to participate in the (lack of) success of the entity (implicit ex post risk adjustment).

60. The vesting period must be decided in the credit institution by the competent body in accordance with the business model and risk profile. The duration must be suitable for bringing the incentives for the staff members in line with the long-term interests of the credit institution. In so doing, the credit institution must take several factors into account, for example the duration of the business cycle, the duration of the assessment period (whether a single year or across multiple years) and the length of deferral period pursuant to no. 12 (five years or longer) preceding the retention period (five years or longer) preceding the retention period.

61. An example for the duration of the vesting period/retention period: pursuant to no. 11 final sentence of the Annex to Article 39b BWG, the principle of payment using instruments, both for variable remuneration paid out immediately as well as for deferred variable remunerations pursuant to no. 12. With regard to the proportional deferment defined in no. 12 of the Annex to Article 39b BWG by the legislator across five years, for instruments that are transferred immediately, a vesting period/retention period of three years is as a general rule appropriate. For the immediately subsequent years within the five year deferral period the instruments that are transferred on a pro rata basis annually, an appropriate shorter vesting/retention period may also suffice, although the parameters set out in paragraph 60 must always be taken into account. In any case a retention period of at least one year should also then be defined for instruments that have been issued.

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37 Cf. "III. Principle of proportionality".
38 Cf. paragraphs 263 - 267 of the EBA Guidelines on sound remuneration policies.
39 See also paragraph 267 of the EBA Guidelines on sound remuneration policies.
V. DEFERMENT

A. DEFERRAL PERIOD

62. Pursuant to no. 12 of the Annex to Article 39b BWG, at least 40% of the variable remuneration shall be deferred for five years. The deferred remuneration may not be acquired more quickly during this minimum period that is permitted on a pro rata basis, i.e. a maximum every year of one-fifth of the deferred amount. It remains permissible, both for the increased alignment of interests as well as for the opportunity to reduce the administrative burden, to prescribe a longer pro rata purchase period (e.g. on a pro rata basis only every two years or the entire total only after five years).

63. In the case that variable remuneration forms a particularly large amount, pursuant to no. 12 third sentence at least 60% of the variable remuneration is to be deferred. A particularly "high amount" of variable remuneration is assumed, when the variable remuneration exceeds 100% of the fixed annual salary or EUR 150,000 (gross).

B. EX-POST RISK ADJUSTMENT

64. Pursuant to no. 12 point (a) of the Annex to Article 39b the pay-out of the variable remuneration including the deferred portion only occurs, where considered sustainable with regard to the financial situation of the credit institution as a whole, and justified according to the performance of the business unit and individual concerned.

65. If during the deferment period it emerges that the performance that was being rewarded was either not sustainable (malus), or where a pay-out would not (or no longer) be compatible with the credit institution’s financial situation, then the pay-out of the deferred portions should be cancelled. The credit institution is required to ensure that organisational and legal frameworks (including the design of contracts) are created in order to ensure that this principle on remuneration is applied effectively.

66. In the event that the paying out of (deferred) variable remuneration is cancelled for one or several years due to one of the aforementioned circumstances prevailing, it shall not be permissible to make good the pay-out in later years (e.g. once the institution has recovered financially).

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40 Pursuant to point 10 of the Annex to Article 39b BWG, credit institutions are already obliged to take into account all current, future and potential risks when measuring the performance as well as when allocating the variable remuneration (e.g. by means of RAROC). This is a forward-looking, and therefore “ex ante” risk adjustment. Any reduction pursuant to no. 12 point (a) allows a retroactive i.e. “ex post” risk adjustment.

41 See also “VI. Personal Performance and Corporate Success” below.

42 See also paragraph 275 of the EBA Guidelines on sound remuneration policies.
VI. PERSONAL PERFORMANCE AND CORPORATE SUCCESS

A. GENERAL

67. Pursuant to no. 7, no. 7 point (b) and no. 12 point (a) of the Annex to Article 39b BWG the granting or payment of must on the one hand be justified by the personal performance of the staff member as well as that of his/her division, while on the other hand also being viable in terms of the financial situation of the credit institution. The total variable remuneration is also to be significantly limited, in the event of the financial or earnings situation deteriorating. Variable remuneration is therefore contingent on both the personal success of the individual staff member, as well as the success of the credit institution (or the group of credit institutions).

68. It should be noted that the contingency of variable remuneration is defined in both a general (all staff members no. 7 point (b) as well as in a specific remuneration principle (identified staff, risk-takers in a broad meaning, no. 12 point (a))43. Pursuant to the principle of proportionality, the differentiation into identified staff pursuant to Article 39b BWG and other staff members should be taken into account, in that (negative) changes to the financial and earnings situation in a credit institution take effect to a greater extent or at an earlier stage on the variable remuneration of identified staff, than on the variable salary components of other staff members. Accordingly the bonuses and incentives of other staff members shall be reduced or cancelled only in severe cases of financial failures44.

B. VARIABLE REMUNERATION AND PERSONAL PERFORMANCE

69. As defined in no. 7 and no.12 point (a) of the Annex to Article 39b BWG the personal criteria for assessing whether variable remuneration should be afforded or paid out should be as close as possible to the area of responsibility of the individual staff member: consequently the result of the credit institution as a whole must be attributed to a member of the management, the result of a division to a head of division head etc.

70. From this perspective variable remuneration is frequently not permitted for members of the management, heads of divisions or departments as well as staff members, that produce a loss within their area of responsibility. Possible exemptions from this are the group members and organisational units, the generally do not generate any (direct) profits (e.g. IT, facility management etc.), as well as those that perform banking or financial institution transactions, for which it is apparent from the outset, that profits are not possible, and which are therefore deliberately taken into account for business policy

43 See above "II.D.1. General and specific principles of the remuneration policy".
44 See paragraph 75 of this circular.
reasons (e.g. a credit institution or business line that is currently in the process of being established, or otherwise conversely during the orderly exiting from a business area).

71. In addition to personal performance, the success/failure of the respective division or the entire institution must always also be taken into consideration, i.e. facts that are also not dependent on the personal performance of the individual staff member.

C. VARIABLE REMUNERATION AND CORPORATE SUCCESS

72. From no. 7, no. 7 point (b) as well as no. 12 point (a) of the Annex to Article 39b BWG it therefore follows that the (deferred) variable remuneration of a staff member is however also to be reduced or even be cancelled, if, while still justifiable on the basis of the staff member’s personal performance, the overall financial situation of the credit institution would preclude doing so.

73. The principles set out in no. 7 point (b) and no. 12 point (a) of the Annex to Article 39b BWG do not exclude the possibility that variable remuneration is granted or paid out, in the event that a net loss was returned in one year. Under these provisions variable remuneration would not be permissible, in the event that a substantial net loss is incurred, or in the case that an adequate capital base no longer exists, or is unable to be sustained.

74. From the above, it follows that in the case of net losses that the entire variable remuneration, in particular for the special categories of staff pursuant to Article 39b BWG, is to be reduced significantly or even to be cancelled, in the event that compliance with or attaining a minimum own funds requirement in accordance with supervisory law\textsuperscript{45} is no longer certain of being ensured. The application of such principles does not depend on the performance of the individual staff member. The only applicable benchmark is the capital base of the credit institution (or the group of credit institutions).

\textsuperscript{45} This covers in any case the minimum own funds requirements under Pillar I (Article 92 et seq. CRR) and under Pillar II (Article 39a and Article 70 paras. 4a and 4b BWG). Of course, the requirement arising from the combined capital buffer requirement must also be taken into account (Article 2 no. 45 BWG).
III. TRANSITIONAL PROVISION OF THE AUSTRIAN BANKING ACT (BWG)

75. Pursuant to the transitional provision set forth in Article 103o para. 1 BWG existing contracts and operating agreements concluded by 31.12.2010 are generally unaffected by the entry into force of the new provisions on remuneration in the BWG.

76. The credit institutions and their competent bodies responsible for the conclusion of contracts and operating agreements must work towards ensuring that all existing agreements that influence the remuneration policy, whether in relation to temporary or permanent contracts, are adjusted so that they reflect the new legal situation.

77. Where it is not possible to reach a mutual agreement over the amendment of the contract, then this should be clearly documented. From the documentation it must be apparent that the credit institution has tried to adapt a contract (by addressing the issue with the supervisory board, by presenting the staff member(s) with a concrete proposal for the amendment, as well as records about how many staff members accepted the amendment to the contract, and how many rejected the amendment). Where such documentation exists (and no evidence to the contrary) it is assumed that the obligation to make concerted efforts to make such an amendment pursuant to Article 103o para. 1 BWG have been fulfilled.

78. The conclusion of any new contract, whether amending a permanent contract or extending a temporary contract, shall in any case be required to be tied in with the new provisions on remuneration.

79. In the event that certain existing contracts strongly conflict with the provisions on remuneration, in particular in cases where they expose the credit institution to an inappropriately high level of risk, then on a case-by-case basis the credit institution should also consider the option of terminating the contract with an option of altered conditions.