

14 July 2023

EBF COMMENTS ON THE EBA GUIDELINES ON THE BENCHMARKING OF DIVERSITY PRACTICES INCLUDING DIVERSITY POLICIES AND GENDER PAY GAP UNDER CRD AND IFD

General comments:

European legislation requires to record a lot of information about:

- gender and adequate knowledge, skills and experience of members of the management body
- collective suitability criteria of management body (for example, Fit & Proper questionnaire).

We ask to rationalize these collections and provide a data collection system that can be used for different purposes.

It is important that institutions and investment firms only once share information with regulators in order to avoid administrative burdens, also considering that (i) under Article 435(2)(c) of Regulation 575/2013/EU institutions are already required to disclose “the policy on diversity with regard to selection of members of the management body, its objectives and any relevant targets set out in that policy, and the extent to which these objectives and targets have been achieved” and (ii) under Article 91(11) of Directive 2013/36/EU competent authorities shall collect such information and shall use it to benchmark diversity practices.

The information and reporting on gender pay gap at Board level required under the Draft Guidelines may **overlap** up to a certain extent (with the corresponding administrative burden for the entities) **with the information required under the EBA Guidelines on benchmarking exercises on remuneration practices and gender pay gap (EBA/GL/2022/06)**. Therefore, it is suggested that this information and reporting is excluded from the Draft Guidelines and, if necessary, the existing EBA Guidelines on this matter are amended in this respect.

It is important to introduce a proportionality in the Guidelines in order not to increase the administrative burdens of small and non-complex institutions and investment firms.

In paragraph 7 and 8 of the Background and rationale section we read “7. (...) *The following categories for institutions size, based on the balance sheet total at the end of the financial year, have been used in previous exercises: < EUR 1 bn; EUR 1 bn to <10 bn; EUR 10 bn to <30 bn; EUR 30 bn and above and investment firms. Where there has been a high number of institutions, it has been considered proportionate to limit the sample size to 50 institutions per size category.*

8. *To ensure that the results are not based only on data from single institutions, but reflect the market practices, it is necessary that competent authorities collect information, where*

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possible, of at least five entities for each defined size category of institutions and for investment firms. Where necessary, the EBA might ask additional information from competent authorities, e.g. to analyse additional qualitative aspects of diversity policies and practices that cannot be expressed by the data collected under these guidelines.”

We propose to use the classification of European Regulation of Institution in three categories:

- small and non-complex institution as set out in points 145 of Article 4(1) of Regulation (EU) No 575/2013;
- Significant institutions: means institutions referred to in Article 131 of Directive 2013/36/EU (global systemically important institutions or 'G-SIIs', and other systemically important institutions or 'O-SIIs'), and, as appropriate, other institutions determined by the competent authority or national law, based on an assessment of the institutions' size, internal organisation and the nature, the scope and the complexity of their activities;
- Other institutions.

For Investment firms we propose to use the classification of European Regulation too. Moreover, we propose that for small and non-complex institution competent authorities collect information **of no more than** five entities.

EBF COMMENTS

Background and rationale

Paragraph 5 and last paragraph on page 32: while Article 34(2) of the Directive (EU) 2019/2034 is the clear legal basis for requiring EBA to benchmark the gender pay-gap for investment firms, it is unclear that Articles 75(1) and 75(2) of the Directive 2013/36/EU are the legal basis for requiring the collection of data on the gender pay gap and EBA to benchmark the gender pay-gap for credit institutions. Article 51 of Regulation (EU) 2019/2033 requires the disclosure of data on the gender pay gap for identified staff, including for members of the management body that are identified staff. However, it would be desirable that the Guidelines include a **clearer legal basis on the collection and benchmarking of these data for the rest of the staff and, particularly, for members of the management body who are not staff of the credit institution (non-executive directors).**

Subject matter, scope, and definitions:

Q1: Is the section on subject matter, scope, definitions, addressees, and implementation appropriate and sufficiently clear?

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The addressed entities covered by the draft guidelines “on the benchmarking of diversity practices including diversity policies and gender pay gap” should be further clarified. Especially, divergence in addressees from other EBA or ESMA Guidelines (in particular the joint ESMA/EBA Guidelines on the assessment of the suitability of members of the management body and key function holders) should be clarified or explained. Moreover, the reference to Articles 25 and 34 of Directive 2019/2034 in paragraph 9 which refers to “small and non-interconnected” entities is not sufficiently clear.

The assumption is that only entities which are directly supervised by the NCA / ECB should report. Given the fact that CRD also refers to the entities falling within the scope of the prudential perimeter of a top mother company, it should be clear that these entities are outside the scope of the reporting.

More clarity on the scope within a group would be desirable. Considering the scope of the guidelines are defined under CRD provisions, it would be useful if the guidelines could clarify institutions/investment firms based outside the EU are not subject to these guidelines.

In our view, the definitions of Chief Executive Officer and Chairperson can be misleading and lead to uncertain interpretations. On the one hand, the Chairperson may be vested with certain executive powers without being a CEO in one-tier systems and on the other hand the CEO does not have the authority to manage and steer business activities on his own in two tier systems. Moreover, considering that in certain one-tier systems the management body (normally, a Board of Directors) is at the same time the “management body in its management function” and the “management body in its supervisory function” both in accordance with the definitions of Directive 2013/36/EU, its President or Chair could be both the Chairperson and the Chief Executive Officer in accordance with the definitions proposed in the consultation paper, which would be contrary to the provisions of Article 88 of Directive 2013/36/EU.

In consequence, we suggest the following wording so as to clarify and distinguish both concepts:

- *Chief executive officer (CEO): means the person who is responsible for managing and steering the overall business activities of an institution or investment firm and who is primarily responsible to carry out the strategic plans and policies as established by the management body where applicable under local law ~~or investment firm and should include, for the purpose of this exercise, the chair or president of the management body in its management function.~~*
- *Chairperson: means the chair of the management body in its supervisory function of an institution in accordance with Article 88 of Directive 2013/36/EU. In one-tier systems, the chair of the management body shall be considered the Chairperson for the purpose of this exercise in all cases.*

More clarity on the definition of “Professional background” would be desirable, since the reference to “experience gathered by a member of the management body by conducting professional activities” seems too open, particularly when the Guidelines aim at “harmonization”.

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Furthermore, more clarity on the definition of geographical provenance is needed. The current definition does not seem to adequately reflect the purpose of including the measuring the diversity of geographical background. For instance, if a Danish citizen takes a degree or work abroad in the US for 3 years or more, this person will have a geographical provenance from the US and not DK.

Finally, definitions should also include "management body", since it is mentioned under Guidelines section 1, number 13.

1. Sample of institutions and investment firms to be included in the diversity practices benchmarking:

Q2: Is the section 1 on the sample of institutions and investment firms appropriate and sufficiently clear?

Although we appreciate the aim to ensure consistency over time when selecting the sample of banks to be part of the benchmarking exercises, we consider more details on the approach that the EBA and the competent authorities will use to establish the sample of the benchmarking are needed for the sake of transparency. Especially whether as indicated in the guidelines, the initial sample will determine future exercises.

Finally, we consider the guidelines would benefit from further elaboration on the possibility of several entities from different geographies, but belonging to the same Group, could be selected. We believe the wording "The sample may include on an individual basis more than one institution or investment firm within a group. Competent authorities should not add investment firms to the sample where they have approved that there is only one person directing the business under Article 9(6) of Directive 2014/65/EU" is not sufficiently clear and specific.

We also suggest eliminating listed companies from those institutions eligible to be included in the diversity practices benchmarking given that these companies are already obliged to publish an annual remuneration report in which the remunerations of the members of the management body are detailed pursuant to the provisions of Directive (EU) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. This remuneration report includes detailed information on the remuneration schemes of members of the management body from which competent authorities can extract all the relevant information.

Additionally, as regards gender diversity in management bodies, listed companies are also obliged to publish certain information in this regard pursuant to Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures. In consequence and in order to avoid duplication of works, we consider that institutions that are listed companies should be exempt from doing this exercise.

Finally, more clarity is needed on the dates by which the institutions selected to participate in the exercise will be informed. Therefore, we suggest including a specific period of time (e.g., three months) in paragraph 16 so as to grant institutions with legal certainty as regards the time they have to collect the data.

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Reformulate the paragraph par. 14 as indicated below:

It should be clear the sample should **only** consist of institutions subject to Directive 2013/36/EU and investment firms that are either subject to the requirements on governance under Article 91 of Directive 2013/36/EU, in accordance with Article 1(2) or (5) of Regulation (EU) 2019/2033 (Class 1-), or subject to Article 26 of Directive (EU) 2019/2034 (Class 2). The sample may include on an individual basis more than one institution or investment firm within a group **subject to Directive 2013/36/EU and investment firms that are either subject to the requirements on governance under Article 91 of Directive 2013/36/EU, in accordance with Article 1(2) or (5) of Regulation (EU) 2019/2033 (Class 1-), or subject to Article 26 of Directive (EU) 2019/2034 (Class 2)**. Competent authorities should not add investment firms to the sample where they have approved that there is only one person directing the business under Article 9(6) of Directive 2014/65/EU.

16. Competent authorities should inform institutions and investment firms that form part of the sample in good time of the data collection.

In par. 16 specify the meaning of "in good time". It should be indicated a **deadline** to inform institutions and investment firms that form part of the sample. **It should be December 31st of the year immediately preceding the year to which the collected data will correspond.**

2. Submission of diversity practices benchmarking data

Q3: Is section 2 on the procedural requirements appropriate and sufficiently clear?

The methodology to select the sample and to publish it in advance as well as the composition of the sample are not clear and transparent enough. Notably, it should be specified if the sample will be the same for each group every 3 years (unless there is a change in the selected entities) or if it will change every 3 years at the discretion of NCAs.

In paragraph 17: in line with paragraph 13 of Section 4 (Guidelines), it is suggested that the sentence "on diversity policies, diversity practices and the gender pay gap" be rephrased as "on diversity practices including on diversity policies and gender pay gap".

In paragraph "19. *Competent authorities should provide to the institutions and investment firms the necessary additional technical instructions to submit the data set out in Annexes I to XI of these guidelines.*"

Please indicate a **deadline** for Competent authorities to provide to the institutions and investment firms the necessary additional technical instructions to submit the data set out in Annexes I to XI of these guidelines. **It should be December 31st of the year immediately preceding the year to which the collected data will correspond.**

3. General specifications for the submission of diversity practices benchmarking data

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4. Specification of the governance system to be provided

Q4: Are the general specifications for the data collection appropriate and sufficiently clear?

Yes.

5. Specifications for the submission of data on members of the management body

Q5: Are the specifications on the collection of data of members of the management body (read together with the definitions) appropriate and sufficiently clear?

It is unclear what the definition of "*governance body*" is in section 5, paragraph 26.b. We propose to include a definition of governance body in the definitions.

As regards reference to "legal gender" should be avoided as:

- There is no recognized legal definition of "legal gender".
- In some countries, even in the ID cards, the gender is not provided anymore (such as in Germany).
- In some other countries "non binary" is not legally recognized and will not be representative at all in most countries.

It should be clearly mentioned that in accordance with some local laws, determination of a gender for a specific person is forbidden which would for example lead to the impossibility to answer the question of the gender for a Chairperson.

The same comment as the above should be made regarding ethnical provenance: in some countries (such as in France), it is forbidden to tag a person with its ethnical provenance. This may create breaches with RGPD regulation, notably in terms of collection and treatment of statistics.

Paragraph 10 of "Background and rationale", paragraph 28 of Guidelines and Annex VII (Business Regions/Geographical provenance): The Guidelines establish that "[a] separate collection of information for employee representatives is needed as those non-executive directors are appointed by a different process and as the requirements on the selection of employee representatives differ materially between Member States." There are only two references to the employee representatives in the Guidelines which are preceded by the expression "where applicable". The overall impression of the Guidelines is that the employee representatives are elected at the Board level in all Member States though appointed by a different process. However, there are Member States that do not legally require to appoint employee representatives at the Board level. Therefore, the Guidelines should clarify and include simply that national law of some Member States may not require the appointment of employee representatives at the Board level and exclude this data from the Annexes and samples to be filled in those Member States.

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6. Specifications for the calculation of the gender pay gap

Q6: Is the section on the instructions for the calculation of the gender pay gap appropriate and sufficiently clear?

Paragraph 32 a). We would appreciate more detail on the rationale behind the inclusion of interest-free loans within the non-monetary benefits category when establishing the total gross annual remuneration as the sum of fixed and variable remuneration before tax. We are of the view that it is not appropriate to consider them as compensation since they are granted by the personal decision of each employee and not by the institution's initiative.

As regards **paragraph 33**, it states that “[m]embers who were not employed any longer at the end of the financial year and their remuneration should not be taken into account”. As we understand that the Guidelines cover all Board members (executive and non-executive), there may be members who are not employees of the institutions. Additionally, the relevant point is whether they are still engaged by the institution. Therefore, we suggest that it is simply stated that “they are no longer members at the end of the financial year for any reason (i.e., dismissal, resignation, etc.)”.

In relation to **paragraph 35**, it should be adjusted to encompass the fact that all members of the Board (executive and non-executive members) may be remunerated with a **fixed fee per each attendance at the meetings of the Board and its Board Committees** as mentioned in paragraph 12 of Section 3 (Background and rationale).

In the event of the executive Board members, this fee is separated and additional to the remuneration for its functions as executive members. For the purpose of Annex XI (Gender Pay Gap Benchmarking), it should be clarified whether said fixed fee should be taken into account when assessing the gender pay gap of executive directors.

Additionally, it should be clarified if, where there are both an annual fixed remuneration for their function and a fixed daily participation fee, institutions should report the sum of the annual fixed remuneration plus the participation fee for only one day. Alternatively, we suggest changing the wording to report all of the daily participation fees received, which reflects better the real remuneration.

The calculation of the gender pay gap for the management body should also take into account that some members of the management body in its supervisory function receive additional fixed remuneration/ fees that are connected to specific roles they hold in the body (e.g. Chairperson and the vice-chairperson of the management body), to their participation in specific internal committees (e.g. the in the management control committee in one-tier governance systems), and to specific roles they hold in the internal committees (chair persons of the internal committees). Failure to take into due account the different roles there are in the management body and its committees would be in contrast with the principle “equal pay for the same position or positions of equal value” and can lead to detecting a gender pay gap where, in fact, there isn't one.

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7. Data quality

Q7: Is the section on data quality appropriate and sufficiently clear?

Yes.

Q8: Are the Annexes on the data collection appropriate and sufficiently clear?

- **Annex II (Executive directors´ age and gender):** Because of the above-mentioned suggestion in Q1, we consider that 3 new categories are needed: Chairperson, male; Chairperson, female; and Chairperson, non-binary.
- **Annex III (Composition of committees):** there may be other Board committees or other combined Board committees (risk, audit, nomination, etc.). The sample should be flexible enough to include these other cases so we understand that it would be convenient to leave a blank for institutions to complete the data with additional committees. In this case, please specify if all Board Committees should be reported (credit delegated committee, strategy and sustainability committee, etc.).
- **Annex V (Newly appointed executive directors):** In Annex II the CEO is reported separately from the executive directors. Annex V refers to executive directors and not to the CEO. Please clarify if the CEO should be reported among the executive directors or not reported in this Annex.
- **Annex VIII (Educational Background):** Annex VIII says that "multiple degrees per director are possible". Please clarify if, in the case that a director has multiple degrees, all of them may be reported in the corresponding line. If this is the case, we propose (i) the following wording: "multiple degrees per director may be reported" and (ii) eliminating the "Total" row, given that the total in each category of directors will not be the total heads; alternatively, a Total column may be added to sum the number of directors on each degree subject.
- **Annex IX (Professional Background):** Annex IX says that "multiple sectors per director are possible". Please clarify if, in the case that a director has a professional background in multiple sectors, all of them may be reported in the corresponding line. If this is the case, we propose (i) the following wording: "multiple sectors per director may be reported" and (ii) eliminating the "Total" row, given that the total in each category of directors will not be the total heads; alternatively, a Total column may be added to sum the number of directors on each sector.
- **Annex X (Diversity Policy):**
 - page 28: we understand that the questions refer to the diversity policy in place at the relevant entity, without requiring a specific "*Diversity policy on non-binary members*". Therefore, it is suggested that the sentence "*Diversity policy on non-binary members: Does the policy explicitly consider non-binary directors (please select the option that best describes your policy)?*" be rephrased as "*Diversity policy on non-binary members:*

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Does the diversity policy explicitly consider non-binary directors (please select the option that best describes your policy)?"

- page 30: the policy may have several targets and/or a target per each sub-group of directors. Therefore, the question "Has the target been met at the reference date? Yes/no" should be rephrased to contemplate these scenarios.
- page 30: as to the other aspects than gender included in the diversity policy, they may be considered in the diversity policy but without a target – therefore the question "Has the policy target been met at the reference date? please select ("yes") or ("no")" should be rephrased by including a "N/A"
- additionally, we suggest including the additional possible answer "N/A" or "Not foreseen in the applicable national regulations" to the second section of Annex X c) given that some national legislations (e.g., Spain) do not foresee the possibility of workers' representatives to be part of the management body.

- **Annex XI – Gender Pay Gap Benchmarking**

The calculation of the gender pay gap for the management body should also take into account that some members of the management body in its supervisory function receive additional fixed remuneration/ fees that are connected to specific roles they hold in the body (e.g. Chairperson and the vice-chairperson of the management body), to their participation in specific internal committees (e.g. the in the management control committee in one-tier governance systems), and to specific roles they hold in the internal committees (chair persons of the internal committees). To this end, with reference to Non-executive directors, the data should be collected separately for:

- Non-executive directors (including Chairperson, **vice chairperson, chairpersons of the internal committees**, without employee representatives)
- Non-executive directors (excluding Chairperson, **vice chairperson, chairpersons of the internal committees**, without employee representatives)
- Non-executive directors (employee representatives only)

Others

Page 32 – there are a couple of typos: "Under paragraph (11) of this Article **91**..." and not Article 11; "Article 75(1) of Directive 2013/36/EU..." and not Directive 20143/36/EU.

About EBF

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