THE OUTSOURCING IN CREDIT INSTITUTIONS, INVESTMENT FIRMS AND IN PAYMENT AND ELECTRONIC MONEY INSTITUTIONS

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DOI: https://doi.org/10.31410/EMAN.2020.251

Abstract: *The creation of a solid and effective system of government, as well as the development of the company subject, sometimes advise the outsourcing of functions in order to achieve agility and efficiency. The Guidelines EBA/GL/2019/02 starts from a basic idea and is that it is aware of the new technologies to carry out the credit business. The subjective scope of application of the Guidelines not only affects credit institutions, but also extends to investment services companies and payment and electronic money institutions. Then, it is necessary to analyse how the new guidelines on outsourcing fit into the referred institutions.*

Keywords: *Outsourcing, Financial market, Governance, Business, Supervision.*

1. INTRODUCTION

The financial crisis that began in 2007 demonstrated the need for the profound reform that the European legal system has undergone to date. In the particular sector of banking, the legal doctrine has analysed the reasons and the whys of the financial crisis[2]. The truth is that we cannot reproduce the reasons for the birth of the crisis, as their variety and extent would lead us to diminish the importance we seek in our work. However, we consider it necessary to stress that, from the point of view of the European institutions, the crisis was analysed in the de Larosière Report of 25 February 2009[3], which highlighted the relaxation of the risk control mechanisms of credit institutions, mainly due to the lack of supervision by the administrative bodies of the institutions and the supervisory authorities of each country. The report also criticized the parsimony of the owners for not exercising the control that the shareholders meeting, as the governing and supervisory body of the institution, should exercise[4].

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2 OLIVENCIA, M., (2009), "Crisis financiera internacional. La respuesta española: introducción (planteamiento de la problemática)", *Revista de Derecho Bancario y Bursátil*, núm. 115, Madrid, 13-18.; MARTÍNEZ GONZÁLEZ-TABLAS, A., Mª., (2011) "Contexto y dimensión financiera de la crisis", *Revista de economía crítica*, núm. 11, Barcelona, 22-44.; VIÑALS, J., (2010), "Reflexiones sobre la crisis financiera internacional", *Revista del Instituto de Estudios Económicos*, núm. 1, Madrid, 25-40.; MASSA, J., (2009), "Algunas reflexiones sobre la crisis financiera", *Revista de Derecho Bancario y Bursátil*, núm. 115, Madrid, 19-29.; CONTHE GUTIÉRREZ, M., (2009) "El aniversario del euro y la crisis financiera", *Revista Española de Derecho Europeo*, núm. 29, Madrid, 5-15; LINDE DE CASTRO, L. Mª.,(2009) "La crisis financiera internacional y la Unión Europea", *Revista de Derecho de la Unión Europea*, núm. 16, Madrid, 139-154.; RODRÍGUEZ FERNÁNDEZ, J. M., (2011), "Crisis financiera y regulación de la solvencia bancaria: una reflexión crítica sobre los Acuerdos de Basilea". *Revista de economía crítica*, núm. 11, Barcelona, 65-95.

3 TAPIA HERMIDA, A. J., (2009) "El Informe Laroisière de febrero de 2009 sobre la crisis financiera", *Revista de Derecho Bancario y Bursátil*, núm. 114, Madrid, 282-285.

4 DURÁN CASTIÑEIRA, B., (2015) "El informe anual de gobierno corporativo*", Comentario práctico a la nueva normativa de gobierno corporativo, Ley 31/2014, de reforma de la Ley de Sociedades de Capital*, ARIAS VARONA, F. J., RECALDE CASTELLS, A. J., (Coord.), Dykinson, Madrid, 217-220.

As a result of this report, in 2010 the European Commission published a Green Paper, which reviewed the shortcomings in corporate governance of financial institutions. The shortcomings focused mainly on the lack of controls and countervailing powers, which had allowed directors ample room for manoeuvre while allowing for group thinking on the part of the board of directors, which meant less intense debate, fewer ideas and therefore fewer alternatives at board meetings. There was also criticism of the high remuneration of directors and certain employees, whose remuneration structure was focused on the short term and not sufficiently compensated by the results obtained by the company[5].

Directive 2013/36/EU[6], in its recital 53, points out that systemic problems at global level, in Member States and the collapse of a number of institutions have been caused by weak corporate governance in institutions, excessive and imprudent risk-taking, the general nature of corporate governance arrangements and the existence of non-binding codes, the lack of effective internal control mechanisms, the lack of management strategies and, finally, the lack of effective supervision.

In addition, the Bank for International Settlements July 2015 „Principles of Corporate Governance for Banks" focus on analysing: the responsibilities of the board, the composition and qualifications of the board, board structure and best practices, the bank's management, the governance of group structures, the role of risk management, risk identification, monitoring and control, risk communication, compliance, internal audit, remuneration, information and transparency and, finally, the role of supervisors.

Therefore, one of the conclusions that can be drawn is that there is a lack of ethics[7] in the management of credit institutions. The excessive appetite for risk, together with a lax control of the institutions' risks, has led to European regulations allocating specific articles to risk management, so as to banish from the system a short-term mentality, the aim of which is to distribute dividends in a short period of time.

Thus, the reform focuses on two fundamental pillars: on the one hand, all the new regulations focus on the control of the risks of the credit institutions, and on the other hand, on the capital margin, which are used to determine the level of solvency of the institutions. The Basel III[8] principles establish a balance between the risks assumed by the institution and its capital buffers, so that the risk map[9] that the company prepares must be in line with these buffers. Thus, a risk map that demonstrates that the company's capital buffers can be exceeded will lead the management body to adopt measures to mitigate such risk exposure.

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5 SÁNCHEZ-CALERO GUILARTE, J., (2013) "Crisis económica y gobierno corporativo", *Revista de Derecho Mercantil*, núm. 287, Madrid, 63-88.

6 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

7 FERNÁNDEZ DE LA GÁNDARA, L., (1993-1994) *Derecho, Ética y Negocios*, Discurso de la apertura del Año Académico, Universidad de Alicante, www.cervantesvirtual.com.

8 CALVO VÉRGEZ, J., (2014) "Principales rasgos configuradores de la regulación del sistema financiero acordada en Basilea III y su progresiva implantación en nuestro ordenamiento bancario", *Revista de Derecho Bancario y Bursátil*, núm. 135, Madrid, 201-231.

9 MARÍN HERNÁNDEZ, S., GRAS GIL, E., (2005) "Auditoría interna en las entidades de crédito: Áreas y matriz de riesgos", *Gestión: revista de economía*, núm. 34, Murcia, 15-29.; BANCO DE ESPAÑA, *Guía para la elaboración de la matriz de riesgos*, Versión de 28-03-2012.

2. THE COMPANIES WITH LIMITED RESOURCES

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, sets out basic principles where companies will establish corporate governance procedures, but also recognises the principle of proportionality in view of the nature, scale and complexity of the credit company.

There is no detailed treatment of the legal ideas underlying the application of the principle of proportionality. Perhaps the *mens legis* of the rule is clear, since obviously the same corporate governance obligations cannot be demanded from banks as capitalist companies as from credit cooperatives, whose scope of action does not go beyond one region.

As regards nature, in our opinion, we maintain that if we approach the typology of companies that operate in the financial market, we can distinguish between those that are capitalist based and those that are mutualist based[10]. Banks are capitalist based companies, while savings banks and credit unions are mutualist based companies. However, in accordance with the regulations on management and supervision, their corporate purpose is not limited, i.e. the activity of the entity is not predefined by the corporate form, so that capital-based companies operate in free competition with mutual-based companies.

Thus, capitalist companies and mutual companies, in accordance with their corporate purpose, and with certain specific exceptions, may all carry out the same activity, so that the corporate form cannot be considered as a defining element determining the scope of the principle of proportionality[11].

In terms of the scale and complexity of its operations, the company's activity cannot be separated from the risks it bears. From the reading of the European regulations[12] it is not possible to separate the activity from its risks, so it does not seem that the principle of proportionality can be applied according to the activity it carries out. The company's risk map[13] is important because, although this element does not only include the risks derived from the corporate purpose, it will provide decisive elements for the supervisory body.

10 SÁNCHEZ CALERO, F., (1976) "Los conceptos de sociedad y de empresa en la Ley de Cooperativas", AA.VV, *Libro Homenaje a Ramón Mª Roca Sastre*, Vol. III, Junta de Decanos de los Colegios Notariales de España, Madrid, 493; VICENT CHULIÁ, F., (1977) "La sociedad en constitución", *Revista Crítica de Derecho Inmobiliario*, núm. 518, Madrid, 71-130., GIRÓN TENA, J., (1964) "Los conceptos y tipos de sociedades en los Códigos Civil y de Comercio y sus relaciones", AA.VV, *Estudios del Centenario de la Ley del Notariado*, Tomo IV, Ministerio de Justicia, Madrid, 1; AÑOVEROS TRÍAS DE BES, X., (1998) "Razón de ser de las sociedades personalistas", AA.VV, *Estudios de Derecho Mercantil. Homenaje al Profesor Justino Duque Domínguez*, Vol. I, Universidad de Valladolid, Valladolid, 149-162.; PAZ-ARES, C., (1999)´"La sociedad en general: elementos del contrato de sociedad", AA.VV, URÍA, R., MENÉNDEZ, A., (Coord.), *Curso de Derecho Mercantil*, Vol. I, 1ª ed., Civitas, Madrid, 482.

11 VERCHER MOLL, J., (2018) "Aplicación del principio de proporcionalidad a las entidades que operan en el mercado financiero", Revista Aranzadi de Derecho Patrimonial, núm. 47, Pamplona, 140.

12 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

13 RODRÍGUEZ LÓPEZ, M., PIÑEIRO-SÁNCHEZ, C., DE LLANO MONELOS, P., (2013) "Mapa de Riesgos. Identificación y Gestión de Riesgos", *Revista Atlántica de Economía*, núm. 1, Vol. 2, A Coruña, 1-29.

The risk map dynamically includes the risks to which the company is subject through integrated management. Thus, the company's governance system is configured around the identification of the risks as the main objective and delimiting, each one of them, with an assessment of the acquired risks[14]. Therefore, taking into account the risk analyses carried out by the company and the verification carried out by the supervisor, this public administration will be able to calibrate the application of the principle of proportionality.

The European Banking Authority's Guidelines on Corporate Governance[15] dedicate Title I to the principle of proportionality. This states that significant institutions will have more sophisticated governance systems, while smaller and less complex institutions may apply simpler systems. In line with this idea, it establishes a list of criteria according to which institutions must configure their system of governance and warn the supervisory authorities in the performance of their duties.

The criteria relate to such essential elements as the company's balance sheet, the geographical presence and volume of its operations, the legal form and group of which it forms part, whether the entity is admitted to trading, whether it uses internal models for calculating capital requirements, the type of authorised activities and services performed by the entity, the underlying business model and strategy, the nature and complexity of the business activities and the organisational structure of the company, the risk strategy, risk appetite and actual risk profile of the company, also taking into account the outcome of capital and liquidity assessments, the ownership and financing structure of the company, the type of customers and complexity of products or contracts, outsourced activities and distribution channels, information technology systems.

However, we consider that the criteria referred to do not really solve the problems generated by their application, since their scope is not detailed, for example, to the different areas that make up the system of government, the internal control mechanisms and their contingency plans, etc. At this point, in order to solve the problem, the Guidelines in some points indicate when the system of government can be relaxed in application of the principle of proportionality. Thus, proportionality will be possible in processes, strategies and policies; in the risk committee, remuneration committee and appointments committee.

According to the obligations contained in the Directive, it is questionable whether it is possible to outsource part of the company's organisational structure. Such an approach is not trivial, given the increasing obligations of credit companies from an organisational point of view. Examples are the new obligations arising from data protection regulations; or the obligations under money laundering regulations, whose provisions include the obligation to appoint a representative to the Commission's Executive Service, etc.

The December 2006 Committee of European Banking Supervisors (CEBS) Guidelines on Outsourcing provide important information on this subject. They set out basic principles on the definition of outsourcing, the system of accountability to the outsourced firm, delegation of tasks,

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14 GARAYETA BAJO, A., ITURRICASTILLO PLAZAOLA, I., DE LA PEÑA ESTEBAN, J. I., (2012) "Evolución del capital de solvencia requerido en las aseguradoras españolas hasta Solvencia II", *Anales del Instituto de Actuarios Españoles*, núm. 18, Madrid, 147.; PÉREZ FRUCTUOSO, Mª. J., (2005) "Análisis de los riesgos de las aseguradoras bajo Solvencia II", *Revista Española de Seguros*, núm. 122, Madrid, 245-266.; RODRÍGUEZ-PARDO DEL CASTILLO, J. M., ARIZA RODRÍGUEZ, F., (2015) "El riesgo de modelo en la industria bancaria y aseguradora: Propuestas para su evaluación, control y mitigación", *Análisis Financiero*, núm. 129, Madrid, 52-66.

15 EBA/GL/2017/11

deposit taking, procedures and policies to be included in the outsourcing agreement, control of risks arising from outsourcing, clarity in the wording of the outsourcing contract and access to confidential information, relationship of the outsourcing firm and the Supervisory Authority.

3. THE OUTSOURCING OF FUNCTIONS

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, does not include the possibility of outsourcing part of the company's organization, but the Directive does not prohibit it.

For credit institutions, the possibility of outsourcing governance is recognised in the European Banking Authority's Guidance on Internal Governance. In particular, Guidelines 90 to 93 set out the basic premises for a policy on the outsourcing of functions.

However, Guidelines 90 to 93 are not sufficient to regulate something as complex as the relations of the credit institution with the outsourced company, the characteristics of such companies, the mechanism of liability and assumption of obligations, the reporting mechanisms between the credit institutions and the company to which a service has been outsourced, the monitoring to be carried out by the credit institution, etc.

On the outsourcing of services to cloud service providers, the Recommendations[16] of the European Banking Authority aim to provide institutions with clarity if they wish to benefit from the advantages of outsourcing services to the cloud while ensuring proper identification and management of risks; and to promote supervisory convergence regarding expectations and processes applicable to cloud outsourcing.

But the rules of outsourcing focus only on cloud services, so they do not apply to any other service or subject of the company being outsourced. Thus, on 25 February 2019 the European Banking Authority (EBA) published the Final Report of the Guidelines on Outsourcing Arrangements[17], which aims to set out specific provisions for the governance systems of all financial institutions within the scope of the EBA's mandate, with regard to their outsourcing arrangements and related supervisory expectations and processes.

The new Guides standardise outsourcing services into a single Guide, so that the EBA/REC/2017/03 Guide on Cloud Services, whose activity will be affected by the new Guide, and the December 2006 Committee of European Banking Supervisors (CEBS) Guidelines on Outsourcing are repealed.

4. EBA/GL/2019/02

The Guide starts from a basic idea: it is aware of the new technologies for performing the credit business. Thus, it shows the interest of credit institutions to subcontract or outsource activities whose purpose is to reduce costs and improve their flexibility and efficiency. This can be seen, fundamentally, in the context of digitalisation and the growing importance of new financial

16 EBA/REC/2017/03.
17 EBA/GL/2019/02.

technology providers (fintech), so it is easier for credit institutions to outsource such services than to develop them through their own areas or services.

Therefore, the subjective scope of application of the Guidelines does not only concern credit institutions, but also extends to investment firms and payment and e-money institutions.

4.1. Concept of outsourcing

Guideline 12 states that outsourcing means an agreement between a credit institution, an investment firm, a payment institution or an electronic money institution and a service provider whereby the service provider performs a process, service or activity that would otherwise be performed by the aforementioned institutions.

The idea behind outsourcing is to encompass any activity, process or service of a company. It is possible to question what its impact is on the company's governance system. It is at this point that the obligation arises to distinguish between outsourcing of all or part of the company's corporate purpose and, on the other hand, the outsourcing of own functions, whose internal management of the company is key to controlling the development of the company itself.

4.2. Critical or important functions

One of the issues to be studied in the face of the phenomenon of outsourcing is the extent of outsourcing. The Guide distinguishes critical or important functions from non-critical ones. Furthermore, it should be stressed that the identification of critical or important functions is based on the text of Directive 2014/65/EU (MiFID II) and the Commission's Delegated Regulation (EU) 2017/565, which complements MiFID II and is used only for outsourcing purposes.

Guidelines 29 to 31 consider outsourced functions as critical or important when a defect in their operation would affect the conditions of their administrative authorisation or obligations under Regulation (EU) No 575/2013, when the outsourcing may affect the company's internal control or when the activity of the company to be outsourced requires an administrative authorisation under the terms of Directive 2013/36/EU. Thus, this means focusing on the outsourcing of functions that affect the internal control of the company or affect its business lines.

In order to know if outsourcing affects any critical or important function, the Guide establishes the need to analyze the following parameters: whether the outsourcing arrangement is directly related to the performance of banking activities or payment services for which the credit institution is authorised; the potential impact on the credit institution of any disruption of the outsourced function or failure of the service provider to provide the service on an ongoing basis; the impact on the company that may affect the identification, monitoring and management of all risks, compliance with all legal and regulatory requirements and the conduct of appropriate audits with respect to the outsourced function; the potential impact on the services provided to its customers; the ability to reintegrate the outsourced function into the institution; the protection of data and the potential impact of a breach of confidentiality or lack of guarantee of data availability and integrity on the institution or the payment institution and its customers.

However, if the Guide focuses its regulation on the outsourcing of critical or important functions, this means that, at least from a theoretical point of view, there are functions in companies that can be outsourced without being subject to the Guidelines. In practice, this possibility is remote, given that any outsourcing can affect the company's risks. In this regard, the overlap of all areas or functions of the governance system is such that it will be difficult to fit an outsourcing arrangement that is not in accordance with the Guidelines.

4.3. Effects on the system of government

Title III of the Guidelines reflects the European Banking Authority's concern about what the impact of the outsourcing arrangement on the system of governance will be. The concern is centred on the increase in the company's risks, which leads to the conclusion that these risks are fundamentally of an operational nature given the outsourcing of functions. However, this conclusion may be erroneous, due to the fact that the reference to risks is generic, so that the outsourcing does not harm the company.

However, this does not mean that an externalisation that increases risks cannot be carried out, as the principle of proportionality must be weighed up. The Guide points out that the identification, assessment, monitoring and management of all risks resulting from agreements with third parties should not be neglected.

Outsourcing must be articulated through certain basic rules that the Guidelines develop on. For this reason, we will now analyse the need to maintain good governance of the company despite outsourcing, to have an outsourcing policy, to regulate the methods for preventing and resolving possible conflicts of interest, the business continuity plan, the internal audit function and documentation requirements.

A) *Maintenance of good governance of the company*

Guidelines 35-40 set out a central idea: outsourcing of functions cannot lead to delegation of responsibilities of the management body. Thus, responsibilities for the management and representation functions of the management body cannot be entrusted to the company providing the outsourcing service. It is obvious that the management body will not only have to define the governance system but will also be responsible for it, so if it outsources any element of the company it will assume the responsibility. All of this is without prejudice to the measures that the management body itself can adopt to resolve its deficiencies.

The guidelines detail the responsibilities of the management body in the event that functions of the governance system have been outsourced. Thus, the management body must ensure that the company continues to fulfil its obligations to maintain the administrative authorisation that enables it to carry out the corporate purpose; it must also carry out a specific function focused on supervising the relationship between the company and the company carrying out the outsourced function, all with the aim of ensuring compliance with the outsourcing agreement, so as to avoid risks associated with outsourcing, as well as conflicts of interest.

Furthermore, the guidelines do not forget the need for outsourced functions to maintain the subjective requirements of good repute, experience and professional qualifications that are required of any system of governance of credit or payment institutions. This is to ensure that the institutions performing the outsourced functions do not lack the necessary expertise to perform the outsourced work.

B) *Outsourcing policy*

Directive 2013/36/EU establishes that companies must have solid corporate governance procedures, which affect the organisational structure, risk control, internal control and remuneration system, etc. Therefore, we conclude that the outsourcing of some of the functions of the governance system must be included in a procedure in order to maintain transparency and sound prudent management.

In this regard, Guidelines 41-44 are based on the rule that companies should approve, periodically review and update a written outsourcing policy and ensure its implementation. To this end, the outsourcing policy should define the principles, responsibilities and processes in relation to outsourcing; in particular, who has the ability to choose the outsourced company, the lines of the company's business that can be outsourced, the procedures for the identification, assessment, management and mitigation of potential conflicts of interest, the business continuity plans, the process for approval of new outsourcing agreements.

On the other hand, as regards the control of the outsourced company, the outsourcing policy must establish the bases through which the company can carry out constant supervision of the outsourced company, strategic changes to the outsourcing agreement, review of compliance with all legal requirements, the renewal process, as well as the process of extinction of the outsourcing contract, either supervening or in response to the natural termination of the contract due to compliance.

C) *Conflicts of interest*

Guidelines 45-47 set out the obligation for companies to identify, assess and manage conflicts of interest with respect to their outsourcing arrangements. However, the guidelines emphasise the conflicts of interest that can arise within a group of companies.

In addition, if the outsourced service provider is part of a group of companies that may generate conflict with other companies. Thus, the company seeking to outsource its governance system must ensure that there is no conflict of interest in providing the outsourced service. However, without prejudice to the possibility of exploiting synergies, the service provider must guarantee its independence, even if it forms part of a group of companies.

D) *Business continuity plan*

Guidelines 48 and 49 state that companies should establish, maintain and periodically test appropriate business continuity plans with respect to critical or important outsourced functions. These continuity plans should take into account the possible event that the quality of the provision of the outsourced critical or important function deteriorates to an unacceptable level or fails. Such plans should also take into account the potential impact of insolvency or other failures of service providers and, where relevant, political risks in the service provider's jurisdiction.

The business continuity plan goes beyond a viability plan that reflects a situation of financial deterioration[18], but must ensure that, whatever happens to the outsourced service provider, the company continues with the development of its activity.

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[18] VALPUESTA GASTAMINZA, E., (2018) "El llamado gobierno corporativo de las entidades de crédito", AA.VV, *Cuestiones controvertidas de la regulación bancaria*, GONZÁLEZ VÁZQUEZ, J. C., COLINO

The preparation of the continuity plan is not a trivial matter. Replacing one service provider with another is not usually a quick process; it requires the analysis of different parameters. We believe that the plan should revolve around certain questions such as the mechanism for reversing the service outsourced to the company, whether the company has staff with sufficient capacity and knowledge to assume, even temporarily, the functions that were outsourced. Therefore, the plan must establish the bases of the analysis to assess the impact of the extinction of the outsourced service on the ordinary development of the corporate purpose of the entity. Finally, the continuity plan must refer to the contracting policy for the designation of a new supplier if the company's administrative body so decides.

E) *Internal audit function*

Guidelines 50 and 51 regulate the obligation of companies to conduct a periodic review of outsourced services. Thus, it entrusts the internal audit function with its review according to a plan, which should analyse whether the outsourcing arrangement, including the outsourcing policy, is being implemented correctly and effectively. In addition, it must review whether the plan is in accordance with applicable laws and regulations, the risk strategy and the decisions of the management body.

The internal audit function shall ensure that the outsourced company complies with the aforementioned suitability requirements and that the outsourcing of the functions or role does not increase the company's risk to a greater extent than if the service had not been outsourced, i.e. was carried out internally by the company.

The reason for this is the important work done by the internal audit function. According to the Basel Committee on Banking Supervision's Principles of Corporate Governance for Banks of July 2015, internal audit provides independent advice on the quality and effectiveness of a bank's internal control, management and risk systems and processes[19]. It is a kind of internal police force that reviews the management of the institution during the development of the corporate purpose.

Finally, internal audit will review whether there is adequate participation by the governing bodies in the outsourcing agreements, as well as the periodic monitoring and control of the outsourcing agreements.

F) *Documentation requirements*

To complete the analysis of the effects on the company's governance system of the outsourcing arrangement, Guidelines 52 to 60 set out certain documentation and registration obligations for companies that outsource part of their services. The obligations that we will analyse below may be redundant, so it seems clear that documentation of outsourcing agreements must exist, but the aim is to ensure the consistency or traceability of companies' outsourcing agreements.

Companies should properly document all current outsourcing arrangements, distinguishing between the outsourcing of critical or important functions and other outsourcing arrangements. In addition, they shall create a register in which they shall collect all information on outsourcing.

MEDIAVILLA, J. L., (Dirs.), Wolters Kluwer, Madrid, 175.

19 SILES TALENS, A. L., (2016) "Fuentes regulatorias del gobierno corporativo y tendencias", AA.VV, *El Gobierno Corporativo de las Entidades Bancarias*, LÓPEZ JIMÉNEZ, J. Mª., (Dir.), Thomson Reuters-Aranzadi, Cizur Menor, 113.

The register shall include at least the following information for all existing subcontracting agreements: a reference number for each subcontracting agreement; the start date and next renewal date of the contract, the end date and/or notice periods for the service provider and for the company; a brief description of the outsourced function, including what data is outsourced and whether personal data has been transferred or whether its processing has been outsourced to a service provider; the name of the service provider, the company identification number, the address and other relevant contact details, and the name of its parent company (if applicable); the country or countries where the service will be performed, including the location of the data; whether the outsourced function is considered critical or important, including, where applicable, a brief summary of why the outsourced function is considered critical or important; in the case of outsourcing to a cloud service provider, the cloud service and deployment models, and the specific nature of the data to be maintained and the locations where the data will be stored; and finally, the date of the most recent assessment of the importance of the outsourced function.

All this information must be available to any public administration with the capacity to supervise the companies, mainly the banking authority of each country and the European Banking Authority. In addition, the companies must communicate to the banking authority of each country which functions or departments of the company have been outsourced, and the changes that have taken place during the outsourcing agreement.

4.4. The Outsourcing Process

Analyzed the effects that the outsourcing of functions may have on the company's governance system. The EBA/GL/2019/02 Guide extensively analyzes the basic elements for the process of choosing the company that will provide the outsourced service. The outsourcing process is a matter of internal organization of each company, in accordance with its own policy and procedure manual, both in the choice of the service provider and in the interrelationship between the latter and the company.

Finally, it should be noted that the regulation of the outsourcing process in the Guide leads to a tacit extension of the subjective scope of application. As the Guide points out, in Guidelines 7 and 8, the addressees are credit institutions, investment firms and entities providing payment services; however, the Guide's regulation causes entities with the capacity to provide the outsourced service to adapt to the requirements that a priori are only intended for the mentioned companies and not for the outsourced ones.

A) *Prior analysis*

Guidelines 61-73 provide as a kind of pre-outsourcing procedural manual. The company will first monitor whether the service provider is authorized to perform the outsourced activity, in the event that the service requires authorization. In addition, a risk assessment will be carried out, focusing on the operational risk that the outsourcing may entail for the company. Therefore, various simulations will be carried out in order to plan the effects of various events that may affect the development of the service, whether they are external, computer or human errors. In view of the risks, they will be weighted with the benefit or cost that can be generated for the company, so that a significant increase in the risks may discourage the outsourcing of a service or function.

On the other hand, it is possible that the service provider subcontracts the provision of the service, in which case, the credit institution or payment service provider must analyze the risks that such subcontracting may generate, because the company must know in detail who the service provider actually is.

Finally, in order to make a proper selection of the service provider, the company must conduct a due diligence to determine whether the service provider has the business reputation, adequate and sufficient capabilities, experience, resources, organizational structure and, if applicable, regulatory authorization or registration to perform the critical or important function in a reliable and professional manner to fulfil its obligations during the term of the contract.

B) ***Contract phase***

Once the service provider has been selected, the Guidelines 74 to 99 start from the principle that the rights and obligations of the parties must be clearly documented. To this end, the Guidelines indicate that they will be expressed in the contract document: the functions assigned to the service provider, the start and end date of the contract, applicable regulations, financial obligations of the parties, if possible the subcontracting by the service provider, the location of the service and the location of the data that the service provider collects during the execution of the contract, the company's supervision over the service provider, the alerts that the service provider must provide to the company, whether the service provider must take out insurance for any damage it may cause to the entity, access to the data collected by the service provider, the obligation for the service provider to cooperate with the competent authorities and the termination of the contract.

However, problems arise when the service provider outsources critical or important functions. In this case, the credit institution or payment service provider will have to specify in the outsourcing agreement whether and to what extent it allows outsourcing. Thus, the institution seeking to outsource must set out the necessary guidelines for carrying out the monitoring work, not only on the service provider, but also on the outsourced provider. In this sense, the aim is to prevent companies from increasing their risk by means of a network of subcontracting.

On the other hand, the outsourcing of the service also generates problems in the security of data and systems, in which case, the contract should state whether the service providers comply with cyber security standards. Thus, companies must provide the service provider with the data and system security parameters within the outsourcing agreement and monitor compliance with these requirements on an ongoing basis. To this end, the processing of personal data[20] will be ensured, as well as the location of the storage service provider.

In addition, the contract should reflect that the internal audit function may review the outsourced function using a risk-based approach. So that an oversight activity of the outsourcing arrangement is performed to ensure compliance with all applicable regulatory and contractual requirements.

Finally, the subcontracting agreement should expressly allow the possibility for the credit institution or the payment institution to terminate the agreement, in accordance with applicable law, either for breach of contract itself or for failure to comply with instructions given by the

20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

supervisory authority to the service provider. Even in the event that the contract is terminated because of the above circumstances, the contract should clearly set out the obligations of the existing service provider, in the case of a transfer of the outsourced function to another service provider or back to the institution, including the processing of the data. In addition, establish an appropriate transition period, during which the service provider, after termination of the outsourcing agreement, will continue to provide the outsourced function to reduce the risk of disruption; and include the service provider's obligation to support the company in the orderly transfer of the function in the case of termination of the outsourcing contract.

C) *Supervision of outsourced functions*

Once the outsourcing contract has been concluded, the Guide shows its concern with how the credit institution or payment service provider and the service provider relate to each other during the execution of the contract. Therefore, Guidelines 100-105 order such a relationship. Thus, as a basic idea, they establish that institutions will have the capacity to monitor the service provider with a risk-based approach, taking into account the availability of information and data and, in turn, ensuring its security and integrity.

In addition, if as a result of their supervision they detect an increase in risk due to the actions of the service provider, they shall inform the administrative body of the latter so that it can adopt measures to rectify the risks revealed.

If deficiencies are identified, credit institutions or payment service institutions should take appropriate enforcement or corrective action. Such actions may include termination of the outsourcing agreement, with immediate effect, if necessary.

D) Termination of the contract

Finally, Guidelines 106 to 108 set out the consequences of termination. Thus, credit institutions or payment services institutions should have a documented strategy for termination of the contract, i.e., institutions should have a procedural manual that regulates the guidelines to be followed when the contract is terminated.

One of the most important issues is that, as a consequence of the termination of the contract, the company's commercial actions are not paralyzed, the compliance with the legal requirements in the development of the corporate purpose is not limited and, all this, without detriment to the continuity and quality of the services rendered to the clients.

In this sense, it is particularly relevant because the procedure manual mentioned, which must develop and implement exit plans that are comprehensive, documented and, where appropriate, sufficiently tested. In addition, it should identify alternative solutions and develop transition plans that allow the credit or payment service institution to remove outsourced functions and data from the service provider and transfer them to alternative providers or back to the institution, or take other measures that ensure the continued provision of critical or important function or activity in a controlled and sufficiently tested manner.

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