Position Paper

Comments on EBA/CP/2025/20

Draft revised Guidelines
on internal governance under 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.

Against this background, we would like to take the opportunity to comment on the draft revised Guidelines on internal governance under Directive 2013/36/EU (the "draft Guidelines") as follows:

Questions for consultation

Question 1: Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?

The current definition of the gender pay gap in marginal number 13, which is based solely on the difference in average gross hourly earnings, is too narrow and does not adequately reflect actual remuneration structures in practice. Particularly in remuneration systems that consist of fixed, variable or monetary components, this creates a distorted picture that does not correspond to market conditions or the internal remuneration logic of institutions.

Directive (EU) 2023/970 provides a more practical framework for a meaningful reference system. It covers all components of remuneration and is based on the principle of equal or equivalent work, thus ensuring a realistic and comprehensive view of remuneration. Such a broader definition avoids the methodological weaknesses of a purely hourly-based approach and increases the informative value and comparability of the indicator. Moreover, the Guidelines need to be in line with this level 1 text.

Question 2: Are the changes made in Titles I (proportionality) and II (role of the management body and committees) appropriate and sufficiently clear?

No comment.

Question 3: Are the changes made in Title III (governance framework) section 6 appropriate and sufficiently clear?

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While the amendments made in marginal number 68a are already too prescriptive and detailed, marginal number 68 (f) (v) is clearly over the top. The description of roles and responsibilities are and should be already self-explanatory. Providing another level of documentation to include the rationale is mere paperwork in our view and should not be included in the final Guidelines for the sake of bureaucracy reduction.

In marginal number 68c, the notion of "issue detected" is too vague. Herein lies the danger of attributing too much responsibility to one single person after the fact, i.e. in case that any development is observable that in the eyes of the supervisor is undesirable. EBA should bear in mind that in places where humans work, errors and mistakes just happen. EBA should also consider that after the fact, finding a scapegoat is always easy but does not help to prevent the outcome. Thirdly, the complex and time-consuming tasks of managers cannot be reasonably fulfilled without delegation of tasks and refraining from micro-management. Corporate law takes this into account by reducing the responsibility threshold to establishing a sound delegation structure coupled with appropriate controls. The Guidelines should also be drafted along these lines.

Question 4: Are the changes made in Title III section 7 (third-country branches) appropriate and sufficiently clear?

Marginal numbers 91a and 91b refer only to the supervisory function of the management body of the head undertaking. But according to Art. 48g (2) CRD VI, competent authorities may also require third-country branches to establish a local management committee to ensure an adequate governance of the branch. That means that the Guidelines should explain how to deal with both a supervisory function being at the head undertaking and, as a second alternative, a supervisory function of the local management committee. If the local management committee option was omitted in the Guidelines, the implementation of the level 1 text would remain unclear.

The blanket prohibition set out in marginal number 90c, whereby persons who actually manage the business of a third-country branch may not simultaneously hold management positions in the internal control functions of the parent company, clearly goes too far. While the management and control structures of a branch must, of course, be clear, independent and effective, such a general exclusion leads to an unnecessary restriction of organisational flexibility. In addition, it is considerably more difficult to recruit qualified specialists for such key positions. Many branches do not have sufficient local talent pools, and recruiting is often a lengthy and costly process. Especially in transition phases, in the event of unplanned personnel changes or in smaller branches, it is therefore often necessary for experienced managers from the parent company to take on certain tasks on an interim basis. A rigid ban would further exacerbate these structural challenges and disproportionately impair operations.

In marginal number 90g (c) the meaning of "third party agreement" is not specific enough. Currently there are different approaches in the Member States as to whether the head office is a third party in relation to its TCB. There is already a definition in marginal number 93, which states that a third party means a separate legal entity. However, for the sake of harmonization of the treatment of TCBs, we would encourage EBA to clarify that this is also the case for TCBs, i. e. the head undertaking is not a third party for its TCB because they are one and the same legal entity.

In marginal number 90j the inclusion of ESG risks in this context does not appear suitable. The existing Guidelines on remuneration policy already provide a clear and risk-oriented framework that is sufficient for third-country branches. An additional ESG link seems artificial at this point and increases complexity without offering any discernible practical added value. Focusing on the essential requirements of proper, risk-oriented and gender-neutral remuneration is therefore sufficient and ensures clear, practicable implementation without unnecessary additions.

Question 5: Are the changes made in Title IV (risk culture) appropriate and sufficiently clear?

The current wording of "Third-party risks" instead of "outsourcing" (for example used in marginal numbers 91 following) may be read to capture all external service providers, including services without material risk relevance. Institutions could be compelled to perform risk assessments and maintain registers for contracts that pose no prudential concern. It is recommended to specify that the term should only relate to contractual arrangements involving banking or ancillary services that are capable of affecting the institution's sound and prudent management that pose a material risk, while excluding external services of a purely non-financial nature or with only a low risk. Otherwise, the institutions face personnel and financial costs that are out of proportion to the actual risks and potential added value. The replacement of the term "outsourcing" by the term "third party risks" or "third party agreements" will result in unnecessarily increasing the bureaucratic burden. We encourage EBA to reconsider in order to avoid a policy error.

In marginal number 94, a number of undesirable developments that have to be prevented as far as possible is listed. However, we think that the list is incomplete. One occurrence that is potentially very harmful both for the institutions and their staff on a personal level is the use of false allegations. In order to counteract such negative outcomes, institutions should be aware and encouraged to defend themselves and their staff against unjustified accusations. Institutions, alike all other companies, should observe their employers' duty of care towards employees. The second sentence of marginal number 94 should therefore be amended to read as follows: "Institutions should also aim, as part of the risk culture, at establishing a culture of equality, diversity and inclusion and prevent discrimination, harassment or unjustified or false allegations."

The expansion of the indicators to be collected, as provided for in marginal number 101a, goes well beyond what is necessary for effective and targeted gender equality management. The large number of required indicators leads to a considerable amount of additional recording, documentation and analysis work, without any discernible practical benefit. For small and medium-sized institutions in particular, such a comprehensive catalogue of indicators is neither realistic nor proportionate. Furthermore, many of the aspects addressed are already adequately covered by established HR, governance and reporting processes, meaning that this would create an additional level of detailed documentation that would be predominantly administrative in nature. Against this background, a targeted reduction of the catalogue appears sensible. The following indicators offer only limited added value, are context- and data-sensitive, or generate a disproportionate amount of bureaucracy and should therefore be omitted:

- age distribution by gender (e)
- ratio of temporary vs. permanent contracts by gender (f)
- ratio of full-time vs. part-time positions per gender (g)
- days of training by gender (i)
- complaints relating to discrimination, harassment or equal pay issues per gender (k)

Focusing on a few meaningful and proportionate indicators enhances practicality, avoids unnecessary bureaucracy and helps to effectively support the objective of equal treatment without overburdening institutions with additional work. At the same time, it ensures that significant developments in diversity and equal treatment can be adequately monitored.

In our view, the provisions set out in marginal number 107b concerning cooling-off periods for transitions from a management to a supervisory function go beyond what is required under EU law. In particular, the recommended minimum cooling-off period of three years is disproportionate and lacks any basis in binding European requirements. Such a rigid timeframe would significantly reduce institutions' organisational flexibility and could delay or even prevent the timely appointment of experienced and suitably qualified individuals to supervisory functions. This is even more relevant as internal candidates typically possess in-depth, institution-specific knowledge and expertise that provide a decisive advantage for the effective performance of oversight duties and should be leveraged to ensure competence-based appointments to governing bodies. We therefore propose limiting the cooling-off period to no more than two years. Deviations from this period should be possible where, for example, the shareholders expressly request an earlier appointment or where the institution can demonstrate that no relevant conflicts of interest exist and that any residual risks can be sufficiently mitigated through appropriate measures

Question 6: Are the changes made in Title V (internal control framework) appropriate and sufficiently clear?

We think that the amendments in marginal number 152 could potentially have negative side effects. The deletion of reference to all risk categories on the one hand but the explicit promotion of ESG risk management might provide incentives to institutions to re-direct resources. This could be dangerous: Experience shows that institutions and financial systems are most susceptible to credit, market and liquidity risk. These risks need to be addressed very carefully, because they are most likely to materialize in the coming years and will definitely and repeatedly cause idiosyncratic bank failures and the next financial crisis. On the other hand, ESG risk factors have not yet compromised and – for the foreseeable future – will not compromise the stability of institutions or the financial system. We do not oppose the deletion of explicit references to risk categories in sentence 5 but, on the other hand, we would like to encourage EBA to delete the new sentence 6 as well. As ESG risk constitutes a risk factor to all other risk categories, it is already self-explanatory that ESG aspects have to be considered comprehensively.

Replacing the word "should not" with "must not" in marginal number 176 unnecessarily restricts the possibility of combining internal control functions, which may result in a lack of flexibility in individual cases. The use of the phrase "should not" makes it sufficiently clear that the separation of internal audit from other internal control functions is generally intended. However, it also allows for exceptions that can ensure the functioning of the institution, particularly for small institutions.

In our view, the use of the term 'senior manager' in marginal number 201 and 204 is not useful, as job titles and role descriptions vary greatly across Europe and even between individual institutions. The term is neither harmonised across the EU nor clearly defined, and therefore leads to difficulties in interpretation and differentiation that could be avoided in practice. The decisive factor is not the formal title, but the actual professional competence and independence of the

respective function holders. Focusing on the requirements of 'sufficient expertise, independence and authority' is therefore more appropriate and in line with the established European governance system. This enables a consistent, institution-specific implementation without creating unclear hierarchical requirements or structural constraints.

Question 7: Are the changes made in Title VI (business continuity management) appropriate and sufficiently clear

No comment.