Frankfurt am Main,
17 March 2021

BVI[1] position on EBA's Consultation Paper on Draft Guidelines on sound remuneration policies under Directive (EU) 2019/2034 (EBA/CP/2020/26)

We take the opportunity to present our views on the consultation paper of the EBA related to guidelines on remuneration policies under the IFD.

In general, we welcome the approach taken to involve the proportionality principle as a main principle of the guidelines. This also applies to the guidance on how investment firms should set an appropriate ratio between the variable and the fixed remuneration for identified staff and the proposed transitional provisions. However, we see the need to amend or to clarify the guidelines at least on the following topics:

- **Policies for all staff**: We disagree with the proposed scope that the remuneration policies and practices shall apply to all staff. We are aware of the general requirements in Article 26(1)(d) IFD to ensure that investment firms have robust governance arrangements, including gender neutral remuneration policies and practices that are consistent with and promote sound and effective risk management. Therefore, remuneration policies for all staff must be limited to (1) the application of the principle of equal pay for male and female workers for equal work or work of equal value and (2) to clear principles on how to align remuneration with the risk profile of investment firms. All other requirements on the remuneration policies must be limited to identified staff members and to the content defined in Article 30 IFD. **We therefore request to amend the guidelines in such a way that the requirements regarding the structure of remuneration (Title III), such as particular cases of remuneration components (e.g. variable remuneration based on future performance, dividends and interest payments, retention bonuses, discretionary pension benefits), exceptional remuneration components (e. g. guaranteed variable remuneration, compensation or buyout from previous employment contract and severance pay) and prohibitions, should only be recommended on a voluntary basis for all other staff members.**

- **Scope of the previous remuneration rules under CRD**: As addressed in the EBA hearing we do not share EBA's assessment that the CRD IV governance and remuneration requirements already apply to all investment firms covered by the IFD remuneration rules. The EBA explained during the hearing that this would be the reason why there is no need to change anything under the IFD in contrast to the current CRD approach in general. We expressly disagree with this assessment. According to a difference in the definitions of investment firms in the CRR/CRD and the IFD, certain investment firms in the meaning of the IFD are not covered by the CRD remuneration framework. The definition of investment firms in the CRR/CRD does not involve entities providing certain MiFID services (such as portfolio management) without a licence to hold client money or to deal on own account (cf. Article 4(1)(2)(c) CRR – so called limited licence firms). They do not qualify as institutions in the meaning of CRD IV for which the CRD governance and remuneration rules apply (cf. Article 4(1)(2) CRR which expressly does not include such limited licence firms in the meaning

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 112 members manage assets of 3.85 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

BVI
Bundesverband Investment und Asset Management e.V.

Contact
Phone +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brussels
Rue du Trône 14–16
1000 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

of Article 4(1)(2)(c) CRR). Irrespective of the coming into force of the IFD, such limited licence firms are (and have been) out of scope of the remuneration rules of the CRD IV, even if they are part of a banking group because the application of the remuneration requirements shall only be ensured for *institutions* at group level (cf. Article 92(1) CRD IV). This is not only a purely national German implementation, but already clearly delimited due to the definitions in the CRD/CRR framework.

In Germany, we have a number of such limited licence firms which do not reach the thresholds in Article 12 IFR and for which the IFD framework lays down new rules for the first time regarding the remuneration requirements, in particular, the identification of risk takers and the pay-out rules which require considerable implementation effort. This is the reason why the principle of proportionality and the voluntary approach for applying the remuneration policies to all staff members is very important. Otherwise, it seems strange that these firms have not been covered so far, but in the future – with an unchanged risk profile – they will be subject to much stricter rules as required under Level 1 of the new IFD framework.

- **Level of complexity**: In general, the guidelines are very complex to read and to understand. An overview or a table as an Annex to the guidelines that shows to whom each guideline should apply (such as to identified staff only or also to all staff members on a mandatory or voluntary basis) with references to the legal requirements and relevant paragraphs of the guidelines could be very helpful. For example, ESMA already provided such an overview in its guidelines on remuneration under the AIFMD (cf. Annex II). Moreover, we request to distinguish much stricter between individual or consolidated level. In particular, the terms used in the group context are not consistent (such as 'subsidiaries', 'consolidating institution', 'subsidiaries as investment firms'). We suggest defining conclusively the group approach under section 3 and to delete all references to consolidation or subsidiaries in the other sections applying individual level.

Subject to our general comments, we would like to comment on the detailed questions as follows:

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

Legal scope: The reference in ***paragraph 8*** of the draft guidelines to the definition of financial institutions of the EBA Delegated Regulation and the MiFID II definition of investment firms is very far-reaching and not in line with the scope of the IFD framework and thus not covered under the EBA's mandate in this context. This would involve several entities which are not in scope of the IFD framework but provide MiFID services (such as credit institutions providing MiFID services). The scope of the EBA guidelines should be clearly limited to the Level 1 scope of investment firms in the meaning of Article 2 IFD (authorised and supervised under MiFID II) which do not meet the conditions of Article 12 IFR. Therefore, we request to amend the addressees of the draft guidelines (paragraph 8) as follows:

> '8. These guidelines are addressed to competent authorities as referred to in point (v) of Article 4 (2) of Regulation (EU) No 1093/2010 and defined in point 5 of Article 3(1) of Directive 2019/2034/EU, and to ~~*financial institutions as referred to in Article 4 (1) of Regulation (EU) No 1093/2010that are*~~ investment firms ~~*as defined in Article 4(1)(1) of*~~ ***as referred to in Article 2(1) of Directive 2019/2034/EU authorised and supervised under*** Directive 2014/65/EU and do not meet all of the conditions to qualify as small and non-interconnected investment firms under Article 12(1) of Regulation (EU) 2019/2033 ("investment firms").'

Policies for all staff: We also refer to our general comment in the introduction where we ask for a voluntary approach of Title III for all staff members because these requirements on remuneration policies are limited to identified staff (cf. Article 30(1) IFD).

Question 2: *Is the section on gender neutral remuneration policies sufficiently clear?*

In general, the proposed requirements on gender neutral remuneration policies are sufficiently clear. We welcome the approach to distinguish between general principles and additional aspects which an investment firm may consider.

However, we request amending ***paragraph 26*** of the draft guidelines as follows:

> '26. In order to monitor that gender neutral remuneration policies are applied, investment firms should document ~~***job descriptions for all their staff member***~~ and determine which positions are considered as equal or of equal value per unit of measurement or time rate, taking into account at least the type of activities, tasks and responsibilities assigned to the position or staff member.'

In practice, job descriptions for all staff members are not the norm. In our view, the aim of equal pay for male and female workers for equal work or work of equal value could be achieved through a general documentation and determination of the positions (and not of each staff member) based on assessments and scoring systems on skills, knowledge, activities or tasks.

Question 3: *Are the sections on the remuneration committee sufficiently clear?*

Remuneration committee at group level (paragraph 48 of the draft guidelines): We welcome the clarification that a remuneration committee (where it is required) might be established at group level. However, the reference in paragraph 48 of the draft guidelines should be amended as follows:

> "48. The remuneration committee might be established at group level, including in situations where the consolidating ~~*institution*~~ ***undertaking*** is subject to Directive 2013/36/EU […]."

Participating in meetings of the risk committee (paragraph 58 of the draft guidelines): In our view, it is not necessary for members of the risk committee to participate in all meetings of the remuneration committee. It should be clarified that they should have the possibility to participate when appropriate. This would be in line with the Level 1 requirements which state that the risk committee has access to information on the risks to which the investment firm is or may be exposed (cf. Article 28(5) IFD). Moreover, it makes no sense to require a member of the remuneration committee to participate in each meeting of the risk committee. All questions regarding the tasks of the remuneration committee should be discussed within the remuneration committee where a member of the risk management committee can provide input. This would be a much better approach as a member of the remuneration committee would be mandated to attend meetings of the risk management committee.

Question 4: *Are the guidelines on the application of the requirements in a group context sufficiently clear?*

We welcome the general clarification in ***paragraph 70*** of the draft guidelines that specific remuneration requirements of subsidiaries should be taken into account. However, we suggest certain improvements to clarify the group context as follows:

- **Structure of the guidelines**: The guidelines refer on several sections and paragraphs to group issues (such as sections 5.3, 5.4, 5.5). In addition, section 3 of the guidelines addresses further group requirements. In order to improve the clarity, readability and application of the guidelines, the

scope of the group application on a consolidated level should be clarified exhaustedly in only one section (such as section 3). This would help to better understand what should ultimately apply in the group context and which entities of the group would be part of the consolidation.

- **Terms and definitions used**: We request to review all references to 'subsidiaries', 'investment firms as subsidiaries', 'consolidating parent investment firm', 'consolidating institution', 'EU parent investment firm' in all affected sections. It seems that the terms used do not comply with the definitions and scope of the prudential consolidation of IFD/IFR framework in all cases. For example, the parent company of an investment firm group is not always an investment firm.

- **Identified staff that has a material impact on the groups risk profile:** We request deleting the reference to identified staff that has a material impact on the groups risk profile in ***paragraph 72*** of the draft guidelines as follows:

  > '72. When applying the requirements on a consolidated basis, the remuneration requirements applicable in the Member State where the Union parent undertaking is located apply, ~~***including to identified staff that has a material impact on the groups risk profile,***~~ even if the implementation of the requirements within Articles 30 and 32of Directive (EU) 2019/2034 by the Member State where the Union parent undertaking is located is stricter.'

  Such category of staff is neither required by Article 30(1) IFD nor determined in the final report of the EBA on providing a draft RTS on identified staff. We are aware of a discussion regarding the CRD IV remuneration requirements which was largely driven by the application of the bonus cap to certain group risk takers being part of a subsidiary with sector specific requirements. This discussion is closed by the new legal group requirements in Article 109 CRD V. Moreover, as long as the IFD framework does not require a bonus cap for investment firms and the EBA argues that the IFD remuneration requirements are consistent with other sector-specific requirements (such as the remuneration requirements under the AIFMD or UCITS Directive), we do not see the need to establish a new category of staff that has a material impact on the group's risk profile.

- **Scope of application on individual and consolidated basis**: We request to review and clarify the scope of application of the guidelines on individual and consolidated bases in a group context. As we understand Article 25(4) IFD, the following approach shall apply:

  (1) Application to investment firms in Member states on an individual level (Article 25(4) second sub-paragraph IFD): This approach is addressed in paragraph 75 of the draft guidelines, but with incorrect terms in the group context. Moreover, the scope of application in the draft guidelines does not involve cases where the group capital test of Article 8 IFR is applied (cf. Article 25(4) second sub-paragraph IFD). We therefore ask the EBA to amend ***paragraph 75 first sentence*** as follows:

  > '75. The remuneration requirements of Directive (EU) 2019/2034 and these guidelines apply to investment firms in Member States independent of the fact that they may be subsidiaries of a ***Union*** parent investment firm***, Union parent investment holding company, Union parent mixed financial holding company*** or ~~*institution*~~ ***a parent undertaking*** in a third country ***or Article 8 of IFR is applied***. […]'

  (2) Application to investment firms as subsidiaries of a banking or insurance group: These investment firms in Member states are required to apply the remuneration rules on an individual basis (see above) independent of the fact that they are subsidiaries of a banking or insurance group. The exemptions of Article 6 IFR addressed to such investment firms does not cover the remuneration requirements. This new approach is important in practice (in particular in a

banking group) and reflects also the new Article 109(4)a) CRD V according to which the CRD remuneration requirements shall not apply to subsidiary undertakings established in the Union where they are subject to specific remuneration requirements in accordance with other Union legal acts (such as the IFD). It would be helpful to clarify this understanding in the guidelines.

(3) Investment firm groups – scope of consolidation: According to Article 25(4) third sub-paragraph of the IFD, member states shall ensure that the remuneration requirements are applied to investment firms on a consolidated basis where prudential consolidation as referred to in Article 7 IFR is applied. That approach is already clarified in **Paragraphs 69 and 70** of the draft guidelines. However, in view of our general remarks on the application of the remuneration policies to all staff and the scope of prudential consolidation as referred to in Article 7(1) IFR, we request to amend the ***first sentence of Paragraph 70*** of the draft guidelines as follows:

> '70. At the consolidated level, the Union parent undertaking and competent authorities should ensure that a remuneration policy is implemented and complied with for ~~***all staff, including all***~~ identified staff, in all investment firms ***in Member states*** and other entities within the scope of prudential consolidation and all branches. […].'

(4) Subsidiaries with sector-specific requirements: Although Article 25(4) IFD lacks concrete guidance on how to deal with subsidiaries with sector-specific remuneration rules, the EBA takes a flexible group approach to these entities. We welcome the clarification in the ***third* sentence of paragraph 70** of the draft guidelines that specific remuneration requirements of subsidiaries should be taken into account at consolidated level. Due to a lack of regulation compared to the new Article 109 CRD V, this is important in practice for subsidiary undertakings that are not themselves subject to the IFD (such as management companies licenced under the AIFMD/UCITS Directive) to which their own sector-specific remuneration requirements apply on an individual basis.

(5) Third-party context: ***Sentences 2 - 3* of *Paragraph 75*** of the draft guidelines only deal with entities established in the EU being a subsidiary of a parent investment firm in a third country. However, Article 25(4) IFD also addresses exemptions for subsidiaries established in third countries which should also be clarified in in the guidelines. According to Article 25(4) fourth sub-paragraph of the IFD, Articles 25 - 35 IFD shall not apply to subsidiary undertakings included in a consolidated situation that are established in third countries where the parent undertaking in the union can demonstrate to the competent authority that the application of the remuneration requirements is unlawful under the laws of the third country where these subsidiaries undertakings are established. Moreover, in view of a better understanding, it could be helpful to separate the third-country approach (sentences 2 - 3 of Paragraph 75 of the draft guidelines) from the application to investment firms on an individual basis (cf. sentence 1 of Paragraph 75 of the draft guidelines).

Question 5: *Are the guidelines regarding the application of waivers within section 4 sufficiently clear?*

In general, we agree with the proposed application of waivers within section 4. However, we would like to request to review and amend the terms used in the group context. The parent company of an investment firm group is not always an investment firm. The determination of the effective ratio between the variable and fixed remuneration is limited to identified staff. This applies to the following paragraphs 85 and 86:

‘85. Investment firm ***group***’s subsidiaries that are subject to a specific remuneration framework must comply with their sector-specific requirements, including the calculation of thresholds for the application of waivers on an individual basis, where applicable. E.g. an investment firm ***group***’s subsidiary with assets of […].’

86. When establishing the amount of variable remuneration paid to a***n*** ***identified*** staff member and the effective ratio between the variable and fixed remuneration for the purposes of Article 32(4) (b) of Directive (EU) 2019/2034, investment firm’s should take into account all fixed and variable remuneration. The amounts should be based on the definition for fixed and variable remuneration within these guidelines and should be calculated based on the gross remuneration awarded. Where the amount is determined on an individual basis, the remuneration awarded by the investment firm should be taken into account, when the amount is determined on a consolidated basis all remuneration awarded by ~~*financial institutions and ancillary service undertakings*~~ ***entities*** within the scope of prudential consolidation should be taken into account. […].

Regarding the criteria for application of the proportionality principle addressed in ***paragraph 81*** of the draft guidelines, we would like to highlight that the amount of assets under management could not be a stand-alone criterion for a risk measurement approach. We are aware that the amount of assets under management is a threshold for the own capital requirements, and this is appropriate for that purpose since operational risks could affect all portfolios managed. However, in avoiding risk taking through incentives by remuneration, the nature, scope and complexity of the activities should be relevant (such as the underlying risk profiles of the business activities that are carried out). In addition to the authorised activity, the type of investment policies and strategies of the portfolios managed, the national or cross-border nature of the business activities and the additional licences to provide MiFID services should be relevant. Therefore, we request to clarify that in assessing what is proportionate, the focus should be on the combination of all the mentioned criteria (size, internal organisation and the nature, scope and complexity of the activities).

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

As mentioned in our introduction, we strongly disagree with the proposed scope that the requirements on severance payments shall apply to all staff members. According to Article 32(1)(f) IFD, conditions on payments relating to the early termination of an employment contract such as severance payments only apply to categories of staff referred to in Article 30(1) IFD (identified staff).

Question 7: *Are the provisions on performance criteria sufficiently clear, which other performance indicators, e.g. regarding the performance of business units or portfolios, are used to determine the variable remuneration of identified staff?*

In general, the provisions on performance criteria are sufficiently clear.

We request to replace the term ‘*asset management’* in ***paragraph 196*** with the term ‘***portfolio management***’. Asset management is a term used by the European Directives (AIFMD and UCITS Directive) dealing with collective investment undertakings. Portfolio management as a MiFID service should be used under the IFD framework.

Question 8: *Is the section on the pay out in instruments sufficiently clear?*

At this point in time, we are not yet in a position to assess whether the provisions on pay-out in instruments are appropriate and practicable, in particular in cases where the investment firm provides portfolio management. We reserve the right to provide further explanations in this regard at a later date.

Regarding the use of alternative arrangements (***paragraph 261*** of the draft guidelines), we understand the proposed provisions addressed to competent authorities as a non-binding and non-exhaustive list of considerations. In any case, the new RTS on classes of instruments that adequately reflect possible alternative arrangements states the criteria which should be considered.

****