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Banking Stakeholder Group's response to Consultation on Draft revised Guidelines on internal governance under Directive 2013/36/EU

The Banking Stakeholder Group (BSG) welcomes the opportunity to express their views on the consultation paper on Draft revised Guidelines on internal governance under Directive 2013/36/EU. In this context, we herewith provide you with our considerations as well as responses to selected questions listed in the consultation paper.

The BSG acknowledges the need to review and amend the guidelines, previously updated in 2021, to further harmonise institutions' internal governance arrangements, to reflect the changes brought by CRD VI, to ensure alignment with the DORA Regulation and take into account the findings of the EBA benchmarking Report of diversity practices and gender-neutral remuneration policies, to consider the lessons learned from supervisory practices across the EU.

The BSG views the proposed changes as broadly appropriate and fit for purpose and appreciates the EBA's efforts to provide practical guidance to institutions on setting up robust governance arrangements. However, the BSG considers that some of the wordings of the draft Guidelines may be interpreted as potentially unduly restrictive, especially when considering the broad variety of corporate governance arrangements foreseen in national legislation, and recommends that the EBA still consider the usability of the draft Guidelines across these different national frameworks, especially when potential conflicts between these arise.

We appreciate your consideration of our comments and remain at your disposal for further clarifications in the matter.

1. Background

The Draft revised Guidelines on internal governance under Directive 2012/36/EU (“**draft Guidelines**”) constitute a revision of the current EBA Guidelines on internal governance, last updated in 2021 to incorporate changes mandates by CRD V and the Investment Firms Directive (IFD). The guidelines apply in the same way to institutions as to investment firms that are subject to Title VII of Directive 2013/36/EU 3 in application of Article 1(2) and (5) of Regulation 2019/2033/EU. The guidelines apply to all institutions regardless of their governance structures (unitary board, dual board or other structure), without advocating or preferring any specific structure.

The draft Guidelines complete the various governance provisions in Directive 2013/36/EU, taking into account the principle of proportionality, by specifying the tasks, responsibilities and organisation of the management body, and the organisation of institutions, including the need to create transparent structures that allow for supervision of all their activities; the draft Guidelines aim at ensuring the sound management of risks across all three lines of defence and, in particular, set out detailed elements for the second line of defence (the risk management and compliance function) and the third line of defence (the internal audit function).

The draft Guidelines have been amended to reflect the changes introduced by Directive (EU) 2024/1619 and to take into account the results of the EBA benchmarking report of diversity practices and gender neutral remuneration policies. As part of robust governance arrangements and in light of Article 151 and 153 TFEU², the draft Guidelines reinforce equality among genders, but also diversity and inclusion. The draft Guidelines take also into account the lessons learnt from supervisory practices.

2. High level principles

The BSG commends the EBA for their effort in updating the Guidelines on Internal Governance, which form an important regulatory product and act as a key building block of the Single Rulebook.

While the BSG recognises the need to achieve harmonised requirements for institutions’ governance models, recent supervisory experience and past financial crises have shown that institutions with different board structures (whether one-tier or two-tier, with executive or non-executive chairs) can be equally exposed to governance and financial failures. The BSG considers that these experiences underline the importance of avoiding a one size fits all approach and instead focusing on ensuring that each institution has robust checks and balances, effective risk management and a strong culture of accountability, rather than imposing a uniform model across the Union.

The BSG further notes that the added level of detail in the draft Guidelines, while aiming at further harmonisation of practices, may lead to additional compliance costs which will be ultimately reflected in the costs of financial services provided to end users.

The BSG invite the EBA to reflect on whether supervisory convergence could be equally achieved with more principles based approach (that would enable to take better into account the difference in size and business model of financial institutions as well as in national laws) complemented with ex-post supervisory convergence practices (via peer reviews and coordination of approaches between NCAs).

Finally the BSG welcome the track change version provided as a comparison to the existing Guidelines that simplifies the change management process of institutions.

3. BSG comments on the draft Guidelines

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

The BSG considers it positive that the draft Guidelines recognise the divergence of national company law frameworks and that the draft Guidelines are to be applied without interfering with the general allocation of competences in accordance with national company law or advocating any particular structure.

However, the BSG notes that some Member States, company law provides for one-tier board systems where the management body collectively exercises both management and supervisory functions. In such systems, it is not feasible to individualise responsibilities as suggested in the draft Guidelines, for example by allocating duties to non-executive members or distinguishing between management and supervisory functions. The BSG considers that the draft Guidelines should explicitly acknowledge this and avoid imposing expectations that conflict with national law or undermine the principle of collective responsibility in one-tier systems. The BSG would further welcome an analysis by the EBA on the compatibility of the draft Guidelines with national law (e.g. company law) frameworks.

The BSG considers it important that the draft Guidelines explicitly recognise that the diversity of governance frameworks in the EU reflects deliberate choices by both national legislators and the EU legislator. The BSG views that by preserving references to national company law, the EBA can ensure that governance arrangements remain consistent with national legal environments while achieving sound risk management and effective oversight. Similarly, in connection with the variety of national governance regimes, the BSG considers that paragraph 9 should maintain the reference to the possibility of appointing an internal executive body (e.g. executive committee, chief executive officer (CEO), management team or executive committee) as permitted under certain national laws.

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

The BSG is appreciative of the considerations on the proportionality and notes the need for proportionality in determining appropriate arrangements of internal governance. While the BSG recognises the need to further reinforce institutions' sound governance arrangements, certain provisions of the draft Guidelines may be overly prescriptive and detailed, which could risk transforming guidance into de facto binding requirements without being necessary to mitigate institution's governance related risks. The BSG notes that it is important for the draft Guidelines to be sufficiently clear and applicable in single-tier systems, where management and supervision

functions are carried out within the same Board. The BSG therefore considers that flexibility should be interpreted broadly, considering not only the size, complexity and risk profile of institutions, but also the diversity of national governance frameworks and board structures across the European Union and its Member States.

The BSG notes that while Article 88(1) of the CRD prevents the chair of the management body (in its supervisory function) from simultaneously acting as CEO, it does not prohibit them from holding other executive functions within the institution. The BSG further notes that the role of an executive chair is allowed in some national legislations and is recognized in the Basel Committee's Corporate Governance Principles, provided that effective checks and balances are in place (for example, appointing a lead independent director or having a higher number of non-executive directors). To this end, the BSG recommends to keep the original wording in paragraph 37 (which is now proposed to be removed) to allow the chair of the management body to assume executive functions provided that the institution has put in place appropriate checks and balances. This would prevent that unnecessary costs and complexity is introduced, particularly for smaller and less complex organisations that can manage the risk with the appropriate checks and balances. Furthermore the BSG views that allowing the chair to hold other executive functions, when appropriate check and balances are in place, can enrich board decision making process when governance discussions are supported and aligned with deep operational insight.

The BSG further notes that requirements set out in paragraph 51 related to committee members knowledge, skills and experience also in relation to impacts of ESG factors on remuneration, while important, would be better suited to be included in the EBA Guidelines on sound remuneration policies, where also the other aspects of the competence requirements for members of the remuneration committee are covered.

Additionally the BSG notes that the requirement for the members of the remuneration committee to have both individually and collectively the knowledge, skills and experience described in the paragraph is a substantially stricter requirement compared to what is required based on the EBA Guidelines on sound remuneration policies section 2.4.1., or by the CRD VI, where these requirements are set on a collective level. Given the new requirements may make it more difficult for institutions to find suitable candidates for their remuneration committees, the BSG recommends that the EBA consider the necessity of the increased requirements.

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

The BSG is supportive of the effort by the EBA to provide more detailed guidance to banks on their governance arrangements. To this end, the BSG notes some further room to improve on the applicability of the draft Guidelines.

The BSG notes that in Section 5.4. concerning the role of the Risk Committee, the EBA provided a list of three examples of operational risks citing "legal, fundamental rights, discrimination and ICT risks". Operational risk is a well-defined and understood risk and it is not clear to the BSG the value of citing these types of risks which may not be the most representative and/or material sub-categories of risks in some financial institutions. In addition, fundamental rights and discrimination risk may rather be reviewed as risk drivers (e.g. discrimination risk may increase legal, business or regulatory risks). Although an illustrative list may in some cases provide useful guidance for some institutions, the BSG views that, in the context of operational risks, these citations may be unduly prescriptive and not fully aligned with risk categorisation used by

institutions. This may also create the risk that supervisors would expect institutions to change their risk taxonomies, creating a misalignment with risk managements. The BSG recommends that either the list is removed, or is reworded to include risks typically included in institutions' risk appetite statement.

The BSG notes that that Section 5.5. on the role of the audit committee could be further amended in accordance with the amendments introduced by the CSRD to the Directive 2006/43/EC. In particular, the CRSD introduces new tasks for the audit committee in relation to sustainability reporting (e.g. amendments to Article 39 of Directive 2006/43/EC regarding the audit committee). These changes could be recognised either in the main text of the Section, or by amending its footnotes.

The BSG notes that the draft Guidelines' paragraph 68 include a reference to third-party arrangements that result in institutions becoming "empty shells" or "letter-box entities" referring to also intragroup arrangements. Some BSG members note that while the proposed wording is well-intended and should address extreme cases of arrangements without appropriate substance, it may also create the presumption that entities with lighter resources are not appropriate, discouraging legitimate and efficient intragroup service arrangements. Some BSG members consider that in many cases these arrangements can provide significant benefits, including increased oversight, operational consistency, and enhanced integration of risk management protocols. Such advantages are especially pertinent when institutions employ group entities to facilitate or deliver key functions. The BSG would welcome the recognition that the substance should be proportionate to the nature, scale, complexities and risks of the activities under the arrangements.

The BSG further notes that the proposed wording in paragraph 68b(b) assumes a collective responsibility model within the management body in its management function, which does not align with national company law in all Member States. As an example, in Finnish corporate law, the management function in its management function when this is in a credit institution includes persons other than the CEO, is not exercised collectively but through individually accountable roles. While the BSG notes the general provision that the draft Guidelines are to be applied without interfering with national company law, the BSG considers that paragraph 68b(b) could be revised for the part of references to collective responsibility to accommodate diverse corporate governance models across the Member States so that governance expectations can be aligned with national legal frameworks and corporate structures.

The EBA provides in Article 68 a(b) that the mapping of duties applies not only at the level of institutions subject to the directive but also to all entities within the prudential consolidation group. It is also planned that the parent company additionally establish a mapping of functions on a consolidated basis. However, the BSG notes that Article 109 of the CRD makes a reference to "at the sub consolidated level, or at the consolidation level". The BSG therefore notes that the draft Guidelines provide additional administrative burden to institutions in this regard, and invite the EBA to assess if this is necessary considering the ongoing efforts to simplify regulations.

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

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

The BSG considers it important that institutions' internal policies foster diversity and inclusion, and that institutions' remuneration policies are gender neutral. At the same time, the BSG notes that parental leave access and duration are regulated by employment laws and collective bargaining agreements in each member state. In many cases local regulation also states that institutions must have gender-neutral policies for maternity and paternity leave that also support staff reintegration. The BSG therefore recommends that the paragraph be revised to account for local employment legislation, collective agreements, and obligations related to parental leave.

The BSG notes that related to paragraph 101a, in some member states institutions are already obligated to take action to promote gender equality in working life based on national legislation. Additionally the Pay Transparency Directive shall be transposed to legislation in the Member States by 7 June 2026, imposing variable disclosure requirements regarding equal pay. The BSG therefore recommends that the EBA consider the need for all of the indicators listed in paragraph 101a given that the Pay Transparency Directive remedies many of the risks related to regulatory gaps on equal pay. Furthermore, the BSG notes that the requirement on KPIs relative to gender diversity and inclusion may overlap with the CSRD that has already given clear requests on these topics.

Finally, the BSG recommends that the list of KPIs be reviewed to avoid any overlap with other regulations, and flexibility should be provided to adapt to the specificities of each member state.

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

The draft Guidelines state that the person in charge of the Regulation (EU) 2024/1624 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing can no longer be the Head of Compliance, but should be a member of the management body in its management function. While the BSG understands the need for some further regulatory clarity on this responsibility, the BSG considers that Head of Compliance could continue to be viewed as the appropriate individual with this responsibility. Should the EBA however decide to proceed with the approach in the draft Guidelines, the BSG suggest that the member of the management body in its management function can delegate this role to the Head of Compliance.

The BSG notes that according to the EBA Guidelines on sound remuneration policies section 2.4.2 paragraph 58, where the institution has established a remuneration committee, *the remuneration of the senior officers in the independent control functions, including the risk management and compliance functions, should be directly overseen by the remuneration committee*. Further in section 2.1 paragraph 37 of the EBA Guidelines on sound remuneration policies it is stated that the supervisory function should directly determine and oversee the remuneration of the senior officers in the independent control functions, *where a remuneration committee has not been established*. The BSG notes that the amendment to paragraph 175 point d is in contradiction with the EBA Guidelines on sound remuneration policies.

The BSG notes that replacing the previous guidelines' term "compliance risk" with the new wording "legal risk stemming from non-compliance events" in paragraph 204 may cause

confusion between the responsibilities of compliance and legal functions, and recommends that the EBA consider reinstating the previous wording.

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

The BSG considers the changes made in the draft Guidelines as broadly helpful and well-balanced for the purpose of aligning the existing Guidelines with the requirements set in DORA.

Paragraph 230 states that documentation should be accessible to relevant staff and stored on 'physically separated systems for emergency use'. However, the BSG notes that the concept of 'physically separated systems for emergency use' is not found in Regulation (EU) 2022/2554 (DORA) or the EBA Guidelines on ICT risk management (EBA/GL/2019/04), which may lead to ambiguity. The BSG recommends revisiting the concept with the view of aligning this requirement more fully with DORA.