

## REMUNERATION AND INCENTIVE POLICIES AND PRACTICES – CONSULTATION PAPER BY THE BANK OF ITALY

### 1. Introduction

On November 18, 2020, the Bank of Italy launched a consultation on the proposed amendments to the supervisory provisions on remuneration and incentive policies and practices in banks and banking groups contained in Bank of Italy's Circular No. 285 of December 17, 2013 ("**Circular 285**"). The consultation will end on January 18, 2021 and is aimed at implementing the new provisions put forth by EU Directive 2019/878 ("**CRD V**"), amending EU Directive 2013/36 ("**CRD IV**" and, jointly with the CRD V, the "**CRD**"). The consultation also takes into account the proposed amendments to EBA's Guidelines on sound remuneration policies (the "**Draft Guidelines**")<sup>(1)</sup>.

Please find below the main changes and impacts for banks and banking groups.

### 2. Subjective scope of the new provisions

The new provisions of Circular 285 will reshape the subjective scope of application of regulations on remuneration and incentives, in light of the *ad hoc* regime applicable to the staff of specific financial institutions, even when they belong to banking groups.

With regards to investment firms, which so far have been subject to the same provisions as banks<sup>(2)</sup>, please note that, at the EU level, Directive 2019/2034 ("**IFD**") and Regulation 2019/2033 ("**IFR**") have been adopted. Notably, the IFD – that should be implemented by Member State by June 26, 2021 – lays down specific remuneration rules different from those applicable to banks, in line with the adoption of a new prudential regime related to investment firms and distinct from the one applicable to bank and banking groups<sup>(3)</sup>.

At a group level, the parent company of a banking group must still ensure that the rules to which it is subject be also applied to the group identified staff belonging to the other companies of the group.

That said, the new provisions allow the parent company to **exclude** the staff of companies other than banks from the scope of application of the regulations on remuneration, provided that such companies are subject to a specific remuneration regime<sup>(4)</sup>. Specific reference is made to:

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<sup>(1)</sup> EBA is to update its Guidelines on sound remuneration policies issued under Article 74(3) of CRD IV (EBA/GL/2015/22) in order to align them the amendments introduced by the CRD V. To this end, EBA launched a consultation – which will end on January 29, 2021 – on the proposed review of such guidelines.

<sup>(2)</sup> Under Article 17 of the Bank of Italy's Regulation implementing Articles 4-*undecies*, 6(1)(b) and 6(1)(c-*bis*) of the Consolidated Financial Act (the "**Bank of Italy's Regulation**"), today investment firms must comply with requirements laid down in the First Part, Title IV, Chapter 2 of the 285 Circular, in line with their operational and dimensional characteristics, with the activities they conduct and with the type and extent of risks incurred by them.

<sup>(3)</sup> In light of their dimensions and interconnections with other financial and economic entities, systemic investment firms will continue to be subject to CRD rules, also with regards to remuneration.

<sup>(4)</sup> On this point, please consider that the regulations currently in force only allow asset management firms to disapply the limit to the ratio between the variable component and the fixed component of the total remuneration (see First Part, Title IV, Chapter 2, Section VII, par. 2 of the 285 Circular).

- (i) **asset management companies**, which are now subject to the detailed remuneration provisions contained in the Bank of Italy's Regulation; and
- (ii) **investment firms**, to which the rules contained in the European IFD/IFR package will apply following the end of the transitional arrangement.

Therefore, the exclusion may also be applied to the staff of asset management companies and investment firms that qualify as group identified staff, provided that such personnel only carries out activities for the asset management company or the investment firm.

The parent company must nevertheless ensure that the remuneration policies adopted by the asset management companies or the investment firms be in line with the group remuneration policy and the overall economic and financial position of the group, and that the gender-neutral remuneration principle be applied by them as well (see para. 4 below).

### 3. Definition of "identified staff"

With regards to the definition of identified staff (the so-called risk takers), the new provisions of the 285 Circular implement the recent amendments put forth by the CRD V.

Notably, on the one hand the CRD V contains a non-exhaustive list of risk takers, and on the other hand mandates EBA to lay down draft regulatory technical standards ("**RTS**") aimed at further detailing the definitions for the proper identification of risk takers and at establishing the criteria for the definition of additional subjects to be regarded as risk takers. The RTS – whose draft has already been published and which will be transposed in a delegated regulation to be adopted by the EU Commission – will be applied in lieu of EU Delegated Regulation No. 604/2014 currently in force (the "**Delegated Regulation**"). Against such background, the new provisions of the 285 Circular mandate banks to identify risk takers, at a consolidated level, on the basis of:

- (i) staff categories explicitly provided for by the new provisions of the 285 Circular themselves, implementing the CRD V;
- (ii) the RTS, as transposed in a delegated regulation to be adopted by the EU Commission; and
- (iii) pending the final adoption of the RTS in the form of a delegated regulation, the draft RTS of June 28, 2020 (EBA/RTS/2020/05) (the "**Draft RTS**").

### 4. Remodelling of the proportionality principle: identification of banks' categories and amounts of variable remuneration to which some of the more detailed rules do not apply

The amendment proposals aimed at implementing the CRD V have introduced relevant changes, and provide that rules related to variable remuneration and with respect to (i) deferral <sup>(5)</sup>, (ii) payment via financial instruments <sup>(6)</sup> and (iii) discretionary pension benefits do not apply to staff:

- (a) belonging to a bank "of smaller dimensions or operational complexity"; or

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<sup>(5)</sup> To this end, please note that banks of smaller dimensions or operational complexity must in any case ensure that part of the variable remuneration of identified staff be deferred for an appropriate period of time. Nevertheless, this requirement does not apply to subjects who receive a variable remuneration of less than EUR 50,000 and which constitutes less than one third of the total annual remuneration (in this case, no form of deferral is required).

<sup>(6)</sup> Should a bank of smaller dimensions or operational complexity autonomously determine to pay part of the variable remuneration in financial instruments, the new provisions of the 285 Circular require it to ensure that such instruments be subject to a retention period to be defined in the bank's remuneration and incentive policy.

- (b) whose variable remuneration does not exceed EUR 50,000 and does not constitute over than one third of the total annual remuneration.

In addition to the above, with regards to the specific regime applicable to risk takers, the new rules of the 285 Circular provide that the minimum deferral period be 4-5 years, unlike the rules currently in force, which mandate a deferral period of 3-5 years.

## 5. Gender-neutral remuneration policy

Among the changes introduced by the CRD V, it appears appropriate to highlight the introduction of the "gender-neutral remuneration policy" principle, aimed at ensuring wage equality between male and female employees in relation to the same position or to positions of equal value.

Under such principle, and in line with the provisions of the Draft Guidelines<sup>(7)</sup>, the proposed amendments to the 285 Circular require banks' remuneration policies to (i) be gender-neutral and contribute to pursue employee equality, and (ii) ensure that, when activities carried out are the same, employees be awarded the same wage, also with regards to conditions for its acknowledgement and payment.

## 6. Update of remuneration policies of banks and banking groups

The rules described above will make it necessary to amend and supplement the remuneration policies of banks and banking groups, which will be subject to approval by the ordinary shareholders meeting of single banks and/or of the parent company.

Notably, the institutions falling in the scope of the new provisions will have to, *inter alia*:

- ensure that retribution structures are defined in line with, among other things, the management strategies of non-performing loans;
- establish retribution systems which ensure gender neutrality;
- state whether the banks intend not to apply such rules to investment firms or asset management firms belonging to the group.

## 7. Transitional period

Apart from specific rules relating to investment firms (see para. 2 above), the Bank of Italy has not yet expressly determined any transitional regime and no final provisions have yet been established. Therefore, in light of the transitional arrangement which is currently being adopted, it will be necessary to ascertain whether the rules analysed above will determine the need to amend the remuneration policies which will be subjected to shareholder meetings convened to approve the 2020 financial statements.

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<sup>(7)</sup> For the sake of completeness, please consider that, within two years from the publication of the guidelines and on the basis of information collected by competent authorities, EBA must publish a report on the application of gender-neutral remuneration policies by institutions.

# Newsletter

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The *Financial Intermediaries Regulations* Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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