Frankfurt am Main,
14 January 2016

BVI Position on public consultation on impacts of maximum remuneration ratio under Capital Requirements Directive 2013/36/EU (CRD IV), and overall efficiency of CRD IV remuneration rules

BVI[1] gladly takes the opportunity to present its views on the Commissions consultation on impacts and overall efficiency of CRD IV remuneration rules. In reply to the questions raised we would like to provide the following information based on the previous surveys in our membership as a result of the past discussions on implementation remuneration policies under the AIFM Directive 2011/61/EU (hereafter: AIFMD), UCITS Directive 2009/65/EC (hereafter: UCITS Directive) and the Directive 2013/36/EU (hereafter: the CRD).

1. IDENTITY OF THE RESPONDENT

We are responding to the questionnaire as an industry representation organization. Our 92 members are mainly asset managers providing management services to collective investment undertakings such as UCITS or AIF or managing assets outside investment funds. They are subject to the following different remuneration requirements:

- **Services provided by AIF or UCITS management companies**

Most of our members (76 members) are investment management companies within the meaning of the UCITS Directive or the AIFMD which are offering services and products under the AIFMD, the UCITS Directive and the Directive 2014/65/EU (hereafter: MiFID). Some of them (37 members) are part of a banking group for which the CRD does not apply and the others (39 members) are part of an insurance group or group-independent. All of these management companies are legally required to comply with different sets of rules with regard to remuneration as follows:

a) Management companies licenced as **AIF managers** fall under the remuneration requirements set out in Article 13 and Annex II AIFMD and under the ESMA guidelines on sound remuneration policies under the AIFMD (Ref.: ESMA/2013/232). Since mid-2013 AIF managers have been obliged to implement internal remuneration policies which comply with the remuneration requirements of the AIFMD (cf. section 37 of the German Capital Investment Code, in German: Kapitalanlagegesetzbuch, hereinafter referred to as "KAGB"). However, ESMA has clarified that they should apply them only for the calculation of payments relating to newly awarded variable remuneration to their identified staff for performance periods that follow the period in which the firms had become authorised as AIF managers.[2] Hence, all of our members will start to pay out the remuneration according to the AIFMD requirements for the first time at the beginning of 2016 for payments relating to the 2015 accounting period.

[1] BVI represents the interests of the German investment fund and asset management industry. Its 92 members manage assets of approximately of EUR 2.5 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.
[2] Cf. ESMA Q&A, Ref.: ESMA/2014/163).

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In accordance with the principle of proportionality, ESMA stated in its AIFMD remuneration guidelines that proportionality may lead, on an exceptional basis and taking into account specific facts, to the disapplication of some requirements. ESMA also clarified that AIFMs should perform an assessment for each of the remuneration requirements that may be disapplied and determine whether proportionality allows them not to apply each individual requirement. Moreover, ESMA did not consider it appropriate to rank AIFMs on specific proportionality levels based on their size since the size of an AIFM is only one element to be taken into consideration when applying proportionality (i.e. its internal organisation, nature, scope and complexity of the activities also have to be considered). For more details, we refer to paragraphs 23-31 of ESMA's AIFMD remuneration guidelines.

In this context, most of our members have applied for or otherwise availed themselves of a waiver of certain remuneration provisions (such as pay-out rules in instruments, deferral requirements) which are in line with ESMA's guidelines.

b) Management companies licenced as **UCITS managers** fall under the future remuneration requirements set out in Articles 14a and 14b of the UCITS V Directive and under the proposed ESMA guidelines on sound remuneration policies under the UCITS Directive.[3] The UCITS V Directive does not impose a specific deadline for the finalisation of ESMA's UCITS Remuneration Guidelines. However, considering the transposition deadline for the UCITS V Directive (i.e. 18 March 2016) and the time necessary to adapt to the provisions of the future guidelines, ESMA aims to finalise the UCITS remuneration guidelines in Q1 2016. Moreover, ESMA proposes that the UCITS remuneration guidelines should then start to apply as from the transposition deadline of the UCITS V Directive. However, most of our members are management companies which manage AIF (exclusively or in parallel to UCITS). They have already implemented the AIFMD remuneration policies for all personnel in the investment management company.

   Because ESMA proposes to align its Guidelines for the remuneration of UCITS managers with the corresponding ones for AIFMs (including the possibility of a waiver of certain remuneration provisions), our members will have, in principle, no relevant changes in the pay-out process of the variable remuneration in comparison to the AIFMD remuneration requirements.

c) UCITS management companies or AIFM providing **MiFID services** of individual portfolio management or non-core services such as investment advice (within the meaning of Article 6 paragraph 3a and b of the UCITS Directive and Article 6 paragraph 4a and b of the AIFMD) are required to comply also with the MiFID remuneration rules stated by ESMA in its guidelines on remuneration policies and practices (MiFID) (Ref: ESMA/2013/606). These provisions are to put a stop to remuneration intended to provide incentives for employees to disregard clients' interests or to breach the conduct of business rules. The German supervisory authority (BaFin) has implemented the MiFID remuneration rules in its Circular 4/2010 (WA) (hereinafter referred to as "MaComp Circular"). The Module BT 8 of the MaComp Circular contains provisions regarding remuneration in investment services enterprises which also apply for management companies providing MiFID services. The provisions entered into force on 30 January 2014 with a transitional period for their implementation.

[3] Cf. ESMA's consultation paper, Guidelines on sound remuneration policies under the UCITS Directive and AIFMD, Ref.: 2015/ESMA/1172.

- **Services provided by MiFID investment firms**

To be distinguished from the services provided by a management company covered above are the portfolio management services provided by (investment) firms which directly fall within the scope of the CRD because they only provide services regulated under MiFID such as portfolio management, investment advice or execution of orders on behalf of clients. They also act as fund managers when they provide management services to collective investment undertakings such as UCITS or AIF by means of outsourcing agreements with regard to the full portfolio management of these investment funds or the management of certain segments (such as European corporate bonds, North American or South-East Asian equities) in which an investment fund is invested. 16 of our 92 members are investment firms as defined in Art. 4(1)(2) CRR or firms in the meaning of Article 4(1)(2)(c) CRR, all established in the EEA. Some of them are a subsidiary within a CRD regulated group and others are part of an insurance group or group-independent for which the following two different sets of remuneration rules apply:

a) As long as these firms are subject to the CRD they have to directly comply with the guidelines on sound remuneration policies under Article 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013 presented by EBA in its final report (Ref.: EBA/GL/2015/22). However, in Germany, the CRD IV remuneration requirements which entered into force at the beginning of 2014 are essentially implemented through the amendments of section 25a (5) of the German Banking Act (Kreditwesengesetz, hereinafter referred to as "KWG") and the Ordinance on the Supervisory Requirements for Institutions' Remuneration Systems (Instituts-Vergütungsverordnung - InstitutsVergV) which both also entered into force on 1 January 2014.

b) In addition, all of these firms are required to comply also with the MiFID remuneration rules stated by ESMA in its guidelines on remuneration policies and practices (MiFID) (Ref: ESMA/2013/606) and implemented by BaFin in its MaComp Circular.

2. MAXIMUM RATIO RULE

2.1 IMPACT OF THE MAXIMUM RATIO RULE ON COMPETITIVENESS

2.1.1 The Maximum Ratio Rule applies to credit institutions and investment firms as defined in CRD in the EEA, as well as (indirectly) to their subsidiaries within the scope of prudential consolidation (including subsidiaries outside the EEA and asset management subsidiaries). Please indicate for which of the aforementioned type(s) of undertaking(s) your answer to the below question applies.

Firstly, we would like to highlight that the remuneration rules of the CRD do not apply to subsidiaries not subject to the CRD such as management companies within the meaning of the AIFMD or the UCITS Directive, even if they are part of a banking group. We therefore strongly disagree with the provided explanation in the consultation paper that within the scope of prudential consolidation the maximum ratio rule also (indirectly) applies to subsidiaries belonging to a banking group and which are directly not subject to the CRD. In particular, investment management companies are subject to their own specific remuneration requirements under the AIFMD and the UCITS V Directive. This is also the current interpretation of the German legislator implemented in the InstitutsVergV and the KAGB.

In this context, we are also concerned about EBA's interpretation that the consolidating institution must ensure that subsidiaries that fall into the scope of prudential consolidation, but which are not themselves subject to CRD, have remuneration policies that comply with the remuneration requirements of the CRD (in particular, complying with the maximum ratio rule) at least for those identified staff of entities that fall within the scope of the UCITS Directive and AIFMD whose professional activities have a

material impact of the group's risk profile.[4] There is no legal basis for this approach under the CRD. In detail:

a) According to Article 75 of the CRD, EBA shall issue guidelines on sound remuneration policies which comply with the principles set out in Articles 92 to 95 of the CRD. With regard to Article 92 of the CRD, the application of the remuneration requirements shall be ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres. With regard to Article 3 (1)(3) of the CRD IV with reference to Article 4 (1)(3) of Regulation (EU) No 575/2013, "institutions" are defined as credit institutions or investment firms. This does not include management companies in the meaning of the AIFMD or UCITS Directive. Therefore, the guidelines could only apply to staff of institutions.

b) To be distinguished from this question is the responsibility of a parent company to ensure group-wide consistency as stated in Article 109 of the CRD. However, the interpretation of Article 109 of the CRD is not subject to EBA's competence set out in Article 75 of the CRD.

   Moreover, according Article 109 of the CRD, the consolidating institution shall ensure that subsidiaries not subject to the CRD implement arrangements, processes and mechanisms in a consistent and well integrated manner. Contrary to EBA's statement under paragraph 68 of its final guidelines such subsidiaries are not required to "*comply*" or to "*apply*" the group wide remuneration policies. The rule only seeks to ensure that subsidiaries which themselves are not subject to the CRD "*implement*" a remuneration policy. Because the remuneration policies under the CRD are consistent with the requirements under the AIFMD (or the UCITS Directive)[5], there is no need to extent their scope to the non-bank entities such as entities subject to the AIFMD or the UCITS Directive.

   We therefore refer to the current German implementation of the group context which is appropriate and sufficient to fulfil the requirements of Article 109 of the CRD. There is also in Germany an obligation of the parent entity to establish a group-wide remuneration strategy. However, Article 27 (2) of the InstitutsVergV requires that the members of the management body of the parent bank entity are responsible for ensuring that only the subordinated companies, which are in particular not subject to the special remuneration requirements of the AIFMD or the UCITS Directive, comply with the CRD remuneration requirements implemented in the InstitutsVergV.

c) In addition, the application to subsidiaries then overrides the intention of the European legislator in explicitly excluding UCITS V and AIFMD from the bonus cap. Neither the AIFMD nor the UCITS Directive applies a bonus cap to AIFMs or UCITS management companies. In particular, UCITS V management firms were explicitly exempted from the bonus cap after thorough discussion in the European Parliament and among Member States. The reason why legislators rejected the bonus cap for UCITS was that they recognised that asset manager remuneration is aligned with the investors' interests as variable remuneration is linked to long term performance. Moreover, the European Parliament's acknowledgment in UCITS V that bank remuneration policy (the prescriptive variable remuneration limit) is inappropriate for aligning risks within UCITS managers is indicative for the need to apply remuneration policies in a proportionate way to asset management firms falling under both CRD and AIFMD. The remuneration provisions in both AIFMD and UCITS Directive are in many other respects nearly identical to the provisions of the CRD. However, differences between

[4] Cf. EBA's Final Report, Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013, paragraph 68 of the final guidelines (Ref: EBA/GL/2015/22).
[5] Cf. ESMA's Questions and Answers – Application of the AIFMD; Q&A 4 page 6.

the remuneration requirements of the UCITS/AIFMD regime and the CRD arise especially in the fields of the bonus cap, the identification of risk takers, pay-out in instruments, the implementation of deferral procedures, disclosure requirements and controlling by the remuneration committee as a result of the different situation of risk-taking (please also see our answer to question 2.2.2).

d) Furthermore, there is no direct link between the professional activities of investment management company staff and the solvency of the institution's balance sheet as they do not trade on the own books of the company. Hence, there is no risk that remuneration policies and incentives have a direct link with the investment management company's solvency. Therefore, fundamental differences exist between the business models of management companies and the banking and investment banking sector.

However, as EBA refers to any operational risks taken by the management company which could have an impact on the group's risk profile, such risks are very low. The reason for this is that UCITS's and AIF's assets are segregated from the own assets of the management company and from other clients' assets. Investment management companies are required to measure, manage and monitor operational risks (including reputational risks). This involves that investment management companies are obliged to cover operational risks (such as professional liability risks) through additional own funds (cf. Article 14 of the Delegated Regulation (EU) No 231/2013 of 19 December 2012). This measurement minimizes the parent institution's capital requirement for operational risks on the consolidated basis. Moreover, in practice, operational risks taken by an investment management company amount to about average 30,000 Euro per year and each investment management company over a period of the last five years.[6] In our view, this amount is in principle not capable of having a material impact on the group's risk profile on a consolidated basis.

e) However, an initial reference point for identification of staff should be the fact that staff's professional activities have material impact on the group's risk profile on a consolidated basis. However, such a proposal is not likely to work in practice. This applies particularly to EBA's approach that for subsidiaries not subject to the CRD the identification assessment should be performed by the consolidating institution based on information provided by the subsidiary.[7]

It should be noted, that according to the remuneration requirements under the AIFMD and the UCITS Directive, investment management companies are responsible to identify their staff, to define the basis on which staff are being paid and to negotiate wages. In this context they need to know the impact of their staff's responsibilities on the company's or managed funds' risk profiles. However, they are not able to identify the risk profile of the whole group or whether their staff have material impact on the group's risk profile. This simply means that they do not know the group's risk profile on the consolidated basis. Therefore, they are not able to take into account their staff's impact on group's risk profile. On the other hand, the parent company knows the group's risk profile on consolidated basis but the risk takers of the investment management company which could have material impact on such a risk profile are unknown or even non-existent (see above).

f) In this context, EBA's approach using the criteria in Articles 3 and 4 of the RTS on identified staff to identify staff of the subsidiaries such as investment management companies not subject to the CRD exceeds the powers conferred on EBA by extending the RTS in the meaning of Article 94 (2) and Article 92 (2) of the CRD on subsidiaries not subject to the CRD. The scope of the RTS is limited to staff of institutions in the meaning of Article 92 (1) of the CRD subject to the CRD. As mentioned

[6] Cf. BVI statistic on losses that have occurred through operational risks.
[7] Cf. Paragraph 108 of EBA's final remuneration guidelines (Ref.: EBA/GL/2015/22).

above, this does not include investment management companies in the meaning of the AIFMD or UCITS Directive.

Moreover, it would be strange if a large UCITS management company acting purely as agent running funds with a low level of leverage was subject to the same level of requirements as a large bank, although they do not represent the same risk to the system or to investors. In this respect we believe that more qualitative criteria rather than size-based criteria should be the deciding factor in determining the proportionate application of the CRD rules especially in respect of remuneration.

Finally, the interaction of different remuneration requirements under the UCITS/AIFMD regime and the CRD IV should be clarified in such a manner that parent undertakings must at least ensure that subsidiaries for which other special remuneration requirements such as under the AIFMD/UCITS Directive apply, comply with their special remuneration requirements.

However, the following answers below apply to our members which are investment firms as defined in Art 4(1)(2) CRR established in the EEA (directly subject to the Maximum Ratio Rule) or EEA subsidiaries of EEA parent covered by CRD such as asset management companies or other types of financial institutions.

2.1.2 What impact, if any, of compliance with the Maximum Ratio Rule have you observed on the COMPETITIVENESS of the undertakings concerned? Please provide as much as possible factual, concrete and verifiable elements that support your answer. If you ticked more than one box above, please make sure to distinguish as relevant.

Extending the CRD pay rules (and in particular the variable pay cap) exclusively to non-CRD regulated entities that are subsidiaries of CRD groups would create competitive disadvantages and un-level playing fields in these businesses or geographies where entities that are operating outside CRD IV groups (e.g. US parented asset managers) are not required to apply the same set of rules. Certainly with the number of entities and individuals affected by the CRD IV requirements to rise accordingly this is another area where, viewed in the context of the changes to the proportionality principle, there will be significant cost impacts.

However, a discussion concerning the effects on global competition between financial institutions is missing in the current discussion about development of positions regarding remuneration rules under the CRD. We therefore refer to Commission's statement in its recital 6 of the Recommendation 2009/384/EC of 30 April 2009 (hereafter: the Recommendation):

> "Given the competitive pressures in the financial services industry and the fact that many financial undertakings operate cross-border, it is important to ensure that principles on sound remuneration policy are applied consistently throughout the Member States. **However, it is acknowledged that to be more effective, principles on sound remuneration policy would need to be implemented globally and in a consistent manner."**

In our assessment of the legal positions in other countries outside the EU/EEA we gained the impression that the principle of proportionality (including a possible application of a maximum ratio rule) is implemented, if at all, in a more principle based manner similar to the current remuneration requirements and interpretations under the CRD. For more details with regard to the different national regulations and supervisory guidance on compensation issued by national regulation authorities, we refer to

the overview published by the FSB on its website.[8] For instance, in the US, different agencies have designed 'Guidance on sound incentive compensation policies'[9] to help ensure that incentive compensation policies at banking organisations do not encourage imprudent risk-taking and are consistent with the safety and soundness of the organisation. In this context, stricter requirements in Europe would lead to competitive disadvantages for the financial industry in the Union.

In this context, we also refer to EBA's benchmarking of approved higher ratios under Article 94(1)(g)(ii) of CRD.[10] The benchmarking shows that not all Member States have yet implemented the CRD or that the bonus cap does not apply in all jurisdictions for all institutions. In consideration that the maximum ratio rule has only been applicable since 2014 an appropriate assessment of the impact on the competitiveness of undertakings is not possible at present.

However, in accordance with the principle of proportionality set out in the CRD IV the German legislator has implemented exceptions with regard to the bonus cap for certain institutions. In particular, portfolio managers, contract brokers and asset managers who, in providing financial services, are not authorised to obtain ownership or possession of funds or securities of customers and who do not trade in financial instruments for own account shall not be subject to the bonus cap (cf. section 2(8b) KWG). Therefore, the bonus cap established in the CRD IV does not apply for our members with such a restricted license in providing investment services.

2.2 IMPACT OF THE MAXIMUM RATIO RULE ON FINANCIAL STABILITY

2.2.1 The Maximum Ratio Rule applies to credit institutions and investment firms as defined in CRD in the EEA, as well as (indirectly) to their subsidiaries within the scope of prudential consolidation (including subsidiaries outside the EEA and asset management subsidiaries). Please indicate for which of the aforementioned type(s) of undertaking(s) your answer to the below question applies.

Our following answer applies to our members which are investment firms as defined in Art 4(1)(2) CRR established in the EEA (directly subject to the Maximum Ratio Rule) or EEA subsidiaries of EEA parent covered by CRD such as asset management companies or other types of financial institutions.

2.2.2 What impact, if any, of compliance with the Maximum Ratio Rule have you observed on FINANCIAL STABILITY? Please provide as much as possible factual, concrete and verifiable elements that support your answer. If you ticked more than one box above, please make sure to distinguish as relevant.

In consideration that the maximum ratio rule of the CRD IV has only been applicable since 2014 an appropriate assessment of the impact on financial stability is not possible at present.

On the other hand, however, it must be noted that the absence of maximum ratio rules in the asset management has no impact on the financial stability. The reason is that risk-taking in the asset management is significant different to the business models in the banking area. In detail:

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[8] http://www.fsb.org/wp-content/uploads/r_120709.pdf.

[9] https://www.fdic.gov/news/news/press/2010/pr10138a.pdf.

[10] https://www.eba.europa.eu/documents/10180/950548/Benchmarking+Report+on+Approved+Higher+Ratios+for+Remuneration.pdf

Asset managers manage funds or assets outside investment funds on behalf of investors. In their fiduciary role, they are obliged to act in accordance with the investment objectives and guidelines set by their investors for a given risk/return level. Managers also do not have custody over the assets, as these are held - or more appropriately, “safe-kept” - by separate depositary institutions (usually a credit institution, but with a specific licence). Here the assets in the fund portfolio are kept segregated and are thus never part of the asset manager’s own balance sheet. Importantly, the investment results - whether positive or negative - belong to the investor. Therefore, there is no direct link between the professional activities of investment management company staff and the solvency of the institution’s balance sheet as they do not trade on the own books of the company. Hence, there is no risk that remuneration policies and incentives have a direct link to the investment management company’s solvency. Therefore, fundamental differences exist between the business models of management companies and the banking and investment banking sectors.

Differences also exist in the methods to incur risks at fund or company level through certain risk strategies such as leverage methods. Leverage in the asset management sector means any method by which the manager increases the exposure of an investment funds it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means. Therefore, leverage of all investment funds is expressed as the ratio between the exposure of a fund and its net asset value. The main difference between AIF and UCITS is the opportunity to use methods by which the fund manager could increase the exposure of a fund it manages. In principle, the AIF manager can use methods in an unlimited manner, where allowed under national law[11], such as borrowing of cash or securities, or leverage embedded in derivative positions or by any other means. In contrast, the manager of a UCITS is limited in using of such methods. In particular, a UCITS is authorised to borrow of cash only on a temporary basis and with a limit of 10 percent of the value of the fund. Moreover, EU member states may authorise UCITS to employ techniques and instruments relating to transferable securities and money market instruments (such as borrowing of securities) under strict conditions and within the limits which they lay down provided that such techniques and instruments are used for the purposes of efficient portfolio management. However, in each case, the UCITS manager is obliged to ensure that the UCITS’ global exposure does not exceed the total net value of its portfolio (the so called “200 percent threshold”).

Moreover, where risk is taken on in the exercise of an agency business and managed according to investors’ risk profile specifications, the use of remuneration principles – especially those relative to the variable remuneration component and its pay-out process – are not intended to address the build-up of systemic risks, but uniquely to ensure that pay is aligned and consistent with an advertised investment strategy and with the underlying investor interests underpinning it. Sound and effective risk management practices are a necessary complement to portfolio management and are primarily intended to protect the value of the underlying investment, not to avert systemic risks.

Furthermore, we must point out as important criteria that the remuneration requirements of the AIFMD and UCITS Directive not only cover risk-taking at fund level, but even more focused on risk takers whose professional activities have a material impact on the management company’s risk profile. This involves in particular any risk-taking with impact on operational risks. Therefore, the remuneration requirements in the asset management area are always designed to avoid risks at company level caused by remuneration or incentive systems for identified staff. This leads automatically to the effect that any influence on the operational risks at the level of the management company as a subsidiary of a banking

[11] In Germany, all retail AIFs are restricted in using leverage (such as by legal investment limits for borrowing of cash or securities or investments in derivatives which are in principle comparable with the restrictions under the UCITS Directive). This also applies for the special funds (AIF) for institutional investors (without hedge funds).

group and their impact of the risk profile on consolidated group basis is always considered in the remuneration requirements of the UCITS Directive or AIFMD.

In addition, it must be noted that the burden of operational risks on the company level of an asset manager lies principally with the company and its management. From the point of view of the investors, operational risks are attached to the different features and quality of the trading, settlement and valuation procedures operated by the investment management companies, which may increase the chances of losses due to human or technical errors. Therefore, management companies are required to measure, manage and monitor such operational risks (including reputational risks). Moreover, management companies are obliged to cover operational risks (such as professional liability risks) through additional own funds (cf. Article 14 of the Delegated Regulation (EU) No 231/2013 of 19 December 2012, BaFin Circular 5/2010 on the minimum requirements of risk management for investment management companies).

2.3 IMPACT OF THE MAXIMUM RATIO RULE ON STAFF WORKING OUTSIDE THE EEA

What impact, if any, of compliance with the Maximum Ratio Rule have you observed on staff working effectively and physically in subsidiaries established outside the EEA of parent institutions established within the EEA?

Not applicable, because our members are only established within the EEA.

3. EFFICIENCY OF THE OVERALL CRR AND CRD IV REMUNERATION PROVISIONS

In CRD IV, rules on remuneration are set out in Articles 74 to 76, Articles 92 to 96, Article 104, Article 109 and Article 162(3), and in recitals 62 to 69. In CRR, Article 450 and recital 97 cover rules on remuneration. The objective of the remuneration rules is to avoid that remuneration policies encourage excessive risk-taking behaviour and thus undermine sound and effective risk management of credit institutions and investment firms. They aim at aligning remuneration policies with the risk appetite, values and long-term interest of credit institutions and investment firms, in order to remedy regulatory loopholes, which enduced a number of managers, especially before the crisis, to an excessive risk-raking approach. The ultimate goal is to protect and foster financial stability within the Union.

3.1 Against this background, how would you assess the efficiency of the following remuneration rules of CRD IV and CRR? Please always back up your views with specific evidence:

In implementing the CRD remuneration requirements and in accordance with the possibility of using ‘neutralisations’ of certain remuneration requirements under the previous CEBS guidelines on remuneration, the German legislator has decided that only major institutions have to comply with the special pay out rules such as deferral arrangements or pay out in instruments for their identified staff. According to section 17(1) of the InstitutsVergV, an institution qualifies as major if its balance sheet total as of the relevant balance sheet dates for the last three completed financial years has reached or exceeded an average of EUR 15 billion, unless the institution provides BaFin with risk analyses proving that it is not a major institution. In principle, our members concerned are not considered as major institutions in this meaning. We therefore propose to clarify that such an approach should be required under the CRD in future.

3.1.1 The requirement set out in Article 94(1)(a) CRD that the assessment of performance is based on a combination of the individual's performance (taking into account financial and non-financial criteria), the performance of the business unit concerned and of the overall results of the institution; the requirement set out in Article 94(1)(b) CRD that the assessment of the performance is set in a multi-year framework.

In our view, these requirements are appropriate and sufficient and always implemented in the internal systems of evaluation with regard to the individual performance as criteria for a performance based remuneration.

3.1.2 The requirement set out in Article 94(1)(m) CRD to defer at least 40% of the variable remuneration.

With the aim of avoiding disproportionality high administrate efforts, a procedure whereby non-compliance with the variable remuneration requirements regarding to the deferral arrangements is accepted by BaFin in the case of staff whose activities have material impact on the overall risk profile if the respective employee's total variable remuneration is below EUR 50,000 per annum. We therefore propose to clarify that such threshold should be considered permitted in future.

3.1.3 The requirement set out in Article 94(1)(l) CRD to pay out at least 50% of variable remuneration in instruments, whereby there will be a balance of shares or equivalent ownership interests, subject to the legal structure of the institution concerned or share-linked instruments or equivalent non-cash instruments, in the case of a non-listed institution, and where possible other instruments adequately reflecting credit quality of the institution as a going concern.

The pay out in instruments leads to the situation that a substantial portion of the variable remuneration shall consist of shares or equivalent ownership interests or other Equity Tier 1 instruments. However, asset managers such as investment firms (directly covered by the CRD) provide management services to collective investment undertakings such as UCITS or AIF. The instruments referred to above are, in principle, not designed to align incentives with the longer-term interests of the asset manager. Suitable instruments are not available.

On the other hand, according to paragraph 68 of EBA's final guidelines (Ref.: EBA/GL/2015/22), risk takers of an entity subject to the AIFMD or the UCITS Directive and belonging to a banking group whose professional activities have a material impact on the group's risk profile should be limited to pay the variable remuneration in the alternative investment funds instruments or UCITS instruments. In case that such risk takers even exist, in our view, pay out instruments of the banking group would be more suitable to consider the material impact of the risk taker on the group's risk profile.

3.1.4 The requirement set out in Article 94(1)(n) CRD that up to 100% of the variable remuneration is subject to malus and claw back.

In Germany 'claw back' is not possible under national labour law. However, the current requirements provide a flexible approach in using malus or claw back policies. Both are forms of ex-post risk adjustment. However, there is no obligation to implement either malus or claw back clauses. Already today, our members adjust remuneration of the staff members identified as risk takers by means of malus clauses as an ex-post risk adjustment instrument.

Practical problems arise in the fact that the application of malus or claw back arrangements must be individually agreed between the entity and the identified staff members. Moreover, such measures must be part of a decision-making tool to obtain the necessary acceptance by employees. Malus and claw back arrangements influence payroll-accounting, in particular the calculation of income tax. The concrete implications and effects on the individual are therefore not foreseeable.

3.1.5 The requirements set out in Articles 94(1)(f) and 94(1)(g) that fixed and variable components of remuneration are appropriately balanced; that the fixed component should represent a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component; and that the variable remuneration cannot exceed 100% (or 200% with shareholders' approval) of the fixed remuneration.

We refer to our answer to section 2 of the questionnaire.

In this context, EBA's guidelines state that staff who are subject to other sectorial legislation, e.g. AIFMD and UCITS Directive, and are employed by a group member have to comply with the maximum ratio rule. While the appropriateness of this approach may be argued for a base plus discretionary bonus scenario, it is almost impossible to work towards a 1:1 or 1:2 ratio when considering industry specific remuneration structures such as carried interest plans. Carried interest plans are not part of the regular annual compensation cycle and a recipient of a carried interest award in one year may not receive another such award for many years to come. As a result, including the value of a carried interest plan award in a ratio calculation for a particular year would be unworkable due to the irregular nature of such awards. Carried interest plans are long term, irregular and carry a real risk of non-pay out and therefore exclusion from a ratio calculation or at the very least being subject to a broader ratio would be more appropriate.

3.1.6 The requirement for significant institutions to establish a remuneration committee (Article 95 CRD) as well as a risk committee (Article 76 CRD) which shall assist in the establishment of sound remuneration policies and practices.

No comment.

3.1.7 The requirements set out in Article 96 CRD and Article 450 CRR on the public disclosure concerning remuneration policy and practices.

No comment.

3.2 How would you assess the overall efficiency of the remuneration rules of CRD IV and CRR collectively? Also, please indicate whether you have identified any lacunae in the existing rules. Please back up your views with specific evidence.

In principle, the current approach of remuneration requirements is sufficiently effective in order to protect and foster financial stability within the Union. Consistent, efficient and effective supervisory practices are already in place. In particular, major efforts involving great costs have been undertaken by our members to implement the remuneration requirements. However, further developing guidelines on sound remuneration policies is an essential element of the supervisory practice. BVI would like to ex-

press its full support for this project. This is an important initiative for enhancing investors' protection and strengthening investors' confidence in investment funds and services provided by asset managers. Remuneration policies and practices in the financial sector should be consistent with and promote sound and effective risk management.

However, in this context, we would like to draw the Commission's attention to the fact that the implementation of the remuneration provision has increased and will increase costs for our members. Further changes of remuneration requirements could lead to the following administrate burden:

- Adjusting the content of the remuneration policies (such as changing the scope of the remuneration policy with regard to the identified staff and the payout process)
- Implementation of a payout process for parts of the bonus (such as deferral arrangements, pay out in instruments, application of malus) including software adaption for the payout process and adjusting the accounting systems (such as implementation of different payment methods and new employees' accounts, monitoring of the deferral arrangements, initiation of subsequent payments)
- In cases where a payout process is partially in place, changing the implemented processes for salary payments (such as changing the calculation process for the deferred part of the bonus and the timeline of the deferred period)
- Adjusting the employment contracts of the identified staff, including conduct of negotiations with the employees
- Informing – where applicable - the workers' council ("Betriebsrat") and requiring the consent of the workers' council (including complying with the requirements of the Equal Treatment Law); in practice, there are open questions what happens if the workers' council fails to give its approval under employment legislation or collective agreements (e.g. consent for malus agreements).
- Clarification of legal issues by internal/external lawyers
- Hiring external service providers for the implementation of the new requirements

Moreover, we see multiple interactions especially in the remuneration rules introduced under different pieces of EU law which overall amount to a huge practical burden for the affected market participants. In particular, management companies offering services and products under the above mentioned different sectoral remuneration requirements are legally required to comply with three different sets of rules with regard to remuneration of their personnel. In particular, it is a common practice that all of these services are provided jointly within an entity by specialised management teams. Thus, it is very common for management companies to have management teams for e.g. European corporate bonds, North American or South-East Asian equities which then provide their services to all AIFs, UCITS and individual portfolios focusing on these markets.

In Germany, we are not aware of any management company which separates employees by legal structure of the managed products, e.g. UCITS employees and AIF employees. In most situations the affected employees need to be remunerated according to AIFMD, UCITS and MiFID rules. Applying all these rules within one employment contract is barely possible. Therefore, we expressly support ESMA's proposed approach to align the guidelines for remuneration of both UCITS and AIF managers. It is important that consistent remuneration requirements apply to investment management companies which manage both UCITS and AIF. Moreover, we are in favour of the approach that only the AIFMD/UCITS remuneration guidelines should apply or should be qualified as more effective for aligning the interest of the relevant employees with those of the clients in case of management companies performing MiFID services such as individual portfolio management or investment advice.

Since the services provided by investment firms are comparable to the services provided by management companies within the meaning of the AIFMD or UCITS Directive, it is important that also an equal remuneration regime applies to these investment firms. We are in favour of applying only one single and consolidated set of remuneration guidelines to all asset managers, irrespective of whether they are management companies licenced under UCITS Directive or AIFMD, or investment firms holding a MiFID licence or if they are part of a consolidated banking group.

In this context, we also refer to EBA's report on investment firms (Ref.: EBA/Op/2015/20)[12] and EBA's opinion on the application of proportionality to the remuneration provisions in CRD (Ref.: EBA/Op/2015/25)[13] in which the EBA states the importance to consider the overarching aim of remuneration requirements for prudential purposes - i.e. creating a strong link between remuneration policies and risks - when considering their relevance to investment firms. We fully support EBA's view that one of the more specific challenges is related to the application of the proportionality principle, which could arise from the application of the CRD/CRR remuneration requirements to investment firms because other than the largest 'bank-like' proprietary trading firms, most investment firms commonly have different risk profiles, based on differing investor bases, risk appetites and risk horizons. However, each review of the remuneration provisions including legal proposals should consider the burden for implementation, in particular for small sized firms. If the result of such review is comparable with the current remuneration requirements applicable for these firms the effort of such a review is questionable. In this context, it must be noted that it is an implication of the principle of proportionality that different solutions are in place taking into account the size, internal organisation and the nature, scope and complexity of institutions' activities. Moreover, it could be more efficient that remuneration policies without performing specific risk assessments should be reviewed by competent authorities.

[12] http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-20+Report+on+investment+firms.pdf.
[13] https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-25+Opinion+on+the+Application+of+Proportionality.pdf