

CRDV and BRRD II derogations: Session Two.



CRDV Derogations (1)

Article Number	Subject Matter	Summary of Provision	Summary of Derogation
Article 1 (27) – amending Art 94(4) of CRDIV	Variable Remuneration	<p>Article 94(4) establishes principles that firms must comply with when setting variable remuneration policies.</p> <p>Article 94(3) (a) provides that the principles in Article 94(4)(l) ,(m) and the second paragraph of point (o) do not apply to :</p> <ul style="list-style-type: none"> • An institution that is not a “large institution” (as defined in Art 4(146) of CRR) AND the value of assets of which is on average and on an individual basis equal to less than EUR 5 billion over the 4 year period immediately preceding the current financial year; 	<p>Article 94(4) allows Member States to lower or increase the €5 billion threshold (up to a maximum of €15 billion) for firms that meet the following requirements :</p> <p>(a) An institution is not a “large institution” AND , where the threshold is increased:</p> <ul style="list-style-type: none"> (i) the institution meets the criteria set out in Article 4(145) (c) , (d) and (e) of a “small and non-complex institution” (ii) the threshold does not exceed EUR 15 billion ; <p>AND</p> <p>(b) it is appropriate to modify the threshold, taking into account the institution’s nature, scope and complexity of its activities, its internal organisation or, if applicable, the characteristics of the group to which it belongs.</p>
Article 1 (27) – amending Art 94(5) of CRDIV	Variable Remuneration	<p>Article 94(3) (b) also exempts a “staff member whose annual variable remuneration does not Exceed EUR 50,000 and does not represent more than one third of the staff member’s total annual remuneration.” from the requirements in Article 94(1)(l) ,(m) and the second paragraph of point (o).</p>	<p>Article 94(5) enables Member states to lower the €50,000 threshold (and <u>therefore lower the limits for exemption to comply</u> with Article 94(1)(l), (m) and the second paragraph of point (o) because of “national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profiles of those staff members”.</p>

CRDV Derogations (2)

Article Number	Subject Matter	Summary of Provision	Derogation
Article 1 (36) – amending Article 109(6) of CRDIV	Variable Remuneration	<p>Article 109(1)-(3) sets out the circumstances whereby the remuneration requirements in Article 92 (Remuneration Policy), Article 94 (Variable Remuneration) and Article 95 (Remuneration Committee) should be applied on a consolidated basis to banking groups.</p> <p>Article 109(4) provides that these requirements are not to be applied on a consolidated basis to :</p> <p>(a) subsidiary undertakings established in the Union where they are subject to specific remuneration requirements in accordance with other Union legal acts;</p> <p>(b) subsidiary undertakings established in a third country where they would be subject to specific remuneration requirements in accordance with other Union legal acts if they were established in the Union.</p> <p>In addition, Article 109(5) establishes when these requirements are to be applied to staff in subsidiaries that would not otherwise be subject to CRDIV on an individual basis.</p>	Article 109(6) enables Member States to apply Articles 92, 94 and 95 on a consolidated basis to a broader scope of subsidiary undertakings and their staff (in situations where they would otherwise be required to apply these on an individual basis).
Article 1(49) – amending Article 133(1) or CRD IV	Systemic Buffers	Article 133(1) provides that Member States may introduce a systemic risk buffer of Common Equity Tier 1 for the financial sector or one or more subsets of exposures in accordance with the requirements set out in Article 133.	Article 133(1) gives Member States the option of introducing a systemic risk buffer.

CRDV Derogations (3)

Article Number	Subject Matter	Summary of provision	Summary of Derogation
Article 1(2)(xv) – amending Article 4(145) CRR	Definition of “small and non-complex institution”	<p>Article 4 (145) requires that for an institution to be classified as a “small and non-complex institution” it must meet all of the conditions within that definition. One of these conditions is that :</p> <p>“(b) the total value of its assets on an individual basis or, where applicable, on a consolidated basis in accordance with this Regulation and Directive 2013/36/EU is on average equal to or less than the threshold of EUR 5 billion over the four-year period immediately preceding the current annual reporting period”.</p>	The definition in Article 4 (145) permits Member States to lower the threshold of EUR 5 billion.
Article 1(108) – amending Article 413(4) CRR	Stable Net Funding Requirements	Article 413 (1)-(3) of CRR sets out the stable funding requirements institutions must meet under normal and stressed conditions.	Article 413(4) enables Member States to maintain or introduce national provisions in the area of stable funding requirements “before binding minimum standards for the net stable funding requirements set out in paragraph 1 become applicable”.

BRRD II Derogations (1)

Article Number	Subject Matter	Summary of Provision	Summary of Derogation
Article 33a(3) – as introduced by Article 1(12) of BRRD II	Pre – resolution moratorium powers	Article 33a gives the resolution authority a pre-resolution moratorium power to suspend any contractual payment or delivery obligations of a credit institution/ relevant investment firm where certain conditions in Article 33a(1) are met. <i>(e.g. a determination has been made that the institution or entity is failing or likely to failing – in accordance with Article 32(1).)</i>	Article 33a(3) provides that where the power in Article 33a(1) is exercised in respect of eligible deposits , Member States may require resolution authorities to ensure that depositors have access to an appropriate daily amount from those deposits.
Article 44a(1)- as introduced by Article 1(16) of BRRD II	Restrictions on the selling of subordinated liabilities	<p>Article 44a(1) provides that a seller of subordinated eligible liabilities can only sell such liabilities to a retail client provided the following conditions are fulfilled:</p> <p>(a)the seller has performed a suitability test in accordance with Article 25(2) of Directive 2014/65/EU;</p> <p>(b)the seller is satisfied, on the basis of the test referred to in point (a), that such eligible liabilities are suitable for that retail client; and</p> <p>(c)the seller documents the suitability in accordance with Article 25(6) of Directive 2014/65/EU.</p>	Article 44a (1) specifies that Member States may provide that the conditions set down in points (a) to (c) above also extend to sellers of other instruments that qualify as own funds or bail-inable liabilities
Article 44a(5) – as introduced by Article 1(16) of BRRD II	Restrictions on the selling of subordinated liabilities	Article 44a(5) gives Member States the option to add a further condition for selling subordinated debt to retail clients in addition to those provided in Article 44a(1) –(4).	Article 44a(5) provides that Member States may , after taking into account the market conditions and practices of that Member State, as well as existing consumer protection measures within the jurisdiction of that Member State, set a minimum denomination amount of at least €50,000 , for retail investors to purchase subordinated eligible liabilities.

BRRD II Derogations (2)

Article Number	Subject Matter	Summary of provision	Summary of derogation
Article 44a(6) – as introduced by Article 1 (16) of BRRD II	Restrictions on the selling of subordinated liabilities	Article 44a(6) gives Member states the option to disapply some of the requirements in Article 44a, under specified circumstances.	<p>Article 44a(6) provides that where the total value of assets of credit institutions and relevant investment firms (caught within the scope of BRRD) that are established within a Member State and are subject to the requirement referred to in Article 45e (MREL) does not exceed EUR 50 billion; that Member State may, by way of derogation from the requirements in Article 44a(1)-(5), apply only the requirement in Article 44a(2)(b):</p> <p>“that the initial investment amount in one or more liabilities instruments referred to in [Article 44a(1)] is at least EUR 10,000”</p>
Article 45b(8) – as introduced by Article 1(17) of BRRD II	Eligible Liabilities for Resolution entities	<p>Article 45b outlines the classes of liabilities, which are eligible to be included in an entity’s MREL requirement.</p> <p>Article 45b (8) states that the resolution authority may require that a G-SII, top-tier resolution entity or any other relevant resolution entities that meet one of the conditions outlined in the second subparagraph to Article 45b(8) hold additional capital requirements, the higher of:</p> <ul style="list-style-type: none"> (i) 8% of Total Liabilities and Own Funds (“TLOF”) or (ii) (2* total capital ratio (8%) + (2* CRD IV Pillar 2 capital requirement) + CRD IV combined buffer requirement. <p>Under Article 45b (7), resolution authorities can only exercise this power with respect to 30% of the G-SII’s, top-tier resolution entities and other relevant entities present in that Member State.</p>	45b(8) provides that Member States may set the 30% limit at a level higher than 30% , upon consideration of the specificities of the national banking sector and the amount of G-SIIs, top tier resolution entities and other relevant resolution entities for which the resolution authority sets an MREL requirement.

BRRD II Derogations (3)

Article Number	Subject Matter	Summary of provisions	Summary of derogation
Article 69(5) – as introduced by Article 1 (30) of BRRD II	In-resolution moratorium powers	Article 69 gives resolution authorities the power to suspend any contractual payment or delivery obligations in respect of an institution under resolution.	Article 69(5) provides that where the power in Article 69 is exercised in respect of eligible deposits , Member States may require resolution authorities to ensure that depositors have access to an appropriate daily amount from those deposits.
Article 71a(2) – as introduced by Article 1(33) of BRRD II	Contractual stay-in provisions	Article 71a, BRRD II introduces a requirement for entities to include a contractual term (within financial contracts governed by Third Country law) recognising that the contract may be subject to the exercise of resolution powers by the resolution authority.	Article 71a(2) gives Member States the option to require parent undertakings to ensure that their third country subsidiaries include similar terms in their financial contracts (which would prevent the exercise of the resolution authority’s powers from constituting a valid ground for early termination, suspension, modification, netting, the exercise of set-off rights or enforcement of security interest on those contracts).