

**Baker  
McKenzie.**

**Employee Benefits within the  
Financial Services Industry: balancing  
COVID-19 relief with EU remuneration rules**

As at 30 April 2020



# Employee Benefits within the Financial Services Industry: balancing COVID-19 relief with EU remuneration rules

As at 30 April 2020

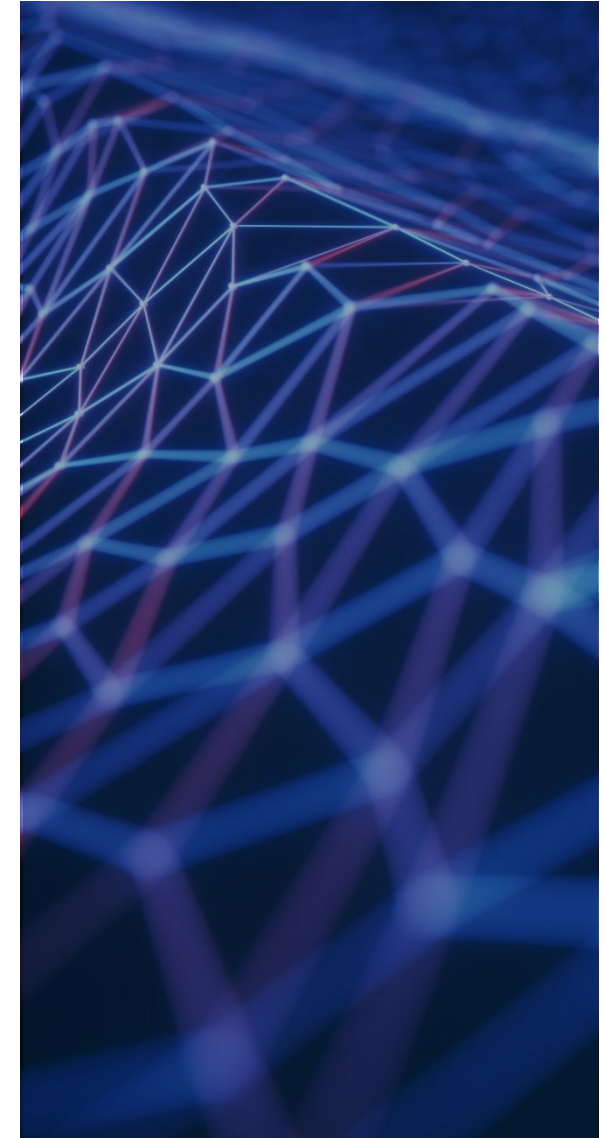
2



This guide looks at the most pressing questions we have been asked by our Financial Services Industry clients, looking to balance COVID-19 relief measures with the very strict EU regulatory requirements that govern remuneration within the sector. It contains the input of our specialists in France, Germany, Italy, the Netherlands, Spain and the United Kingdom.

Questions include:

1. Does COVID-19 relief qualify as "government support"?
2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?
3. How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?
4. Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all)?
5. Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?
6. Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?
  - What if no performance is delivered because people are at home?
7. Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?
8. Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?
9. Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?
10. How to deal with target setting when people are at home, etc.?<sup>1</sup>
11. How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>
12. How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>
  - What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?
13. What options are there to adjust bonus plans?
14. What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?
15. What options are there to adjust employment conditions?
16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?
17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?



<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



# Employee Benefits within the Financial Services Industry: balancing COVID-19 relief with EU remuneration rules



As at 30 April 2020

For more information, please do not hesitate to contact our team members below:



**France**

**Agnès Charpenet**

+33 1 44 17 53 78  
agnes.charpenet  
@bakermckenzie.com



**France**

**Geoffrey Poras**

+33 1 44 17 65 89  
geoffrey.poras  
@bakermckenzie.com



**Germany**

**Ludmilla Maurer**

+49 69 2 99 08 609  
ludmilla.maurer  
@bakermckenzie.com



**Germany**

**Agnes Herwig**

+49 69 2 99 08 417  
agnes.herwig  
@bakermckenzie.com



**Germany**

**Manuel Lorenz**

+49 69 2 99 08 506  
manuel.lorenz  
@bakermckenzie.com



**Italy**

**Andrea Mirabella**

+ 39 02 76231 537  
andrea.mirabella  
@bakermckenzie.com



**Netherlands**

**Don-Tobias Jol**

+ 31 20 551 7486  
don-tobias.jol  
@bakermckenzie.com



**United Kingdom**

**Jeremy Edwards**

+ 44 20 7919 1263  
jeremy.edwards  
@bakermckenzie.com



**United Kingdom**

**Gillian Kate Murdoch**

+ 44 20 7919 1673  
gillian.murdoch  
@bakermckenzie.com



**Spain**

**Davinia Rogel**

+34 93 255 11 25  
davinia.rogel  
@bakermckenzie.com

Click the relevant flag below for guidance on each location:



France



Germany



Italy



Netherlands



Spain



United Kingdom



- 1. Does COVID-19 relief qualify as "government support"?**

  - The French Government has adopted several COVID-19 relief schemes to support companies such as:
    - A solidarity fund for small scale enterprises or self-employed individuals
    - Two schemes allowing the French public investment bank Bpifrance to provide state guarantees on commercial loans and credit lines for companies employing up to 5,000 persons
    - A scheme to provide banks with state guarantees on new loan portfolios for all types of enterprises. This constitutes a direct aid to companies, which will enable banks to promptly provide liquidity to any company in need.
  - These reliefs qualify as "states aid" pursuant to article 107 of the Treaty on the Functioning of the European Union (TFEU), which have been notified to the European Commission according to article 108 of the TFEU. The Commission concluded that the French measures complied with the requirements provided for by the "*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*" dated 19 March 2020.
  - With regard to taxation, the French government has also offered options to postpone the deadlines to file tax returns and to pay certain direct taxes, or even tax remission in certain circumstances. To the best of our knowledge, this aid has not been notified to the European Commission and does not qualify as "state aid" pursuant to Article 107, TFEU.
  - Nevertheless, this option is subject to a commitment of non-payment of dividend in 2020 unless they have a legal obligation to pay dividends or if the decision to pay dividends has been adopted prior to 27 March 2020.
  - In addition, a bill has been submitted to the National Assembly and seeks to prohibit companies that have benefited from national solidarity from paying dividends in 2020.

---

- 2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?**

Please see our answer in item no. 1.

---

- 3. How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?**

Should be assessed according to the abovementioned "*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*".

---

- 4. Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all)?**

Please see our answer in item no. 1.



5. **Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?**

Please see our answer in item no. 1.

6. **Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?**

- Please see our answer in item no. 1.
- No ordinance adopted under the Emergency Law provides for bans on dismissing workers.

**What if no performance is delivered because people are at home?**

7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?**

- The employee's variable remuneration and methodology of calculation/adjustment are generally provided for by the employment contract. When based on performance objectives, being at home has no consequences if the objectives can be met remotely.
- Exceptionally, the employer may decide to pay bonus on a discretionary basis.

8. **Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?**

Please see our answer in item nos. 1 and 7.

9. **Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?**

Please see our answer in item nos. 1 and 7.



10. **How to deal with target setting when people are at home, etc.?**<sup>1</sup> Please see our answer in item nos. 1 and 7.

11. **How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?**<sup>2</sup> There is no specific regulatory requirement on this matter.

12. **How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?**<sup>2</sup> There is no specific regulatory requirement on this matter.

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

13. **What options are there to adjust bonus plans?** Please see our answer in item nos. 1 and 7.

14. **What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?** Please see our answer in item nos. 1 and 7.

<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



- 
- 15. What options are there to adjust employment conditions?** The consent of employees is requested to modify the variable remuneration, provided that the remuneration is based on a contractual agreement.
- 
- 16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?** An ordinance issued under the Emergency Law sets out and allows employers to force their employees to take paid holidays or to reschedule them, without having to comply with the statutory one-month notice period.
- 
- 17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?** Please see our answer in item nos. 1 and 7.



## 1. Does COVID-19 relief qualify as "government support"?

- The German government measures currently focus on the real economy. There is no specific COVID-19 programme for financial institutions nor is there any "active" rule in German banking and financial services supervision law that would block financial institutions from paying bonuses as long as they receive state aid.
- The Financial Sector Support Fund's (FMS or "Soffin") power to support the financial sector has expired on 31 December 2015. The relevant ordinance allowed limitations on the remunerations of members of the bank's organs and the executive managers and did require such remuneration to be reasonable. Any remuneration above EUR 500,000 per annum was deemed unreasonable. Moreover, no severance payments were allowed unless legally required. Bonuses and discretionary benefits were not supposed to be paid as long as the bank was using government aid, including bonuses to compensate a reduced fixed salary. Finally, performance targets, strike prices for stock option and other parameters for performance-related compensation were not supposed to be changed to the detriment of the bank. The concrete measures were decided when the support was granted to a specific financial institution.
- For the sake of clarity, the FMS is not currently "reactivated" in connection with COVID-19 and the above information is purely historical.
- In connection with COVID-19, Germany has created an Economic Support Fund (ESF) that consists of three measures including:
  - i. government guarantees for loans and debit instruments
  - ii. equity and quasi equity participation
  - iii. a refinancing of the COVID-19 Relief programmes offered by the state-owned *Kreditanstalt für Wiederaufbau* (KfW). The KfW does not grant direct loans but supports loans granted by commercial banks.
- The fund is not available to companies from the real economy and not to grant relief to banks or other companies from the financial sector.
- The state guarantees and equity support for the real economy are generally considered as "government support". The approval by the EU will have to be granted individually or in the form of a general framework adopted by the European Commission. According to our information, the EU Commission is currently working on such general framework, which will likely include restrictions on bonus payments.
- The programmes of the KfW include:
  - i. The KfW 2020 special programme allowing
    - a. loans to small companies in the start-up phase (5 year existence of company) to fund investments and operating cost.
    - b. Loans to companies in existence longer than 5 years.
    - c. Participation in syndicated large scale financings
  - ii. The KfW quick loan programme
- In addition, the federal states have their own programmes.





- 1. Does COVID-19 relief qualify as "government support"?**

  - The KfW programmes have already been approved by the European Commission as government support from an EU law perspective.
  - Moreover, the following support measures are available:
    - i. One-off support payments in case of liquidity shortages for small businesses up to 9,000 EUR (for up to five full-time employees) or up to 15,000 EUR (up to ten full time employees). The funds can be used to fund operating cost. These measures are certainly "government support".
    - ii. In addition, the European Central Bank and the Federal Financial Supervisory authority have relaxed regulatory rules in many respects particularly as regards regulatory capital. This type of relief does not qualify as "government support".

---

- 2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?**

It is not apparent that any of the measures have an impact on employee benefits, other than in case of FSM (historical) and ESF support – in the latter case, the grant of relief shall be dependent on certain conditions. These shall be regulated by ordinances that have not yet been enacted, but which would allow limitations on the compensation of the organs of the company, i.e., the senior management and the members of the supervisory board, but not other staff.

---

- 3. How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?**

N/A, as foreign relief rules will determine the limitations on employee benefits.

---

- 4. Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all)?**

Please see our answers in item no. 3.

---

- 5. Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?**

Please see our answers in item no. 3.



6. Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?

N/A, as this would be a matter of foreign law.

What if no performance is delivered because people are at home?

7. Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?

- If no performance is delivered, then no bonus is likely to be awarded.
- Banks will not be allowed to offer bonuses, which are not tied to performance, as this would run afoul of the rule against guaranteed bonuses.

8. Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?

- Guaranteed variable remuneration pursuant to the German rule against guaranteed bonuses is characterised by the fact that they are not determined and promised on the basis of a measurement of success or performance. They can appear under different names, such as "guaranteed bonus", "welcome bonus", "start bonus" or "minimum bonus", and can be granted either in cash or in instruments. Therefore, a case-by-case assessment of the company's remuneration policy, the actual employment agreement and the (performance or other KPI) criteria used to determine the variable remuneration is required to determine whether the variable remuneration is possible under the German rules.
- Supervisory law cannot trump acquired rights under employment law.
- Other than that, the rules (for certain institutions) furthermore make clear that variable remuneration is paid only if it is sustainable according to the financial situation of the institution as a whole, and justified on the basis of the performance of the institution, the business unit and the individual concerned. On this basis, the total variable remuneration shall generally be considerably reduced where subdued or negative financial performance of the institution occurs, particularly, the size of the overall bonus pool must not lead to the institution being unable to meet (or restore) its capital and liquidity requirements on a sustainable basis. The bonus pool must be determined in line with the institution's risk bearing capacity, multi-year capital planning and profit situation.

9. Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?

No, from a regulatory perspective, a guaranteed bonus is one guaranteed at the outset.



**10. How to deal with target setting when people are at home, etc.?<sup>1</sup>**

- Assuming new bonus targets are to be determined for people working at home, there is no reason to deviate from normal principles. Where necessary, targets should be adjusted to set the right performance incentives. It would not be possible to abandon performance targets completely just because people work from home. However, a case-by-case assessment is necessary in order to determine whether the previous targets need to be adjusted or if the employees can still reach the targets working from outside the office.
- For the sake of completeness, the ECB has expressed its expectation that banks shall not use the capital and liquidity relief granted to them against the background of the current COVID-19 situation for purposes of increasing variable remuneration.
- The Federal Financial Supervisory Authority (BaFin) made a similar, but somewhat stronger statement on 24 March 2020 and expressed a "recommendation" that in the current situation, banks should not engage in share buybacks and should "carefully evaluate" the payout of dividends, profits and **bonuses**. While this is a mere recommendation, which does not amount to a downright prohibition of paying bonuses, banks might have some difficulty in justifying their bonus payouts with the regulator and should reconsider their variable remuneration decisions in light of these supervisory recommendations.

**11. How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**

There is no specific regulatory guidance. This needs to be determined under the respective bonus awards and agreements, whether these allow special rewards in recognition of special efforts in light of COVID-19.

**12. How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**

Please see our answer in item no. 11.

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



- 
- 13. What options are there to adjust bonus plans?**
- If the bonus in the bonus plan validly provides for a discretionary bonus, an equitable decision is required but it is possible to not make a bonus payment. The company would then have the authority to decide not to grant a bonus in a relevant year to objective circumstances, e.g., a loss in turnover. However, most bonus payments are not discretionary and have to be paid under the agreed conditions. Employee consent would then be required in order to make changes to the bonus plan. If the bonus conditions were agreed on a collective level with a works council, the conditions could be changed by works agreement with the works council.
- 
- 14. What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?**
- Please see our answer in item no. 13.
- 
- 15. What options are there to adjust employment conditions?**
- In principle, employee consent is required.
  - Depending on the condition, employment contract clauses may give the employer possibility to change employment conditions. However, it needs to be checked whether these were validly agreed.
  - If the employment conditions were agreed on a collective level with a works council, the conditions could be changed by works agreement.
  - In exceptional cases, employment conditions may be changed by way of termination for change of contract. The employer would then terminate the individual employment contract combined with the offer of a continuation of the employment with the changed employment conditions. The requirements for the justification of such termination are very high and the employer must have taken alternative measures first which have a lower impact for the employee. Additionally, the employment conditions could only be changed after the applicable notice period. The works council has to be consulted prior to issuing the termination.
- 
- 16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?**
- Please see our answer in item no. 13.
- 
- 17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?**
- Please see our answer in item no. 13.

**1. Does COVID-19 relief qualify as "government support"?**

- As a relief during the COVID-19 outbreak, the Government has made available (or enhanced and widespread to all companies) a number of salary support schemes (termed "CIGO"; "FIS"; "CIGD", the selection among which depends on business sector and eligibility) Generally speaking, said salary support schemes may qualify as government support (although the CIGD support scheme is provided on a regional basis).
- Pursuant to Section V, Chapter 2, Title IV of the First Part of the [Bank of Italy Circular no. 285](#) (the "Italian supervisory provisions for banks"), a bank or a banking group receiving exceptional public support must review their remuneration policies, in order to:
  - (i) limit the variable remuneration to a percentage of the net operating result, when this might impair the capitalisation and the possibility of exiting from the public support scheme
  - (ii) ensure that no variable remuneration is awarded to those who hold management, control and direction charges within the bank, except under motivated circumstances
  - (iii) ensure that the performance indicators and other parameters used are consistent with the objectives and contents of the restructuring plan and include the contribution of the most relevant personnel (i.e., subjects whose professional activity has or may have a significant impact on the bank's or banking group's risk profile) to its implementation
  - (iv) ensure that the variable component of the remuneration of the most important personnel is deferred by a percentage higher than that usually provided, if applicable up to 100%
  - (v) the variable component of the remuneration of the most important personnel is deferred by a percentage higher than that usually provided, if applicable up to 100%.
- The question is therefore whether an application for accessing to such supportive measures qualifies as state aid within the meaning of Article 107 (1) TFEU.
- Pursuant to Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU), government support would *inter alia* qualify as "state aid" when it is granted selectively. Since the measures recalled are not selective, i.e., no companies or sectors are favoured over other companies or sectors, we opine that if a financial undertaking would resort to such measures, this would not trigger Article 107 (1), TFEU.

**2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?**

This depends on the salary support scheme. Generally speaking, all employees excluding those classified as executives (i.e., *dirigenti*, in Italian).

**3. How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?**

The impact of foreign COVID-19 relief should be assessed along the same lines as under item no. 1 above.





- 
4. **Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all)?** All of the Italian organization.
- 
5. **Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?** No. Please note that only Italian companies may have access to the Italian salary support scheme.
- 
6. **Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?** No. However, please note that as a general rule, employees may not be dismissed while under the salary support scheme (normally, this is provided under the agreement reached between the employer and the unions in order to access the salary support scheme). Also, please note that terminations due to business reasons are prohibited in Italy until 18 May 2020.
- What if no performance is delivered because people are at home?**
- 
7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?**
- Please note that the Italian supervisory provisions for banks provide rules on variable remuneration of personnel and corporate bodies of banks aiming at ensuring that the remuneration schemes reported in the remuneration policy of the bank comply with the purposes of the financial regulation, i.e., connection between remuneration and risk, compatibility of the remuneration with the capital and liquidity levels of the bank or the banking group, medium-long term sustainability and compliance with the applicable legal framework. Hence, the remuneration policy provides for quantitative and qualitative criteria to determine the variable remuneration, which include performance indicators, the risks profile of the bank, the performance evaluation period and an aggregate bonus pool sustainable in respect of the capital and liquidity resources of the bank. Furthermore, in light of the COVID-19 outbreak, the European Bank Authority (EBA) and the Bank of Italy requested banks to adopt a prudent and farsighted approach in setting their remuneration policies.
  - In this respect, any awarding of variable remuneration which does not respect the above conditions provided by the remuneration policy of the bank should not be allowed.
  - Pursuant to the Italian supervisory provisions for banks, banks cannot award guaranteed variable remuneration to its personnel, outside some limited exemptions which apply to newly hired personnel during their first year of employment. Hence, any awarding of variable remuneration which is not linked to the performance of the recipient and to the risk undertaken by the bank is prohibited under Italian law.



7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?**
- Remuneration linked to the permanence of the personnel, i.e., retention bonus and long-term incentive plans (i) coherent with the bank's strategic plan and which (ii) contemplate clear and predetermined performance indicators, do not fall under the prohibition of guaranteed variable remuneration.
  - As a general rule, and without prejudice to what is stated above on the prohibition for financial institutions to provide employees with a granted variable salary, please also note that Italian case law on variable salary holds that if variable aspects of remuneration (e.g., bonus) are paid by the employer on a regular basis and without a close link to specific individual/company's target(s), this remuneration could be deemed to be part of employee's fixed salary. The employer could then be prevented from ceasing the payment of this same amount, provided that should the employer be found in breach of the regulations governing remuneration of individuals employed by financial institutions (see above), the relevant set of rules and sanctions would apply.
- 
8. **Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?**
- This needs to be determined on a case-by-case basis as it depends on the bank's remuneration policy (please see our answer in item no. 7 above for the criteria under which the grant may be in compliance with the bank's remuneration policy).
  - For example, granting of variable remuneration which is due according to the remuneration policy is of course allowed. On the other hand, claims of variable remuneration solely on the basis of acquired rights would fall under the scope of the prohibition of guaranteed variable remuneration.
- 
9. **Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?**
- Please see our answers in item no. 7 above.
  - Only variable remuneration which is not linked to the performance of the recipient and to the risk undertaken by the bank is considered guaranteed variable remuneration.
- 
10. **How to deal with target setting when people are at home, etc.?<sup>1</sup>**
- This is not an issue clearly addressed by the Italian supervisory provision for banks. In principle, it would be possible to amend the remuneration policy adopted by banks in order to adapt them to the new pandemic scenario (but this should be assessed on a case-by-case basis, taking into account the relevant remuneration policy). However, this kind of intervention is of limited application as the remuneration policy must comply with the financial regulation purposes described in our answer in item no. 7 above.
- 
11. **How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**
- Discretionary awards must be compliant with the remuneration policy of the bank. In addition, the recourse to these awards must not violate the prohibition of awarding of guaranteed variable remuneration, as described in our answer in item no. 7 above.

<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



**12. How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

One-off awards must be compliant with the remuneration policy of the bank. In addition, the recourse to these awards must not violate the prohibition of awarding of guaranteed variable remuneration, as described in our answer in item no. 7 above.

**13. What options are there to adjust bonus plans?**

This depends on the content of each bonus plan and on whether the relevant bonus amount have already accrued to the employee(s). In any case, please refer to our answer in item no. 10 above with regard to the amendment of the remuneration policy adopted by banks in light of the pandemic situation.

**14. What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?**

In accordance with the bonus plan provided under the remuneration policy.  
Should the bonus plan do not provide anything in this respect, a case-by-case analysis will be necessary, taking into consideration the actual circumstances leading to the non-payment.

**15. What options are there to adjust employment conditions?**

This depends on the term/condition to be changed. Indeed, certain terms may be unilaterally changed by the employer within the limits set forth under the law (e.g., tasks; workplace) while other terms may be changed only if an agreement with the concerned employee is reached (e.g., working time). For this purpose, the execution of the relevant agreement in a competent venue (e.g., in Court, before unions, before labour authority, etc.) is normally advisable/necessary (depending on the term/condition subject to change).

**16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?**

Individuals cannot be forced to waive certain conditions or accrued rights.  
Certain waivers may be achieved, provided that these do not affect employees' rights that cannot be waived under the law and that the relevant waiver is agreed upon before a competent venue as enumerated in item no. 15.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



- 17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?**
- Under no circumstance may the employer stop to pay social security contributions. As regards a reduction in salary, as a general rule this may not be imposed upon the employee unless a proportional reduction in working time is agreed upon. Special agreements in this regard may be tailored with reference to executive employees (i.e., *dirigenti*, in Italian).



**1. Does COVID-19 relief qualify as "government support"?**

- Article 1: 128 of the Dutch Financial Supervision Act (Wft) stipulates that a financial undertaking, which receives state aid within the meaning of Article 107, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU) in connection with the stability of the financial system, may not award variable remuneration during the period of provision of such aid to its day-to-day policymakers (the Board of Directors) or the second echelon (senior management). Also, the fixed remuneration of these officers may not be increased during this period to compensate for the loss of variable remuneration.
- The question is therefore whether an appeal to the Dutch COVID-19 relief fund (Temporary Emergency Bridging Measure for Sustained Employment or NOW) qualifies as state aid within the meaning of Article 107 (1) TFEU. In the explanatory notes to the NOW, the Dutch government stated that it is "a generic and temporary subsidy scheme for all companies affected in their turn-over by the consequences of COVID-19 or other extraordinary circumstances". Within the meaning of Article 107 (1) TFEU, government support would i.a. qualify as "state aid" when it is granted selectively. Since the NOW is not selective, i.e., no companies or sectors are favoured over other companies or sectors, we feel it is defensible for the time being to follow the Dutch government's point of view that there is no state aid within the meaning of Article 107 (1) TFEU. In addition, the Dutch bonus ban only applies for state aid within the meaning of Article 107 (1) TFEU that is granted in connection with "the stability of the financial system". This is not the case under NOW either. Our tentative conclusion therefore is that a financial undertaking that appeals for the NOW should not trigger the bonus ban under Article 1: 128 of the Dutch Financial Supervision Act (Wft).
- In addition, in case of "exceptional government measures", a specific rule (Article 2, Part A, sub 7, Rbb 2017) applies to banks and investment firms, which provides that (i) the variable remuneration must be limited strictly to a percentage of the net profits and (ii) the (fixed) remuneration must be restructured in such a way that they correspond with sound risk management and long-term development. In this context, it is important to determine whether application of the NOW would qualify as an "exceptional government measure". Although the link with state aid within the meaning of Article 107 (1) TFEU does not follow explicitly from the legal text, it seems likely from the explanatory notes that this article was indeed intended for such state aid, i.e., that it must specifically concern state aid for the (banking) sector. Since this is not the case with the NOW, we tentatively conclude that the aforementioned remuneration restrictions should most likely not apply to a bank or investment firm that uses the NOW either.
- However, please note that the European Commission very recently published a draft policy paper suggesting that companies who received a capital injection from an EU government due to the COVID-19 crisis, should not be allowed to pay dividends and bonuses, nor buy back their own shares. As long as the state holds an interest in them, the paper further suggests they should not be allowed to make any acquisitions. While this very early draft does not have any current legal force, the implementation of these or similar measures might well alter our conclusions as set out above.

**2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?**

N/A, please refer to item no. 1.





- 
3. **How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?** Should be assessed along the same lines as under item no.1.
- 
4. **Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all)?** Should be assessed along the same lines as under item no.1.
- 
5. **Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?** Should be assessed along the same lines as under item no.1.
- 
6. **Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?** Should be assessed along the same lines as under item no.1.
- What if no performance is delivered because people are at home?**
- 
7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?** Under Dutch law, guaranteed variable remuneration is a specific type of remuneration that is based on very limited, performance criteria. As such, assuming that the performance criteria for the variable remuneration to be paid out during the COVID-19 support period have already been set and agreed at the start of the performance period in line with the institution's remuneration policy, the variable remuneration cannot be re-classified as guaranteed variable remuneration (as prohibited in article 1:124 Wft).



8. **Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?**
- This needs to be determined on a case-by-case basis as it depends on the company's remuneration policy, the actual employment agreements and the criteria (performance or other KPI) used to determine the variable remuneration. In general, the criteria must be based on quantitative and qualitative, including financial and non-financial, performance criteria for individuals, business units and institutions. In essence, the company determines the bonus pool and variable remuneration to be awarded based on an assessment of performance and risks taken.
  - The rules (for certain institutions) furthermore make clear that variable remuneration is paid only if it is sustainable according to the financial situation of the institution as a whole, and justified on the basis of the performance of the individual, business unit or institution concerned. On this basis, the total variable remuneration shall generally be considerably contracted where decreased or negative financial performance of the institution occurs, taking into account both current remuneration and reductions in payouts of amounts previously earned,
  - including through malus or clawback arrangements. However, malus or clawback of variable remuneration is generally only allowed for individual acts of the staff member concerned and not for the institution's overall performance, for example responsibility for conduct which resulted in significant losses to the institution or failure to meet appropriate standards of fitness and propriety ("failure is not rewarded").
- 
9. **Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?**
- Should be assessed along the same lines as under item no. 7.
- 
10. **How to deal with target setting when people are at home, etc.?<sup>1</sup>**
- There is no clear guidance on this from the Dutch regulator or competent authorities. The European Banking Authority (EBA) issued guidance to competent authorities to make sure that banks review their remuneration policies, practices and awards to ensure that they are consistent with and promote sound and effective risk management also reflecting the current economic situation. Remuneration and, in particular, its variable portion should be set at a conservative level. According to the EBA, to achieve an appropriate alignment with risks stemming from the COVID-19 pandemic, a larger part of the variable remuneration could be deferred for a longer period and a larger proportion could be paid out in equity instruments.
  - The Dutch Central Bank (DNB) issued a statement that banks are not to use temporary capital and operational relief measures announced by the European Central Bank (ECB) to increase dividend distributions or variable remuneration.
- 
11. **How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**
- There are no specific regulatory requirements on discretionary awards not taking the form of (guaranteed) variable remuneration.

<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



12. **How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

There are no specific regulatory requirements on one-off awards not taking the form of (guaranteed) variable remuneration.

13. **What options are there to adjust bonus plans?**

If the bonus plans are implemented and communicated in a discretionary manner, a company in principle has the authority to decide not to grant bonus in a relevant year due to objective circumstances, e.g., a loss in turnover. However, in the event a company in practice has actually implemented the bonus plans on an annual basis and during several subsequent years unreservedly, the bonus could be regarded as an acquired right, forming part of the employment agreements of the employees in the Netherlands. In that case, consent of the employees is required in order to make changes to the bonus plans.

14. **What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?**

Please see our answers in item nos. item no. 13.

15. **What options are there to adjust employment conditions?**

Please see our answers in item no. 13. In practice, we see that clients are asking for the consent of employees to not pay or postpone bonus payments, merit increases, take ADV days (absences) or reduce salary.

16. **What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?**

Please see our answers in item nos. 13 to 15.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



# Netherlands



17. **For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?** No, in principle, consent is required. While consent given under this circumstance may be questionable, in practice, employers are reaching out to employees to ask their consent during COVID-19.



## 1. Does COVID-19 relief qualify as "government support"?

- Certain COVID-19 relief measures may qualify as state aid in light of Article 107 of the Treaty on the Functioning of the European Union (TFEU).
- To qualify as state aid under Article 107 of the TFEU, the measure must meet the following requirements:
  1. The measure must be attributable to the State and financed through State resources.
  2. It must confer an advantage to its recipients.
  3. Such advantage must be selective in nature.
  4. The measure must distort or threaten to distort competition and affect trade between Member States.
- In fact, several COVID-19 relief measures approved by the Spanish Government have been notified to the European Commission under Article 108 TFEU and the European Commission has confirmed that such measures qualify as state aid. These are Commission decisions on the matter:
  - SA.57019 Spain - COVID-19: Temporary Framework support measures for COVID RDI, wages, tax/social contribution deferral and COVID-19-related production
  - SA.56851 Spain - ECON - Umbrella Scheme - National Temporary Framework for State aid in the form of direct grants, repayable advances, tax advantages, guarantees on loans and subsidised interest rates for loans to support the economy in the current COVID-19 outbreak
  - SA.56803 Spain - COVID-19: Guarantee scheme to companies and self-employed to support the economy in the current COVID-19 outbreak
- It is worth noting that the European Commission has published a Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 91I, 20.3.2020, p. 1–9) and subsequent amendments. In this document, the Commission acknowledges the detrimental effects of the COVID-19 crisis and Member States' support measures to face this effects and further reminds that:
  1. not all support measures will qualify as State aid,
  2. other measures that do qualify as State aid may be covered by existing exemptions and approvals and
  3. there are conditions under which the Commission will approve measures by Member States in a matter of days rather than months.

## 2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?

Both employers and employees.





# Spain



3. **How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?** Helping measures. Please see item no. 1.
- 
4. **Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all?** N/A
- 
5. **Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?** Yes
- 
6. **Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?**
- What if no performance is delivered because people are at home?**
- According to one of the recent Royal Decrees approved by the Government, a dismissal during the state of emergency due to the COVID-19 crisis will be deemed as not justified.
  - The decree makes it easier for people to be temporarily suspended from work, rather than laid off, and to retain all of their benefits. Any workers affected by a temporary collective layoff procedure (ERTE) will receive unemployment benefits, including those that would not normally be eligible. In cases of temporary contract suspensions or reduced working hours due to force majeure an exemption has been granted for 100 percent of employer social security contributions for companies with less than 50 employees, and 75 percent for the rest. The condition to access these benefits is for the employers to maintain the positions for six months once the activity is resumed.
  - The self-employed that cease their activity or see their revenues fall by at least 75 percent will be able to access the self-employed unemployment benefit for the period that the state of emergency is in place, even when the minimum period required has not been met



- 
7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?** It will depend on the terms and conditions of the variable remuneration. If, for example, the variable remuneration depends on the employee's performance or certain goals achievement, if the employee is not working then he/she will not be entitled to the variable remuneration unless he/she meets the conditions for the variable remuneration to be paid. If, on the contrary, the variable remuneration depends on the company's results, if those results are met then the employee will be entitled to the variable remuneration regardless not having worked. **In any case, it is important to analyse the variable scheme, since the payment will depend on the terms and conditions of the same.**
- 
8. **Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?** Yes. If it is an acquired right, in principle, the company will be obliged to its payment. Further, in case the terms and conditions foreseen in the scheme of the variable remuneration are met, then the employee will also be entitled to such amounts.
- 
9. **Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?** Please see our answers in item nos. 7 and 8.
- 
10. **How to deal with target setting when people are at home, etc.?<sup>1</sup>** It would be advisable to review the current variable remuneration scheme in order to adjust it to the current working system if possible.
- 
11. **How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>** It is possible to proceed with a unilateral discretionary payment. However, it would be advisable to make it clear that the payment is extraordinary and that under no concept will it entitle the worker to future payments of the same sort, i.e., it should be indicated that the payment will not constitute an acquired right.

<sup>1</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



**12. How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>2</sup>**

It is possible to proceed to a one-off payment. However, it would be advisable to make it clear that the payment is extraordinary and that under no concept will it entitle the worker to future payments of the same sort, i.e., it should be indicated that the payment will not constitute an acquired right.

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

**13. What options are there to adjust bonus plans?**

1. Unilaterally, as long as the existing plan allows the unilateral change by the employer.
2. Otherwise, unilateral change will not be possible unless a specific procedure is followed for the substantial change of the employment conditions based on economical, technical, organizational or productive grounds. Through this procedure, the company may be entitled to modify the amount and scheme of the bonus. However, the employee will be entitled to request the termination of his employment relationship with a severance payment consisting of 20 days of salary per each year worked up to 9 monthly instalments.
3. Voluntarily agreed with the employee. Given the current situation, it might be possible to reach an agreement with the employees in this regard.

**14. What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?**

1. From an employment perspective, there are not many options to avoid the payment unless otherwise agreed with the employees or if the possibility is foreseen in the plan.
2. Otherwise, the only available option would be to resort to the procedure of substantial change of the employment conditions based on economical, technical, organizational or productive grounds (with the consequence mentioned in item no. 13).

**15. What options are there to adjust employment conditions?**

Substantial changes to existing employment conditions may be agreed with the employee. Otherwise, it would be necessary to follow the procedure mentioned in item no. 13 for substantial change in employment conditions.

<sup>2</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.



**16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?**

1. In practice, companies are keeping its employees informed about the current situation of the company and the impact of COVID-19. If the company is able to convince the employees about the need to adopt some measures, such as the need to reduce their salary or enjoy holidays now to be able to work in the future once the state of emergency is lifted, then in such cases, it is possible to make employees waive certain rights (also bearing in mind the minimum statutory rights of the employees).
2. Another option is to follow the procedure for substantial change in employment conditions (as discussed in item no. 13). Note that regardless of compliance with the procedure, the employees' minimum statutory rights may not be disregarded (i.e., minimum holidays or minimum salary).

**17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?**

- The employer is not entitled to unilaterally stop such payments. In such case, the employee will be entitled to claim against the employer's decision. In order to avoid any claims, the following options may be taken:
1. Try to reach an agreement with the employee explaining to him/her the current situation and the future situation of the company in light of COVID-19. If the employee understands that the future of the company is at stake, he/she may agree to some changes in his/her employment conditions for a certain period.
  2. Proceed with a collective procedure for reduction of working hours and consequently, a proportionate reduction in salaries. Such reduction in compensation will not affect the employee's pensions contribution unless otherwise specified in the pension plan.



## 1. Does COVID-19 relief qualify as "government support"?

- The UK government has provided a range of COVID-19 relief measures to support businesses in the UK. For example, under the Coronavirus Job Retention Scheme (CJRS), all UK employers can claim a grant from Her Majesty's Revenue and Customs (HMRC) to cover 80% of the wage costs of employees who are not working but are kept on the payroll (i.e., they are "furloughed"), of up to GBP 2,500 a calendar month for each employee or Pay As You Earn (PAYE) worker (including the associated employer national insurance contributions).
- Applying Article 93 of CRD IV<sup>1</sup>, the UK's Financial Conduct Authority (FCA) Handbook and Prudential Regulation Authority (PRA) Rulebook confirm that firms who benefit from "exceptional government intervention" must ensure that:
  - (i) variable remuneration is strictly limited as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base and timely exit from government support;
  - (ii) it restructures remuneration in alignment with sound risk management and long-term growth, including when appropriate establishing limits to the remuneration of senior personnel; and
  - (iii) no variable remuneration is paid to its senior personnel unless justified.<sup>2</sup>
- The FCA would normally expect it to be appropriate for the ban on paying variable remuneration to senior personnel of a firm that benefits from exceptional government intervention to apply only in relation to senior personnel who were in office at the time that the intervention was required.<sup>3</sup>
- It could be argued that, where firms to whom the Capital Requirements Directive (CRD) IV applies are in receipt of government support, such as the CJRS, this would constitute "*exceptional government intervention*". No guidance has been issued in relation to this point.
- Furthermore, press reports suggest that companies rescued by EU state share-buying programmes during the COVID-19 pandemic will be barred from paying bonuses to executives, dividend payments and share buybacks.<sup>4</sup> This would apply to the UK at least until the end of the Brexit transitional period which is due to end on 31 December 2020 (although this may be postponed in light of the COVID-19 pandemic).

## 2. Who does this impact (daily policy makers, Identified Staff, all employees, or not)?

Please see our answers to item no. 1 above.

<sup>1</sup> Article 93 of CRD IV

<sup>2</sup> Senior Management Arrangements, Systems and Controls Sourcebook ("SYSC") 19C.3.20; Principle 10.1 of the PRA Rulebook

<sup>3</sup> SYSC 19C.3.21

<sup>4</sup> <https://www.theguardian.com/business/2020/apr/15/eu-to-bar-executive-bonuses-for-state-rescued-firms>



3. **How does local COVID-19 relief in other countries (outside your own jurisdiction) qualify in this respect?** N/A

4. **Does foreign COVID-19 relief impact the entire organization, or only the part of the organization abroad, or not at all?** N/A

5. **Does foreign COVID-19 relief qualify as "government support" under the reward rules in your jurisdiction?** N/A

6. **Do these foreign COVID-19 relief schemes contain conditions with regard to variable remuneration, or e.g. bans on dismissing workers?** N/A

**What if no performance is delivered because people are at home?**

7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?**

- Subject to our responses in item no. 1, employers may award variable remuneration (including guaranteed variable remuneration) in accordance with various remuneration codes.
- For example, under the bonus cap, variable pay should be capped at 100% of fixed remuneration (or 200% with shareholder approval).<sup>5</sup> Each firm must also set appropriate ratios between fixed pay and variable pay to ensure that fixed pay is a sufficiently high proportion of total remuneration to allow for the possibility of paying no variable pay.<sup>6</sup>

<sup>5</sup> Article 94(1)(g)(i) and (ii) of CRD IV

<sup>6</sup> Article 94(f) of CRD IV



7. **Is the employer allowed to award variable remuneration (in the context of, for example, 'good employment' practices), or is this classified as guaranteed variable remuneration?**
- In general, guaranteed variable pay is not considered to be consistent with sound risk management or the pay-for-performance principle and should not be part of prospective remuneration plans.<sup>7</sup> For Code Staff who do not satisfy the de minimis concession, firms must ensure that guaranteed variable pay (i.e., a bonus or other variable pay where the amount that the individual receives is guaranteed or fixed, albeit that these amounts may be forfeitable in certain circumstances) is not part of their prospective remuneration plans unless it is:
    - a) exceptional
    - b) occurs in the context of hiring new staff
    - c) the firm has a strong and sound capital base
    - d) it is limited to the first year of service.<sup>8</sup>
  - The PRA and FCA also expect firms subject to CRD IV to ensure that guaranteed variable remuneration is subject to deferral and malus and clawback.
- 
8. **Should variable remuneration then even be granted (in the context of, for example, employees claiming an acquired right)?**
- Employers may grant variable remuneration but this should be determined on a case-by-case basis, subject to the company's remuneration policy, the employment agreements and the criteria used to determine the variable remuneration.
  - On 31 March 2020, the European Banking Authority (EBA) published a statement which confirmed that remuneration for banks and, in particular the variable portion, should be set at conservative levels. They also suggested that a larger part of the variable remuneration could be deferred for a longer period and a larger proportion could be paid out in equity instruments.<sup>9</sup> Please click [here](#) to access the EBA statement.
  - The PRA - which is responsible for the Prudential Regulation and Supervision of approximately 1,500 Banks, Building Societies, credit unions, insurers and major investment firms in the UK - also published a statement confirming that it expects banks not to pay any cash bonuses to senior staff, including material risk takers. It also requested that boards of the large UK banks suspend dividends and buybacks on ordinary shares until the end of 2020, and cancel payments of any outstanding 2019 dividends.<sup>10</sup> Please click [here](#) to access the PRA statement.
- 
9. **Would this then not be a guaranteed variable remuneration under the FSI remuneration rules?**
- N/A

<sup>7</sup> Article 93(d) of CRD IV

<sup>8</sup> Article 93(e) of CRD IV

<sup>9</sup> European Banking Authority "[Statement on dividends distribution, share buybacks and variable remuneration](#)" published 31 March 2020.

<sup>10</sup> Prudential Regulation Authority, "[Statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to COVID-19](#)" published 31 March 2020.





**10. How to deal with target setting when people are at home, etc.?<sup>11</sup>**

There is no specific guidance on this point from the PRA or competent authorities. Please note the statements made by the PRA and EBA referred to in item no. 8 above.

**11. How to deal with discretionary awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>12</sup>**

- Limited guidance has been published by the UK's regulatory bodies. Discretionary awards for special contributions should not be paid out in cash.<sup>13</sup> Firms must ensure that any variable pay awarded to Code staff who do not satisfy the *de minimis* concession is only paid or vests if it is sustainable according to the financial situation of the firm and justified on the basis of the performance of the firm, business unit and individual. Some institutional investors are recommending that companies pay only salary and, where shares are provided in recognition of special contributions, investors are keen to ensure that directors do not receive undue rewards in the future when share prices have recovered following the COVID-19 pandemic.
- Additionally, in guidance published by the Investment Association on 27 April 2020, they confirmed that, where companies are seeking to make Long-term Incentive Plan (LTIP) grants in the coming months, it is important for Remuneration Committees to take into consideration the individual circumstances of the company and the impact of COVID-19 on the company. In particular, Committees should be considering if it is appropriate to make LTIP grants at the current time and whether given the current market environment it might be more appropriate to postpone the current LTIP grant. To access the Investment Association's guidance, please click [here](#).

**12. How to deal with one-off awards, made for special contributions (not specifically described in the bonus sheets, but important to recognize in light of COVID-19)?<sup>12</sup>**

Please see our answers in item no. 11 above.

**What to do in terms of cost savings (taking into account the aspect of government support detailed under point 1)?**

<sup>11</sup> The guidance from the European Banking Authority (EBA) is to be even more prudent, but target setting is difficult at this time, due to COVID-19.

<sup>12</sup> It is probably not prudent to increase salaries, because this will lead to structurally higher costs.

<sup>13</sup> Prudential Regulation Authority, "[Statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to COVID-19](#)" published 31 March 2020.



### 13. What options are there to adjust bonus plans?

#### Adjustments in favour of employees

Investors are likely to view adjustments to performance conditions in favour of employees negatively. Many investors believe that adjustments should be looked at over long-term period and executive performance should reflect investor performance. It's likely to be hard to justify adjusting performance conditions in favour of employees, given that such adjustments will not be preserving capital (please refer to the EBA and PRA statements noted in item no. 8 above). In the PRA's Q&A published on 20 April 2020, they stated that, "As banks start drawing down on buffers they will face restrictions on distributions, such as dividends... and discretionary bonus payments, as required by European Legislation (CRDIV) which continues to apply in the UK". Additionally, the Investment Association has confirmed that it does not expect Remuneration Committees to adjust performance conditions for annual bonuses or in-flight long-term incentive awards to account for the impact of COVID-19. Shareholders will expect the Committee to use their discretion to reduce vesting outcomes where windfall gains have been received.

#### Adjustments that are not in favour of employees

If bonus plans are implemented and communicated in a discretionary manner, a company may, in principle, have the authority to decide not to grant a bonus in a relevant year due to objective circumstances, for example, where there is a loss of turnover. However, in the event that a company has, in practice, consistently implemented the bonus plans on an annual basis, the bonus could be regarded as an acquired right, forming part of the employees' employment agreements. In that case, consent of the employees is required in order to make changes to the bonus plans.

#### Investment Association Guidance

Guidance published by the Investment Association states that, where dividend payments are suspended or cancelled, members expect Boards and Remuneration Committees to consider how this should be reflected in their approach to executive pay. For some companies, bonus outcomes will have been decided and may even have been paid before the dividend payment was cancelled, however shareholders would expect Remuneration Committees to consider the use of discretion or malus provisions to correspondingly reduce any deferred shares related to the 2019 annual bonus in such instances. Alternatively, shareholders would expect this to be fully reflected in the FY2020 bonus outcomes.

Many listed companies will have spent significant time consulting with their shareholders on the new remuneration policies which will be put to shareholders through this AGM season. Shareholders do not believe that these companies should be rewriting their remuneration policies at this time, but if companies are seeking to propose variable pay increases in the current year, the Remuneration Committee should carefully consider if such an increase is appropriate in 2020. For those companies that are yet to consult on a new Remuneration Policy, it may not be appropriate to bring forward remuneration policies with substantial changes if the company is significantly impacted by COVID-19. For these companies, it may be more appropriate to wait until there is greater clarity on the future market environment before proposing significant changes to their policies.



**14. What options are available for non-payment (e.g. discretionary power of the Supervisory Board to adjust bonus payments downward)?**

- Companies should carefully review the terms of any bonus plans and the performance conditions attaching to any awards to check the scope of their discretion to adjust bonus payments downwards.
- Where financial performance is subdued or negative, firms should ensure that variable pay is "considerably contracted", including reducing payouts of amounts previously earned.<sup>14</sup>
- For firms to whom CRD IV applies, the total variable remuneration should be subject to malus and clawback.<sup>15</sup> Malus arrangements allow unvested variable remuneration to be reduced and clawback arrangements require recipients of awards to repay amounts already received.
- Where firms apply malus provisions to adjust bonus payments downwards, firms should ensure that the reasons are fully documented and taken by the relevant body at the correct stage of the process before vesting, having regard to all of the issues.<sup>16</sup>
- Some executives are reported to be voluntarily relinquishing bonuses. For example, the executive directors of Schroders are reported to have donated their 2020 LTIP awards and 25% of three months' salary to COVID-19 charities, while the chairman and the non-executive directors have donated 25% of three months' fees.<sup>17</sup>

**15. What options are there to adjust employment conditions?**

In practice, employers should comply with their existing contractual obligations before adjusting employment conditions or they should seek the consent of the employee.

**16. What options are there to force people to waive certain conditions or accrued rights (accrued holidays, for example)?**

Please see our answer in item no. 15 above.

**17. For example, can a salary sacrifice be requested or can the employer stop payment of the employer's pension contribution?**

- In practice, we are seeing some clients request that their employees forego part of their salaries in substitution for awards under employee share plans.
- For furlough arrangements under the CJRS, employees should provide their consent to the employer's furlough request. The government has also confirmed that mandatory automatic enrolment employer contributions of 3% of income above the lower limit of qualifying earnings will be covered by the CJRS.

<sup>14</sup> Remuneration 15.20; SYSC 19D.3.29R and SYSC 19A.3.27R

<sup>15</sup> Article 94(n) of CRD IV

<sup>16</sup> *Daniels and another v Lloyds Bank Plc and another* [2018] EWHC 660 (Comm) (27 March 2018)

<sup>17</sup> <https://www.cityam.com/coronavirus-schroders-boss-donates-to-covid-19-charities-as-firm-posts-aum-loss/>



# Baker McKenzie.

Baker & McKenzie LLP is a member firm of Baker & McKenzie International, a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2020 Baker & McKenzie LLP

[bakermckenzie.com](https://bakermckenzie.com)