



FMA Circular in relation to Articles 39 para. 2, 39b and 39c BWG

FMA Circular 05/2022 on Principles of Remuneration Policies and Practices

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1 INTRODUCTION

- (1) This circular is addressed to all credit institutions supervised by the Austrian Financial Market Authority (FMA) pursuant to Article 1 para. 1 of the Austrian Banking Act (BWG; Bankwesengesetz), to which Article 39b BWG and the Annex to Article 39b BWG apply.¹ It is intended to serve as initial guidance regarding the application of the provisions of Article 39 para. 2 in conjunction with Article 39b BWG and to thereby simplify the introduction to this regulatory material.² For this purpose, the circular reflects the FMA's legal opinions. This circular does not however act as a substitute for self-studying of the legal provisions as well as the respective EBA Guidelines.
- (2) This circular does not constitute a legal regulation. 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.
- (3) 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 definition of fixed and variable remuneration, the ban on circumventing of legal provisions, the definition of particular categories of staff, the principle of proportionality, the applicability of nos. 11 and 12 of the Annex to Article 39b BWG, the criteria for measuring performance, as well as the transitional rules. On the basis of these statements, the credit institutions' independent assessment should be facilitated regarding how and in what manner the principles on remuneration in the Annex to Article 39b BWG are to be implemented.
- (4) 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). In the "Guidelines on sound remuneration policies under Directive 2013/36/EU" dated 02.07.2021 (EBA/GL/2021/04), EBA has comprehensively explained the remuneration provisions contained in Directive 2013/36/EU (CRD). Pursuant to Article 69 para. 5 BWG mentioned previously, the BWG is interpreted by the FMA within the meaning of

¹ Some even more specific remuneration provisions apply for some specialised credit institutions (e.g. the provisions of Articles 17a et seq. of the Investment Fund Act of 2011 (InvFG 2011; Investmentfondsgesetz 2011); for management companies pursuant to Article 1 para. 1 no. 13 BWG; cf. however also Article 39b paras. 3 and 4 BWG).

² Additionally, the conduct provisions set out in Art. 33 para. 3 BWG as well as in Articles 45, 46 and Art. 47 para. 4 WAG 2018, which respectively address the avoidance of conflicts of interest in remuneration systems for sales employees (with sales targets), are to be differentiated from the prudential remuneration provisions of Article 39 para. 2 in conjunction with Article 39b BWG. While prudential provisions primarily deal with the protection of the credit institution (and therefore its creditors), the listed conduct provisions focus on the protection of customers and therefore only indirectly on the credit institution (cf. also Articles 27 and 34 (3) c) of Delegated Regulation (EU) 2017/565 as well as the ESMA Guidelines on "remuneration policies and practices (MiFID)" of 03.06.2013 [ESMA/2013/606] and EBA Guidelines on "remuneration policies and practices related to the sale and provision of retail banking products and services" dated 13.12.2016 [EBA/GL/2016/06]).

these Guidelines. Pursuant to Article 16 (3) of Regulation (EU) No 1093/2010 (EBA Regulation) credit institutions are furthermore expected to make every effort in order to observe the EBA Guidelines. EBA Guidelines EBA/GL/2021/04 are therefore also to be applied by the banking industry as an aid to interpretation.

- (5) Where designations used refer to natural persons, the formulation used applies to both genders.

2 LEGAL BASIS

- (6) Article 39 para. 2 in conjunction with Article 39b BWG including its annex form the legal bases 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 CRD into Austrian law.
- (7) Pursuant to Article 39 para. 2 in conjunction with Article 30 para. 7 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 appropriate to the type, scope and complexity of the banking transactions conducted.
- (8) 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 rewards 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 in line with the long-term interests of the credit institution. (explanatory remarks to the government bill no. 922 in the supplements to the stenographic protocols of the National Council (BlgNR) nos. 1-3; nos. 1 and 2 of the Annex to Article 39b BWG).
- (9) Essentially, it follows from the remuneration provisions in the BWG that the granting and payment³ of variable remuneration (bonuses, premiums, success performance-related items, etc.) in credit institutions are linked to two basic conditions: Variable remuneration must

³ Granting means acquiring the basic right to variable remuneration. Payment means its effective transfer. Both points in time may deviate from one another, e.g. where only 60% of the bonus is paid out immediately, and where 40% is deferred for a period of 5 years. During the deferment period, the right is initially only a conditional one (See Section 6 Deferment below).

always **1.) be based on a sustainable performance** and its amount must **2.) be sustainable for the credit institution in accordance with its financial situation** (see below, Section 7 Personal Performance and Corporate Success).

- (10) Article 39b BWG including the Annex clarifies how remuneration systems are to be designed in order to implement the aforementioned objectives: 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 set out in the Annex to Article 39b BWG.
- (11) 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 defined in Article 39b BWG and its Annex who remuneration policies and practices are specifically to be designed.

3 SCOPE OF APPLICATION

3.1 FIXED AND VARIABLE REMUNERATION

- (12) The remuneration provisions in 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) principles on remuneration of the Annex to Article 39b BWG it is apparent that the focus of the provisions for regulating variable remuneration, i.e. remuneration for having achieved a particular level of performance by the employee and which therefore influences the risk-taking behaviour of employees.⁴
- (13) The BWG regulates remuneration as either being fixed or variable, which is why in applying Article 39b BWG including the Annex every remuneration is to be allocated to one category or the other. With regard the named focus of the law on variable remuneration priority lies in particular on whether every variable remuneration in a credit institution, irrespective of its specific designation is also to be identified as such. In this regard, it is also necessary to refer to the ban on circumventing of no. 12 point d of the Annex to Article 39b BWG (see below 3.4. Ban on circumventing of legal provisions).

⁴ 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.

(14) Against the aforementioned background, remuneration components as a rule⁵ only do not constitute variable remuneration, where the following conditions are fulfilled:⁶

1. based on predetermined criteria
2. non-discretionary
3. transparent
4. permanent
5. irrevocable
6. unable to be reduced, suspended or cancelled
7. not providing incentives for the assumption of risk
8. non-performance-based

(cf. no. 12 point d of the Annex to Article 39b BWG; paras. 131-133 as well as 183-190 EBA/GL/2021/04)

3.2 CREDIT INSTITUTIONS AND GROUPS OF CREDIT INSTITUTIONS

(15) On an individual institution basis Article 39 para. 2 and Article 39b BWG and the latter's Annex apply exclusively to credit institutions.

(16) However, the responsible undertaking as defined in Article 30 para. 6 BWG (as a rule the superordinate credit institution) is required pursuant to Article 30 para. 7 BWG to implement the risk control process pursuant to Articles 39 para. 2 and 39b BWG for the entire group of credit institutions. The principles on remuneration set out in the Annex to Article 39b BWG are therefore as a rule to be applied at the level of the entire group of credit institutions⁷ (para. 75 et seq. EBA/GL/2021/04).

(17) Superordinate credit institutions ultimately must ensure that entities within the group, that themselves are not credit institutions (investment firms, ancillary services undertakings and other financial institutions, cf. Article 4 (1) nos. 2, 18 and 26 CRR), are incorporated into the 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 based thereon.

⁵ Ultimately a specific assessment of the case in hand is always required regarding whether a remuneration component is to be allocated to fixed or variable remuneration.

⁶ The criteria are to be observed in accordance with the objectives of the provisions on remuneration. For example an increase in supplementary allowances due to taking over a managerial function on a deputation (and therefore temporary) basis is not permanent in the strict sense of the word, but may as a rule nevertheless be qualified as fixed (since it is "permanent" for the performance of the function).

⁷ The group of credit institutions in the BWG corresponds to supervisory consolidation under the CRR.

- (18) It should be noted that the principle of proportionality set out in Article 39b BWG also applies to members of the group that are not credit institutions. (See also 4.3 Application of the Principle of Proportionality below).
- (19) 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. therefore also 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, where they are stricter (para. 79 EBA/GL/2021/04). The responsibility of individual members of the group for observing their local remuneration provisions remains unaffected.
- (20) Those institutions in the group are in any case excluded from the application of principles on remuneration in the BWG, that:
1. are not subject to the provisions of the BWG or the CRD, and for whom it is not possible to observe the principles on remuneration in the BWG due to statutory provisions in third country in which the member of the group is domiciled (where the superordinate credit institution is able to prove this) (see Article 30 para. 7 third sentence BWG), or
 2. are required or would be required to apply specific remuneration requirements outside of the BWG or the CRD, if they were domiciled in the European Union (e.g. For investment fund management companies (KAGs), investment firms or AIFMs) (see Article 39b para. 3 BWG).
- (21) In this case it should however be noted that there is an “exception to the exception” in Article 39b para. 4 BWG, in accordance with which the principles on remuneration set out in the Annex to Article 39b BWG shall in any case apply to those employees of the group of credit institutions, who:
- work in institutions that are an asset management company pursuant to Article 4 (1) (19) CRR or that perform the investment services and activities listed in Annex I Section A Nos. 2, 3, 4, 6 and 7 of Directive 2014/65/EU⁸, and
 - whose professional activity impacts directly and materially on the risk profile or the business activities of the institutions in the group (see Article 39b para. 4 nos. 1-3 BWG).

⁸ execution of orders on behalf of clients, dealing on own account, portfolio management, underwriting of financial instruments and/or placing of financial instruments on or without a firm commitment basis.

3.3 COMPETENT BODIES IN THE CREDIT INSTITUTION

- (22) Pursuant to no. 3 of the Annex to § 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.
- (23) Furthermore, it should also be ensured that the supervisory board not only monitors the remuneration policy towards the members of the management board, but also directly implements it (conclusion of contract, performance measurement and granting of bonuses). Regarding the remuneration of members of the management board, the supervisory board is directly responsible for ensuring the correct implementation of the remuneration policy and for compliance with the remuneration provisions.
- (24) The general responsibility of the members of the management board to ensure compliance with the provisions in the BWG, including the remuneration provisions, remain unaffected.
- (25) 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 his/her deputy are required to be invited to the meetings of the remuneration committee pursuant to Article 76 para. 4 BWG.
- (26) 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 who attends the meetings of the supervisory board to be aware of their content as well as to be able to issue a statement.

3.4 BAN ON CIRCUMVENTING OF LEGAL PROVISIONS

- (27) 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 or the CRR 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 is not allowed, which help to avoid that a remuneration provision is complied with, even though they would have to be applied in accordance with the principle of proportionality and the affected category of staff.

(28) In particular a circumvention is deemed to exist, when the principles on remuneration are followed in a narrow formal sense, but where their objective and purpose are obviously not achieved or are even circumvented (see in detail including examples paras. 183 to 190 EBA/GL/2021/04).

3.5 CATEGORIES OF STAFF

3.5.1 GENERAL AND SPECIFIC PRINCIPLES OF THE REMUNERATION POLICY

(29) 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 specific categories of staff listed in Article 39b BWG (also known as "identified staff"⁹ or "risk-takers in a broad sense").

(30) The specific categories of staff are those whose activity materially impacts the risk profile of the credit institution or the group of credit institutions (see directly below) and upon whose variable remuneration the more elaborate special principles on remuneration are therefore also to be applied.

(31) The general principles of nos. 1 to 6a, 7 points b to d, 10, and 12 point d of the Annex to Article 39b BWG apply for the institution as a whole and all staff members. In addition the special principles set forth in no. 7 (introductory part), 7 point a, 8 to 8b, 9 to 9a as well as 11, 12 (para. 1), 12 points a to c (Annex 1 to EBA/GL/2021/04) also only apply for specific categories of staff.

3.5.2 DEFINITION OF THE CATEGORIES OF STAFF

(32) Pursuant to Article 39b para. 2 BWG, the following (but not only them) belong to the categories of staff, whose activity has a material impact on the risk profile of the credit institution or the group of credit institutions:

1. the directors,
2. the members of the supervisory board,
3. the members of the senior management,
4. staff members with managerial responsibility for control duties or material business units as well as,

⁹ These terms used in EBA/GL/2021/04 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".

5. staff members, whose remuneration in the preceding year was at least EUR 500,000, where this remuneration corresponds to the average remuneration of the management, the supervisory board and members of the senior management, and the staff member is performing an activity in a material business unit, which has a material impact on the business unit's risk profile.

(33) In addition all other members of staff are to be identified, whose actively has a material impact on the risk profile ("other risk-takers" or "risk-takers in a narrow sense").

(34) Delegated Regulation (EU) No. 2021/923 (DR (EU) 2021/923) additionally defined how the terms in Article 39b para. 2 BWG must be understood (management responsibility, control duties, material business unit and significant impact) and in accordance with which criteria other risk-takers are to be covered.

3.5.3 IDENTIFICATION OF THE CATEGORIES OF STAFF

(35) Insofar as DR (EU) 2021/923 grants a room for discretion, it remains the responsibility of the individual credit institution to carry out a self-assessment at least once a year as to which employees are to be specifically identified as risk-takers in the broad sense and who are to be attributed to other employees (cf. recitals 4 and 8 as well as Article 6 (1) DR (EU) 2021/923, para. 98 EBA/GL/2021/04). Both the abstract identification process as well as its specific annual implementation and its result must be documented in a transparent, traceable and well-founded manner (cf. Article 39 para. 2 third sentence BWG; paras. 33 and 102 ff EBA/GL/2021/04).¹⁰

(36) It should be noted that the classification of the totality of all employees into special categories of staff members (also "identified employees" or "risk-takers in the broader sense") and other employees partly anticipates the subsequent proportionality test between employees and is therefore also significant regarding the issue of how the principles on remuneration are applied: The applicability of the special principles on remuneration or a more comprehensive application of the general principles than in the case of other employees results from being identified as a risk-taker in a broad sense. In particular, by identifying a member of staff, a credit institution already establishes that this member of staff has a material influence on the institution's risk profile (see above in 3.5.1. General and specific principles of the remuneration policy and Section 4. Principle of proportionality below).

¹⁰ In accordance with the principle of proportionality, the annual assessment in small and medium-sized institutions or for clear organisational units in large institutions may also be limited to the assessment of new factual circumstances (new staff members, new competences) or a conclusion that there were no changes since the previous year.

4 PRINCIPLE OF PROPORTIONALITY

4.1 GENERAL

- (37) Pursuant to Article 39b BWG, credit institutions when defining and applying the remuneration policy and practices 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).
- (38) The principle of proportionality contained in Article 39b BWG apply 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 the establish more demanding standards due to their size and 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 based on their less complex nature, or for their members of staff who are less relevant in risk terms, or even both. The manner and extent of the application of the remuneration principles must always adequate for the individual risk situation.

4.2 PROPORTIONALITY BETWEEN INSTITUTIONS AND BETWEEN MEMBERS OF STAFF

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

4.2.1 PROPORTIONALITY BETWEEN INSTITUTIONS

- (40) Credit institutions shall self-assess their size, internal organisation as well as the nature, scale and complexity of their activities, and to apply the principles on remuneration to them accordingly in an appropriate manner (Article 39b para. 1 in conjunction with Article 39b BWG).
- (41) In this way, very large or complex institutions are required to fulfil the principles set out in the Annex to Article 39b BWG in a comprehensive and detailed manner, and in some instances to even go over and beyond the requirements contained therein (cf. for example in nos. 11 and

12 of the Annex to Article 39b BWG: "at least"). Institutions of medium size or complexity¹¹ will apply individual remuneration principles in a simplified manner, while small or non-complex institutions shall apply all remuneration principles in a simplified manner, i.e. Limited to observing the minimum requirements of the Annex to Article 39b BWG (provided that the provisions of the exception do not apply, see Special topic: Exceptions below). This simplified application is then possible for all members of staff in the institution, regardless of whether they are identified staff (risk-takers in a broad sense) or other staff members. The transition from large, complex institutions to small, non-complex institutions is a fluent one. Even in the case of a simplified application, the specific legal rules shall always be considered as a minimum (e.g. If no 11 of the Annex to Article 39b BWG is applicable, then at least 50% of the variable remuneration shall be required to be comprised of instruments. It shall not be allowed to fall below this 50% threshold by referring to the principle of proportionality. For the complete non-application pursuant to no. 13 of the Annex to Article 39b BWG, see below in Special topic: Exceptions).

(42) To aid understanding the concept of proportionality between institutions is explained below in a very schematic form:

- Very large and complex credit institutions:
 - Comprehensive and detailed application of the principles on remuneration
- Medium-size or medium complexity credit institutions:
 - Partial simplified application of the principles on remuneration
 - Any full non-application of the principles for paying using instruments, deferment, and ex-post risk adjustment as well as voluntary pension payments (no. 13 of the Annex to Article 39b BWG see below in the Special topic: Exceptions).
- Small and non-complex credit institutions:
 - Simplified application of all principles on remuneration
 - As a rule, full non-application of the principles for paying using instruments, deferment, and ex-post risk adjustment as well as voluntary pension payments (no. 13 of the Annex to Article 39b BWG see below in the Special topic: Exceptions).

(43) The requirement to have a separate, detailed assessed of the size, the internal organisation, as well as the nature, scale and complexity of the activities in every credit institution however

¹¹ 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 sense) of the activities conducted as a sub-question in the proportionality test.

remains unaffected by the above overview-like delineation. The following criteria in particular indicate an increased level of complexity (cf. Also paras. 85 et seq. EBA/GL/2021/04):

Size:

- total assets (especially over/under EUR 5 billion and over/under EUR 15 billion cf. no. 13 point a of the Annex to Article 39b BWG)
- 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 group¹²)
- 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 internal 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

¹² credit institutions are meant that are of a similar size, business model and belonging to similar sectors.

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

However, merely 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:

- Scale:
 - 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)
 - the international activity rather than only national or regional activity of the credit institution

(44) 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 a greater or even decisive weighting may be assigned.

4.2.2 PROPORTIONALITY BETWEEN CATEGORIES OF STAFF

(45) Following the proportionality test for the credit institution (“large/complex” or “small/non-complex”), a proportionality test is conducted in a second subsequent stage within the credit institution among the staff members. This means that it is necessary to consider whether principles on remuneration are applied in a more comprehensive or simplified manner for certain members of staff. 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 need to be explained (Article 39b para. 1 BWG).

(46) Under the criterion of “type of category of staff”, 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”) and other staff members. Regarding the identification of a staff member as a staff member pursuant to Article 39b BWG (“identified staff members” or “risk-takers in a broad sense”, a credit institution determines that this member of staff materially influences the institution's risk profile.

(47) It also applies, with regard to proportionality between members of staff, that this may also lead to a simplified application of some or all principles of proportionality, but that the legally determined minimum requirements shall still be required to be met (see below for a full exemption from application pursuant to no. 13 of the Annex to Article 39b BWG).

4.3 APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

(48) 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. The credit institution must undertake a self-assessment and document it in a transparent, justifiable and well-grounded manner (Article 39 para. 2 third sentence in conjunction with Article 39b para. 1 BWG).

(49) 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).

(50) 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.

SPECIAL TOPIC: EXCEPTIONS

(51) Following the principle of proportionality, in no. 13 of the Annex to Article 39b BWG, the legislator has standardised an explicit exemption from the application of the special remuneration principles set forth in no. 11 (payment with instruments and vesting period), in the introductory part in no. 12 (deferral and therefore to a large extent¹³ the ex-post risk adjustment) as well as in the second and third sentences of no. 12 point b (voluntary pension payments) for "small" credit institutions or "small" bonuses:

(52) On the one hand, institutions below a certain size and complexity are fully exempt from the application of the named principles on remuneration. As a rule, this applies to institutions, that are not large CRR institutions and whose total assets on average over the last four years has

¹³ The ex-post risk adjustment shall not apply to the extent that a variable remuneration, which is not subject to a deferment, is also not generally able to be reduced on an ex post basis. However, the provision on exceptions does not cover the possible requirement of a clawback even after disbursement (regarding the difference between malus and clawback, see below 6.2. Ex-post risk adjustment).

been a maximum of EUR 5 billion, or where other conditions¹⁴ are met, institutions with total assets of up to a maximum of EUR 15 billion (see no. 13 point a sub-points aa and bb of the Annex to Article 39b BWG).

(53) On the other hand, the listed principles on remuneration must not be applied to members of staff – regardless of whether they are small or large institutions –, whose annual variable remuneration does not exceed EUR 50,000 and which does not constitute more than one-third of the total annual remuneration¹⁵ for the respective member of staff¹⁶ (in this regard see also no. 13 point b of the Annex to Article 39b BWG).

(54) Irrespective of the aforementioned statutory provisions about exceptions, and its official power pursuant to no. 13 final paragraph of the Annex to Article 39b BWG, the FMA recommends credit institutions to still consider the application of the principles on remuneration pursuant to no. 11 in the interests of sustainable governance (payment using instruments and retention period) and no. 12 (deferment and ex-post risk adjustment) in the case of high variable remuneration or high-risk transactions.

5 PAYMENT USING INSTRUMENTS

5.1 APPLICABILITY

(55) 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).

(56) 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. Where smaller and less complex institutions are required to apply no. 11 (cf. para 57 or paras. 51-54 above) it may be sufficient to only pay 50% of variable remuneration using instruments. In larger and more complex credit institutions or, in the case of more senior risk-takers, a higher amount may be necessary to the extent that no. 11 is applicable.

¹⁴ In particular no or only simplified recovery and resolution plans, low trading book activity and low derivatives positions (cf. Article 4 (1) no. 145 points c), d) and e) CRR).

¹⁵ One third of the total annual remuneration corresponds to 50% of the fixed annual remuneration.

¹⁶ The effective allotted variable remuneration, rather than the (contractually arranged) maximum possible variable remuneration is decisive regarding the applicability of the exception.

- (57) 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.
- (58) 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.
- (59) Furthermore, it must be taken into account that in the case of no. 11 not applying, due to the lack of instruments - in contrast to the application of the exemption provision of no. 13 of the Annex to Article 39b BWG - the credit institution may nevertheless remain large or complex. Mere simplified application of other principles of the remuneration policy shall require a more detailed explanation in such instances.

5.2 VESTING PERIOD/RETENTION PERIOD¹⁷

- (60) 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.
- (61) A deferment policy in this case means the agreement on a vesting or retention period, i.e. 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.
- (62) 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 period pursuant to no. 12, the staff member's claim to the deferred portion of the variable remuneration is only a conditional one. Where the performance being rewarded proves to be non-sustainable or in fact deteriorates the financial and earnings situation, the deferred remuneration may be either partly 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).

¹⁷ The term "vesting period" which is frequently used in specialist dialogue should be understood as a synonym for "retention period", cf. para. 285 et seq. of EBA/GL/2021/04.

- (63) 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 (Article 39b para. 1 in conjunction with no. 11 of the Annex to Article 39b BWG; paras. 285-289 EBA/GL/2021/04).
- (64) The minimum duration of a vesting period generally is one year. Where the ex-post risk adjustment occurs exclusively based on the volatility of the value of the instruments (in particular since they were not previously deferred, but instead were immediately transferred) then longer vesting periods are to be stipulated. 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, as a general rule a vesting period of three years is appropriate. For the immediately subsequent years within the five year deferral period the instruments that are transferred on a pro rata basis, then a shorter vesting/retention period may also suffice, although the parameters set out in para. 60 must be taken into account. In the case of instruments that were deferred for at least five years, the vesting period for staff members that are not members of the management board and the senior management, may be reduced to six months (para. 289 EBA/GL/2021/04).
- (65) 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.

6 DEFERMENT

6.1 DEFERRAL PERIOD

- (66) 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).

(67) 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 175,000 (gross).

6.2 EX-POST RISK ADJUSTMENT¹⁸

(68) 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.

(69) If during the deferment period it emerges that the performance that was being rewarded was either not sustainable, 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 (malus, see also Section 7 Personal Performance and Corporate Success). 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 (Article 39 para. 2 in conjunction with Article 39b para. 1 BWG).

(70) 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). A subsequent payment would also contradict the requirements set forth in no. 12 point a BWG and thus effectively constitute circumvention (no. 12 point a and point d of the Annex to Article 39b BWG; para. 127 point c EBA/GL/2021/04).

(71) In addition to the malus, the possibility of a clawback is also to be agreed upon for particularly severe cases of non-sustainable performance (especially fraud as well as causing deliberate or grossly negligent damage to the institution). While the malus is restricted to the deferred variable remuneration, i.e. such remuneration that has been awarded but not yet transferred, any clawback also covers bonuses and incentives that have already been transferred to the member of staff's ownership (cf. also paras. 290-297 EBA/GL/2021/04).

¹⁸ 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.

7 PERSONAL PERFORMANCE AND CORPORATE SUCCESS

7.1 GENERAL

(72) Pursuant to no. 6a point b, sub-point bb, 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 a personal sustained 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) (cf. para. 9 above of this circular).

(73) 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) (see above 3.5.1. General and specific principles of the remuneration policy). Under 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 failures.

7.2 VARIABLE REMUNERATION AND PERSONAL PERFORMANCE

(74) 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.

(75) 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 that 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 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).

- (76) In addition to the 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.

7.3 VARIABLE REMUNERATION AND CORPORATE SUCCESS

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

- (78) 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 to those staff members who have achieved their performance goals, although 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 where an adequate capital base no longer exists, or is unable to be sustained.

- (79) 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 (“identified staff” or “risk takers in a broad sense”), shall be reduced significantly or even cancelled, in the case that compliance with or attaining a minimum own funds requirement¹⁹ in accordance with supervisory law is no longer absolutely 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).

8 PERFORMANCE CRITERIA

- (80) Variable remuneration is to be granted to the extent that the targets set in this regard (performance of the member of staff as well as successes of their department or of the entire

¹⁹ This in any case covers 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 22a BWG).

credit institution) have been achieved (cf. nos. 6a point b, 7, 7 point a, 10 and 12 point a of the Annex to Article 39b BWG).

(81) Quantitative and qualitative criteria, including financial and non-financial ones²⁰, are to be applied for the assessment of performance and success (nos. 6a and 7 of the Annex to Article 39b BWG; paras. 225 et seq. EBA/GL/2021/04). The principle of proportionality in any case also applies here.

(82) The following should be observed especially in the case of the variable remuneration of the directors and the senior management as well as in the case of high variable remuneration:

1. The performance criteria must be adequately defined for the majority of the variable remuneration in order to be able to determine objectively that targets have been achieved.
2. The performance criteria must be defined and documented in a traceable manner in advance, i.e. before the start of the performance period.
3. Performance criteria may generally not be subsequently modified or added to.²¹
4. Ultimately, the process for measuring performance must also be documented traceably.

The aforementioned requirements follow conclusively from the wording of the law which, on the one hand, makes the granting of variable remuneration compulsorily linked to performance based on predefined performance criteria and, on the other hand, prohibits any form of activity to circumvent the law (cf. nos. 6a, 7 introductory part, 7 point a, 10 and 12 points a and d of the Annex to Article 39b BWG; paras. 20, 32 - 33, 74, 183 - 190 EBA/GL/2021/04).

9 TRANSITIONAL PROVISION OF THE AUSTRIAN BANKING ACT (BWG)

(83) 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.

²⁰ In the case of non-financial targets, on the one hand, the activities of the back office departments should be considered (back office, risk management function, compliance function, internal audit etc.). On the other hand, credit institution may stipulate targets for both front office and back office departments irrespective of their fundamental profit orientation in the areas of social and economic governance (ecological sustainability, diversity, etc.)

²¹ In the case of exceptional subsequent changes or additions of performance criteria their necessity and appropriateness would need to be justified in a conclusive manner and documented. In any case, it would be inadmissible to reward particular performances for the overcoming of a crisis that was caused by the performing staff member due to previous decisions.

- (84) 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.
- (85) 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.
- (86) The conclusion of any new contract, whether amending a permanent contract or extending a temporary contract, shall in any case be required to be tie in with the new provisions on remuneration.
- (87) 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.

SPECIAL TOPIC: REMUNERATION PROVISIONS AND CONTRACT LAW

- (88) The remuneration provisions in the BWG are administrative law and not civil law. Contracts that are concluded in contravention of the BWG are fundamentally valid.
- (89) However, as previously mentioned (para. 86), credit institutions are obliged to conclude contracts with their bodies and staff members in terms of their content, in such a way that they fulfil the requirements of Article 39b BWG including the Annex, or that the credit institution is able to proceed in accordance with the remuneration principles (e.g. ex-post risk adjustment or clawback). Any remuneration contracts that are concluded in contravention of the law constitute a breach of supervisory law and thereby the corresponding supervisory actions are entailed (e.g. instruction to ensure legal compliance, SREP capital add-on, or even prohibiting management of the entity, cf. Article 70 paras. 4 – 4b BWG).²²

²² In this context it is necessary to refer to the special case of the remuneration contracts of executive directors: Since executive directors are directly responsible for ensuring compliance with the provisions set out in the BWG, in the event of unlawful agreements, they will not be able to insist on their fulfilment (e.g. due to a lack of good faith). In any case, claims for damages on the part of the credit institution may need to be examined.