Position Paper

Comments on EBA/CP/2025/17

Draft Guidelines on instruments available for third country branches for unrestricted and immediate use to cover risks or losses under Article 48e(2)(c) of Directive 2013/36/EU

General

Our Association represents international banks, investment firms and asset managers having business premises established in Germany, in the form of subsidiaries or branches. A significant number of our member institution are currently licensed under the German third country branch framework and operate significant businesses under such license. They will in the future qualify as third country branches as defined and regulated by CRD VI. Therefore, the future regulatory framework is vitally important for our members.

Against this background, we would like to take the opportunity to comment on the draft Guidelines on instruments available for third country branches for unrestricted and immediate use to cover risks or losses under Article 48e(2)(c) of Directive 2013/36/EU (the "draft Guidelines") as follows:

Questions for consultation

Q1. Do you consider the described requirements that capital endowment instruments should meet appropriate to ensure that they are available for use in the case of resolution of the TCB and for the purposes of the winding-up of the TCB? Is there any further requirement the EBA should consider adding? Or alternatively removing?

We would like to draw attention to an issue that needs a harmonised approach and should be clarified by EBA in order to avoid frictions and severe regulatory misalignment between EU jurisdictions.

The scope of the liability, which is used to calculate the capital endowment amount, is at present not sufficiently clear in several regards.

First, the question whether the financial relationship between the head office and the TCB is causing any financial "liabilities" needs to be answered. In our view, this relation cannot cause financial liabilities because head office and branch are the same legal person, which should theoretically be clear under the CRD VI wording. However, this needs to be unanimously agreed because under national regulatory tradition (as in Germany), TCBs have been deemed legally independent from their head offices as separate entities – in order to apply CRR – and therefore

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agreements and legal acts resulting in TCBs liabilities to or assets from head offices were commonly assumed and entered in the balance sheet. Under the draft German implementing act, this legal independence is carried forward under the new regime. In other EU Member States, such legal independence has never been the case. Therefore we assume that without a general agreement on the EBA level, national authorities might calculate relevant liabilities for capital endowment differently. This might result in vastly different regulatory outcomes and the risk of regulatory arbitrage.

Second, the purpose of the capital endowment requirement is to protect the depositors. Considering this point, intragroup borrowing and market-oriented products such as CD/CP and bonds should be eliminated from the calculation of the liability. Intragroup borrowing does not carry the risk of causing losses for customers. Furthermore, professional investors of the market-oriented products are highly expected to understand the characteristic of the loss very well.

Third, we believe that deposits maturing within 30 days should be eliminated too depending on the outflow rates applied in the LCR requirement because the expected outflow in the LCR is already held as HQLA to meet the LCR requirement. If the same liabilities would be covered by HQLA/liquidity and capital endowment instruments, a double-counting/double-covering of the same risk would result. This would be unnecessary and overly burdensome.

Therefore, we would like to encourage the EBA to specify the scope of the liabilities to be covered by capital endowment instruments accordingly.

Q2. Do you consider the list of instruments proposed for the purposes of Article 48e(2)(c) of Directive 2013/36/EU adequate? Is there any further instrument the EBA should consider adding? Or alternatively removing?

We welcome the inclusion in paragraph 12c of the draft guideline of “Debt securities issued or guaranteed by central, regional or local governments or central banks of third countries which apply supervisory and regulatory arrangements at least equivalent to those applied in the European Union and that would receive a 0% risk weight under the standardised approach as a result of the application of Articles 114(7) and 115(4) of Regulation (EU) 575/2013”. Being able to use non-EU government bonds to meet the capital endowment requirement is important for third-country banks and allows for efficient use of group resources.

However, the guidelines as currently drafted would preclude the use of non-EU government bonds in many, if not all circumstances. Article 114(7) CRR only allows for non-EU government bonds to be considered for 0% RW where the “competent authorities of a third country which apply supervisory and regulatory arrangements at least equivalent to those applied in the Union assign a risk weight which is lower than that indicated in paragraphs 1 to 2 to exposures to their central government and central bank denominated and funded in the domestic currency.”

In short, this means that the third country banking group must demonstrate that its headquartered jurisdiction is both equivalent and that the third country branch is funded in the domestic currency if it wants to use third-country denominated government bonds to meet the capital endowment requirement. Previously, competent authorities have taken divergent views on how branch funding is calculated, which has prevented EU subsidiaries of third country banks from using non-EU government bonds as HQLAs. For the purposes of fulfilling the capital endowment

requirement, the EBA should clarify that TCBs can be considered as funded in the domestic currency of the head undertaking, as the branch is part of that the same legal entity. This would allow for an appropriate use of group resources to meet the capital endowment requirement, which is more useful for resolution purposes.