EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Template for comments

ECB Guide on qualifying holding procedures

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General comments

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the ECB's draft guide on qualifying holding procedures. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA), a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Template for comments

ECB Guide on qualifying holding procedures

Please enter all your feedback in this list.
When entering feedback, please make sure that:
- each comment deals with a single issue only;
- you indicate the relevant article/chapter/paragraph, where appropriate;
- you indicate whether your comment is a proposed amendment, clarification or deletion.

Deadline:	9 November 2022

ID	Chapter	Paragraph	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1	Chapter 1: Foreword						Kolle, Arved	Publish
2	Chapter 2: Framework for the assessment of acquisitions and increases of qualifying holdings in credit institutions by the SSM						Kolle, Arved	Publish
3	Section 2.1: The SSM Regulation and the SSM Framework Regulation						Kolle, Arved	Publish
4	Section 2.2: Implementing/regulatory technical standards (ITSs/RTSs) on procedures and forms; the Joint Guidelines						Kolle, Arved	Publish
5	Chapter 3: General principles for qualifying holdings						Kolle, Arved	Publish
6	Section 3.1: Transparency						Kolle, Arved	Publish
7	Section 3.2: Consistency						Kolle, Arved	Publish
8	Section 3.3: Case-by-case assessment and proportionality						Kolle, Arved	Publish
9	Chapter 4: Obligation to notify						Kolle, Arved	Publish
10	Section 4.1: General	4.1 & 4.2	7	Amendment	We would welcome for the notification requirement for intragroup operations, in case of restructuring or dissolution of a higher level entity, to be removed, as intragroup operations differ from other types of acquisitions of qualifying stakes in nature and object.	The nature of intragroup operations differs from other acquisitions, and this should be reflected in the notification requirements, which could be reduced.	Kolle, Arved	Publish
11	Section 4.2: What is a qualifying holding?	4.2.3	9	Amendment	Section 4.2.3 names the control criterion as well as the multiplication criterion as two different ways to determine the obligation to notify. While the control criterion is consistent with the aim to ensure that the control over credit institution is only exercised by authorised parties, the sole application of the multiplication criterion could lead to situations in which entities will be forced to notify which have no degree of control over the qualified holding or may not even have a "need-to-know" with respect of the M&A activity (e.g. a 10.1% shareholder of an entity which itself acquires a 100% qualified holding in a target). This causes unnecessary administrative burden with no actual merit, as the involvement of additional parties into a confidential M&A activity could cause harm to the process and increase leakage risks. Furthermore, all entities with participations in other companies would need to establish control processes obtaining information from uncontrolled investees to mitigate the risk of missing a notification duty which seems excessive. Therefore, we believe that the multiplication-criterion should not be taken into account as it does not properly correlate with influence over the controlled entity. Indirect holdings would still be covered through the chain of control as long as an entity can really exert control over the qualified holding. In this context, we also note that while there seems to be a hierarchy intended as the control criterion has to be applied first and the multiplication criterion in a second step, the side note on page 10 treats the methods as parallel "[…] as determined by applying one of the two criteria described above." and provides no further guidance on application.	The multiplication criterion should not be taken into account, and indirect holdings would still be covered through the proper chain of control.	Kolle, Arved	Publish
12	Section 4.2: What is a qualifying holding?	4.2.3	10	Amendment	In the side note, there are multiple references to "specific acquirers" and "complex structures" which are not further defined, but would be subject to enhanced obligations. In practice, complex holding and/or transaction structures are chosen for various purposes by many acquirers, while the benefits and costs of structures are weighted against each other. While a structure may increase the required effort of an supervisory assessment, this aspect should not influence the selection of transaction terms and structures by independent market participants. In particular, it is not clear to whom the side-note on p.27, i.e. additional disclosure of shareholder identities with 0.5% indirect multiplied ownership, is applicable. Applying the 0.5% on public stock corporations like large multinational banks (e.g. acquiring a qualified holding of 100% in another institution), would mean that they have to disclose the names even of 0.5% shareholders, which will in no case have influence on the entity, and sometimes will be registered only as fund managers in the stock register. It is further questionable whether the disclosure has merit in absence of a UBO-determination.	We would welcome clarification on the definitions of specific acquirers and complex structures, as they are not further defined in the aforementioned sections of the Guide. Furthermore, the 0.5% disclosure requirement would seem meritless, as shareholders of that caliber have no influence on the supervised entity.	Kolle, Arved	Publish
13	Section 4.2: What is a qualifying holding?	4.2.4	10	Amendment	Whether or not acquirers are "acting in concert" can be determined based on explicit shareholder agreements. However, relying on passive or implicit criteria for the determination of "acting in concert" would require a high amount of judgement, which in turn would cause high uncertainty for the proposed acquirers whether a filing is required. Furthermore, it would often only be possible for these criteria to be assessed in retrospective, while it is not sufficiently clarified in the guidelines what effect this would have on the approval process.	The high amount of judgement required in relying on passive criteria could lead to an uneven playing field in the harmonised framework the ECB operates under. Even in the case of non amendment, clarification would be welcomed on the subject.	Kolle, Arved	Publish

14	Section 4.3: Decision to acquire	4.3	12	Amendment	The ECB clarified during the stakeholder meeting on 19 October on the guide regarding the notification requirement that the notification process is triggered by the unconditional intention of the proposed acquirer. It was also noted that, in light of a constant bilateral dialogue between the supervisor and the institution, the notification process should not be too burdensome on the institution. We would therefore welcome clarification on the formal requirements of the notification and if, in case of complex acquisitions processes, lighter requirements are foreseen to be put in place. AFME believes that the trigger point of the notification requirement is set at too early a stage in the acquisition process (i.e., at the point of the final bid). As qualifying holding acquisition procedures are the result of a variety of negotiations, multiple bidders could be expected. The process of generating a regulatory notification at this stage for each bid could put unnecessary strain on institutions, particularly in case of non-acceptance of the final offer. According to paragraph 4.3, the obligation to notify is triggered as soon as the proposed acquirer has taken the decision to acquire a qualifying holding in the target. It is further clarified that submission of a final bid to the seller by the proposed acquirer is the latest point at which the decision to acquire materialises and triggers the subsequent obligation to notify. In M&A processes, legally binding unconditional offers typically come into existence only after a ready-to-sign transfer agreement has been agreed with one particular purchaser and the ultimate responsible decision body of the purchaser has approved the signing (as otherwise any offer has the condition of missing internal approvals). In most cases this is in very close proximity or even on the same day of the actual signing of the agreements (which then have a condition precedent for the non-objection by the supervisor). As long as no factual agreement between the parties has been reached, it is also in the interest of the seller to keep the transaction as confidential as possible. It will typically ensure this by making the participation in an M&A process for potential buyers conditional upon execution of a confidentiality agreement prohibiting non-mandatory information exchange with third parties. Furthermore, it is market practice for SPA agreements to contain a series of conditions precedent, consisting among others, of obtaining the necessary regulatory authorisations and to include certain provisions with the obligations of the parties, in relation with the submission of relevant notifications and follow-up of such regulatory processes.	The more relevant point of notification would be when the parties enter a legally binding acquisition agreement. Agreements are invariably subject to conditions precedent, including obtaining of any required regulatory approvals – that would be the point in time when it makes sense for the acquirer to prepare the detailed notification documentation to submit to the regulators for their consideration. In other jurisdictions with notification requirements, this is the typical point of notification for mergers and acquisitions.	Kolle, Arved	Publish
15	Section 4.3: Decision to acquire	4.3.3	13	Amendment	According to section 4.3.3, the proposed acquirer should notify the competent authorities as soon as it becomes aware or can expect that the proposed acquisition will take place. We suggest to limit the obligation to notify when becoming aware that the proposed acquisition will take place, and further suggest to delete the reference to expectations of the potential acquirer since this introduces an element of subjectivity that is difficult to assess.	The subjectivity component with regards to the expectations of the potential acquirer introduces an element which might be difficult to define and assess equally.	Kolle, Arved	Publish
16	Chapter 5: Assessment	5	14	Amendment	According to article 4 (1) (36) CRR, a 'qualifying holding' is defined as a “direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking”. Both the indirect and the direct owner of a qualifying holding must be suitable according to the same criteria for such holding. Consequently, we believe that it is in accordance with CRR, that a change from an indirect to a direct holding (e.g. in case the group parent acquires the direct ownership in a subsidiary that it did formerly hold indirectly) would not require a new assessment of the acquirer who was formerly an indirect holder of such participation. It is however ECB’s practice to request a new assessment procedure in such case. We believe this places an unnecessary burden on acquirers, e.g. in case of changes in the group structures which can arise more frequently. The requirement of a new assessment could also be qualified as too burdensome under the proportionality principle, at least for acquisitions in a supervised consolidated group.	The direct acquisition of a qualifying participation formerly held indirectly by the same acquirer should not lead to a new assessment of the acquirer, as it could place an unnecessary burden on acquirers.	Kolle, Arved	Publish
17	Section 5.1: The principle of proportionality	5.1	14	Clarification	AFME welcomed the point raised during the ECB stakeholder meeting on 19 October referencing the harmonised framework under EBA guidelines for SSM supervised institutions, in order not to duplicate information already available. We would however welcome further guidance on the scope and interpretation of the proportionality principle, also considering national law requirements in the subject matter. We would find it helpful to understand the precise impact and interpretation of proportionality in the supervisor's view, in order to correctly inform both the dialogue with the industry and relevant actions on the subject.	Clearly understanding the scope and interpretation of the proportionality principle is key to be able to provide insight and effective communication between the supervisor and the industry at the collective and bilateral level.	Kolle, Arved	Publish
18	Section 5.2: Assessment criteria	5.2	14	Amendment	In relation to the assessment of compliance with the fit & proper requirements for the members of the management body and where multiple related qualifying holding procedures are involved (i.e. several NCAs and ECB working in the assessment of the same transaction), we identify a lack of an harmonised and synchronised process that allows NCAs directors fit & proper processes to rely on the existing ECB fit & proper procedures. In our view, to the extent that there is an ECB fit & proper framework in place, NCAs should act within the harmonised framework to perform their fit & proper assessment at the national level.	Communication and contact between the ECB and NCAs is key to provide a harmonised framework at the operational level and to avoid duplication of information.	Kolle, Arved	Publish

19	Section 5.2: Assessment criteria	5.2.1	14	Amendment	We believe that it is important to avoid duplication with regards to the requirements provided under paragraph 5.2.1 (Criterion A). The full scope and application of par. 5.2.1 would imply that SSM institutions filing a request of authorisation for the acquisition of a qualifying holding would have to provide relevant documentation for the reputation, integrity and professional competence assessment. We understand that this information is already available to the national and European supervisory authorities, resulting in an unnecessary duplication of activities: The “Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector” published by EBA/ESMA /EIOPA on 2016 already adopt this approach since they provide that “the professional competence requirement should generally be considered to be met if […] the proposed acquirer is a legal person regulated and supervised as a financial institution by the same competent supervisor or by another competent supervisor in the same country or in another Member State”. The same circumstance is also relevant for the assessment of the proposed acquirer’s integrity, unless there are further developments or new information available that may determine a different conclusion. With a view of simplifying the assessment process and minimising the potential adverse impact on the entities involved in the acquisition process, we consider important to avoid the duplication of activities for the collection of information and statements - and relevant updates - by members of the management body that have been already assessed by the National Authorities and the ECB according to the Fit and Proper procedure. In light of the above we suggest the inclusion of the following provision under par. 5.2.1: “If the proposed acquirer is a SSM credit institution it is exempted from submitting any information on the suitability of the members of its management body and no additional assessment is required under this paragraph. Any updating of information referring to the suitability of members of the management body for SSM credit institution is to be made within the procedure and time constraints provided by the ECB Guide to fit and proper assessments.”	The request is aimed at simplifying the procedure for the acquisition of a qualifying holding and avoiding duplication of the duties and procedures burdening the management body.	Kolle, Arved	Publish
20	Section 5.2: Assessment criteria	5.2.1	15	Amendment	The assessments described under “Integrity and professional competence” are already part of the ongoing supervisory process of acquirers should they be regulated credit institutions in EU member-states. It should be considered to carve out these institutions from all assessments that would be redundant / duplicative with the ongoing supervisory process, including the obligation to obtain criminal records and certificates of good standing by authorities. We also note that providing details on all pending litigations could be excessive, as these would include ordinary course of business items, e.g. mortgage-disputes, and we would welcome a proportionate approach from the ECB.	The request is aimed at simplifying the procedure for the acquisition of a qualifying holding and avoiding duplication of the duties and procedures burdening the management body, as well as strengthening the harmonised operational framework.	Kolle, Arved	Publish
21	Section 5.2: Assessment criteria	5.2.1.1	15	Amendment	As footnote 30 to par. 5.2.1.1 highlights, the roles and responsibilities of non-executive members of the board of directors are subject to national law. We understand that as per these national requirements, non-executive members do not directly influence the day to day decision making or represent the legal person. Hence, we believe that the footnote could be amended as per the below: "the persons who “effectively direct the business” should be taken to mean the persons who jointly or individually can represent and legally bind the legal person. These usually comprise the members of the management board (in two-tier management systems) or the executive board (in one-tier management systems) of the proposed acquirer. In principle, the members of the supervisory board (in two-tier management systems) and non-executive members of the board of directors (in one-tier management systems) of the proposed acquirer are excluded, ~~unless they are able to directly influence the day-to-day decision-making and/or represent and bind the legal person.~~ However, this remains subject to national law“.	The proposal is aimed at improving the clarity of the rule.	Kolle, Arved	Publish
22	Section 5.2: Assessment criteria	5.2.1.1 and slide note	15	Amendment	Obtaining a certificate of absence of criminal records is often more difficult and time consuming in non EU jurisdictions, and it has been proven to be challenging in a variety of previous procedures. We would welcome for this to be taken into account by the ECB.	Timing in the collection of criminal records outside of EU jurisdictions should be taken into account by the supervisor, as it might affect the general communication timelines.	Kolle, Arved	Publish
23	Section 5.2: Assessment criteria	5.2.2	17	Amendment	We suggest to amend par. 5.2.2 (Criterion B) that requires to conduct the FAP assessment of any new member to be appointed by the proposed acquirer to the management body of the target as a result of the proposed acquisition, as part of the qualifying holding procedure, by attaching to the notification the information required for the FAP assessment. We understand that this provision can be incompatible with some member state rules, according to which the proposed acquired must provide to the relevant authority specific information on the candidate as new member of the management body of the target, while the FAP assessment is performed by the management body of the target after the appointment of the candidate (ex post assessment). According to the above, we propose to amend par. 5.2.2: *“Where the proposed acquirer has already identified a new member to be appointed to the management body of the target, the information* ***referred to the candidate, as provided by the national law applicable to the target, should be attached to the notification. Otherwise, it will be considered incomplete.*** *[…]If the fit and proper assessment conducted as part of the qualifying holding procedure follows the same principles as a regular fit and proper* ***procedure according to national law****, further assessment should not in principle be required once the appointment has been made.”*	The request is aimed at simplifying the procedure for the acquisition of a qualifying holding and avoiding duplication of duties and procedures burdening the management body.	Kolle, Arved	Publish

24	Section 5.2: Assessment criteria	5.2.3.1	20	Amendment	The guideline states that “supervisors will pay particular attention when an acquisition by a credit institution generates goodwill or badwill and will consider the impact on the institution’s total capital position, once this has been verified by the auditors”. This seems to contradict the “Guide on the supervisory approach to consolidation in the banking sector” which states that the “supervisory approach with regard to badwill is based on the recognition of the accounting value of badwill, unless there is specific supervisory evidence of valuation issues not yet recognised.” (par. 3.3., page 9 of the Guide). The term “[…] once this has been verified by the auditors” is an additional point and does not reflect the practice of goodwill/badwill recognition. The purchaser’s auditors will as part of their audit mandate only vet the goodwill/badwill recognised in the financial statements of the purchaser after the fiscal year end of the year in which the transaction has been consummated and the goodwill/badwill has been recognised in the financial statements. Consequently, the Guide on the supervisory approach to consolidation in the banking sector” refers to “duly verified accounting badwill from a prudential perspective, expecting it to be appropriately calculated after thorough accounting recognition and valuation of assets and liabilities”, but does not require an audit of the badwill for initial recognition. If an audit would be a pre-requisite for recognition there would be an intermediate time period in which a positive capital effect of badwill cannot be recognised and therefore a contemplated transaction may practically become impossible	As per the ECB's press release regarding the present Guide, it has a complementary approach to the Guide on the supervisory approach to consolidation in the banking sector. The additional audit process requirements seem to be not compatible with the complementary framework laid down by the ECB previous guidelines on the topic.	Kolle, Arved	Publish
25	Section 5.2: Assessment criteria	5.2.4.2	21	Amendment	According to the guideline, a proposed acquirer shall be exclusively responsible for writing the target’s business plan. Even though the proposed acquirer has to define and present its plans with the target, we understand that a credible business plan for the underlying business of the target would under normal circumstances be established by its own management. The buyer will use the target’s management’s plan as a basis for the post-acquisition plan. The guideline requires the supervisors to challenge the assumptions of the business plan on a granular level and build an “adjusted base case”, to e.g. consider the key drivers of success and competitive advantages of the target, consider synergies or identify a lack of them, perform benchmarks with 3rd party data., etc. All this will only be possible with in-depth and expert knowledge about the target business and the results of the due diligence which a supervisor would not normally possess. However, the involvement of third party advisers in the assessment of an M&A activity would not be acceptable from a confidentiality perspective. To perform all described steps for the assessment would require substantial time and resources and would endanger the success of M&A transactions which depend on secrecy and swift execution. Furthermore, we understand that the level of detail required for the business plan for supervisory purposes is too comprehensive in light of a continuous dialogue between the supervisor and the industry. While certain requirements - such as the general understanding of financial estimates and its impact on the solvency position of the acquirer - appear to be proportionate, the level of detail envisioned on the individual and detailed assumptions being required in order to carry out the “supervisory challenge scenario” could be too burdensome in a framework of constant communication and exchange of information.	The provision regarding the business plan assessment would be extremely burdensome to perform not only under a M&A activity perspective, but from a confidentiality one as well. The required level of detail of the business plan envisioned by the Guide could also be reduced to provide more effective and swift communication between the industry and the supervisor.	Kolle, Arved	Publish
26	Section 5.2: Assessment criteria	5.2.5	24	Amendment	If the acquirer is a EU regulated financial institution, AML risks are managed within its existing legal obligations which also includes ensuring a sufficient AML/CFT organisation in the post-acquisition perimeter. Therefore, duplicative requirements should be avoided.	The request is aimed at maintaining and strengthening the harmonised framework under which EU regulated financial institutions operate, as well as avoid duplication of information already available to the supervisor.	Kolle, Arved	Publish
27	Chapter 6: Procedural aspects and documentation; information requirements	6	28	Amendment	It is important to avoid duplication as part of the documentation and information requirements, particularly regarding intragroup operations where this information is already available to the ECB.	To avoid duplication of information and ensure swiftness in the dialogue between the institution and the supervisor, the institution should not present information already made available to the ECB.	Kolle, Arved	Publish
28	Section 6.1: Pre-notification phase and synchronisation of procedures involving several NCAs	6.1	28	Amendment	We do believe that it is important to synchronise efforts between the information requirements from different NCAs (and the ECB) where multiple related qualifying holding procedures are involved. In our view, information requirements from ECB and NCAs involved in related qualifying holding procedures should be as harmonised as much as possible. In line with this, the information requirements of NCAs qualifying holding procedures - which are related to (and arise as a consequence of) the main transaction that is being analysed by ECB - seem to be more burdensome in comparison to the file being analysed by ECB as part of the main transaction. Similar to the points above on notifications (4.3), it should also be noted that the obligation to notify at the binding offer stage might affect the success of the operation, given the complexity of M&A transactions.	Harmonisation, in correlation with the proportionality principle, is key and the underlying approach in the Guide as well. In light of this, the NCAs information requirements in this regard could be reduced. Additionally, the notification at a too early stage might interfere with the success of the transaction, particularly when there is a bidding process in place.	Kolle, Arved	Publish
29	Section 6.2: Acknowledgement of receipt and calculation of the procedural deadline	6.2.3	29	Amendment	In case of correct and timely use of the IMAS portal, filing additional notifications could be counterproductive in the context of the supervisory dialogue where such information is already presented.	Avoiding duplicate notification processes is both in the interest of the supervisor and the institution, as it could be counterproductive and affect the timeliness of the supervisory dialogue.	Kolle, Arved	Publish
30	Section 6.3: Request for further information and suspension of the legal deadline	6.3	29	Amendment	The interruption of the procedure in case of missing a non-essential item could negatively impact both the procedure as a whole and the supervisory dialogue at a bilateral level.	To keep procedural aspects running smoothly, as well as the dialogue between the institution and the supervisor, the interruption of the procedure should be carefully considered.	Kolle, Arved	Publish
31	Section 6.4: Material changes during and after the assessment period						Kolle, Arved	Publish

32	Section 6.5: Ancillary provisions to the ECB's decision	6.5	30	Amendment	The ability to make conditions, obligations or ask for commitments from proposed purchasers gives supervisors the power to actively alter the terms and structure of M&A transactions which have been agreed by free market participants. This would go beyond the clearly defined supervisory role. Market participants have to rely on clear timelines and legal certainty when agreeing on transactions, in particular clear end-dates of the assessments. Conditions, obligations and commitments would lead to de-facto prolongations as they will have to be clarified, discussed and agreed after the conclusion of the assessment. After having agreed a transaction with a counterparty the proposed purchaser is exposed to destabilisation and reputational risks in case the transaction has to be stopped. Therefore, proposed acquirers may be forced to proceed with a transaction despite of any obligations exposed, which would ex-ante have led to their withdrawal from the bidding process. The possibility for NCAs to make one-sided obligations seems unproportional in this context (as opposed to remedies proposed by the proposed acquirer instead).	A more proportionate approach would be to limit the supervisor's power to either reject transactions or approve them tacitly, but not to alter or influence the transaction terms and structures other than perhaps through the informal discussions during the assessment process.	Kolle, Arved	Publish
33	Section 6.6: Procedural issues relating to the qualifying holding assessment						Kolle, Arved	Publish