



EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Template for comments

ECB Guide on qualifying holding procedures

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General comments

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
1	Chapter 1: Foreword				It is important to remind the context of high competition in which the acquirer operates. In M&A process, supervised banking institutions may face new entrants that are usually unsupervised and unregulated (Fintech companies, investment funds,...). Any additional requirement that would apply specifically to banks involved in M&A transactions may create a real risk of distortion that could alter or influence the transaction terms and structures, other than perhaps through the informal discussions during the assessment process. Therefore we support that conditions, obligations and commitments should be asked in the same way to all market participants whether or not they are supervised.	
2	Chapter 2: Framework for the assessment of acquisitions and increases of qualifying holdings in credit institutions by the SSM					
3	Section 2.1: The SSM Regulation and the SSM Framework Regulation	2.1	4	Clarification	We ask to add at the third sentence "The competence is exercised in close alignment with the NCAs, which serve as the entry points for receiving notifications by IMAS portal if applicable and must submit a proposal to the ECB to oppose or not oppose the acquisition or increase of a qualifying holding."	As indicated in section 6.2.3 of the present Guide, where the competent NCA has opted to use the IMAS portal, the notification should be sent to the NCA through this tool, excluding any direct submission or double submission.
4	Section 2.2: Implementing/regulatory technical standards (ITSs/RTSs) on procedures and forms; the Joint Guidelines					
5	Chapter 3: General principles for qualifying holdings					

6	Section 3.1: Transparency					
7	Section 3.2: Consistency					
8	Section 3.3: Case-by-case assessment and proportionality					
9	Chapter 4: Obligation to notify					
10	Section 4.1: General					
11	Section 4.2: What is a qualifying holding?					
12	Section 4.3: Decision to acquire	4.3 introduction	12	Amendment	<p>We suggest an amendment "The obligation to notify is triggered as soon as the proposed acquirer has taken the decision to acquire a qualifying holding in the target. As a general rule, it can be presumed that the proposed acquirer has taken the decision to acquire a qualifying holding at the very latest once the current shareholder(s) and the proposed acquirer have entered into a legally binding transfer agreement. The execution of a binding transfer agreement between the current shareholder(s) and the proposed acquirer is therefore the latest point at which the decision to acquire materialises and triggers the obligation to notify."</p>	
12	Section 4.3: Decision to acquire	4.3.2 Obligation to notify for temporary acquisitions	13	Clarification	<p>It should be completed to also provide for the cases where there is a temporary acquisition which is done intra-group (and therefore does not change the final shareholding structure, i.e. the top mother company would still be the final shareholder) and is done only for the purpose of carrying out intra-group organizations (such as simplified merger that requires holding 100% of the shares of the absorbed company) and pursuant to which the target entity will cease to exist (a filing for the withdrawal of its license will be submitting without the need to also make a filing for the temporary acquisition). In this case, the temporary acquisition should be done only for a period necessary to proceed with the simplified merger (usually less than two months). This would also be in line with what is provided in iii) of the § 5.1 regarding the principle of proportionality.</p>	<p>In line with the proportionality principle, this would allow to avoid an additional burden and formalities both for the supervisor and the proposed acquirer.</p>

13	Chapter 5: Assessment	5.1	14	Clarification	<p>It is important to specify in point ii) that pursuant to this principle it is not necessary to provide to the supervisor all the information that is required for the proposed acquirer if the latter is a supervised institution. This should be true when the proposed acquirer and the target company are located in the same country, but also when they are located in different member states and the proposed acquirer is supervised by the ECB. It is important that the NCAs use the cooperation instruments available between each-other and also between them and the ECB.</p> <p>In this paragraph, it is also important to specify that pursuant to point i), when the proposed transaction is an intragroup reorganization or a simplification of the shareholding structure (and also often the proposed acquirer is a supervised entity or a shareholder that has been already approved), that the NCA, after consultation with the ECB, may refrain from a formal procedure (as it is for example provided for the case referred to in §4.3.2). Indeed, this is an additional work load for both the proposed acquirer and the supervisor, whereas the proposed acquirer is part of the group, is already supervised and approved by the supervisor and the ultimate shareholder is unchanged (i.e. the top mother company of the group).</p>	In line with the proportionality principle, this would allow to avoid an additional burden and formalities both for the supervisor and the proposed acquirer.
15	Section 5.2: Assessment criteria	5.2.1.1	16	Amendment	We suggest to add: "Where the members of the management body of the proposed acquirer has already been assessed or are currently assessed by the ECB or the NCA, the notification only includes a letter certifying there is no change since the last update sent to the ECB or the NCA."	We request for a lighter file based on a previous assessment in order to avoid burdensome file preparation by providing elements that are already available to the supervisors.
15	Section 5.2: Assessment criteria	5.2.1.2 paragraph 2	16	Amendment	We ask to amend the text as follow : " All-Significant pending proceedings should be adequately described by the proposed acquirer in the notification (...)"	It would be too burdensome to indicate all pending proceedings, it is necessary to define a materiality threshold and a period, and to inform only of significant disputes.

15	Section 5.2: Assessment criteria	5.2.2 paragraph 3,4,5	17	Amendment	<p>In order to avoid any unnecessary administrative burden and costs, the ECB should not request any FaP form to be sent where the potential candidate to be appointed as member of the management body is already known by the ECB or the NCA. Instead, the entity should provide a letter certifying that there is no change in the situation of the potential candidate since the last update made to the supervisor. Within the SSM, there is no need to duplicate the fit and proper formalities, especially where there isn't any decision taken by the relevant body within the entity.</p> <p>Here is the related amendment we propose: "Where the proposed acquirer has already decided to appoint identified a new member to be appointed to the management body of the target, unless the person has already been assessed or is currently assessed by the ECB or the NCA, in which case a letter certifying there is no change since the last update sent to the ECB or the NCA. The information required for the FAP assessment should be sent attached to the notification. Otherwise, it will be considered incomplete.</p> <p>Within the limitations set out in national law when transposing Article 23(1)(b) of the CRD, the fitness and propriety of members of the management body are will be assessed on due time on the basis of the following criteria: (i) experience; (ii) reputation; (iii) conflicts of interest; (iv) collective suitability; and (v) time commitment.</p> <p>Unless national laws provide otherwise, the fit and proper assessment conducted as part of the qualifying holding procedure follows the same principles as a regular fit and proper procedure, and further assessment should not in principle be required once the appointment has been made."</p>	<p>This would avoid to duplicate formalities where there is no change since the last update sent to the ECB or the NCA. French banks refuse the assessment of the target's management as part of the notification and therefore the sending of the PAF before the appointment of the said management.</p> <p>We very strongly disagree with the ex ante evaluation by the competent authorities.</p> <p>The supervised entities have the primary responsibility for selecting and appointing directors for the management body while an ex ante consultation of the supervisor would amount to co-responsibility. With a recruitment already very well supervised, an ex-ante approval would not only constitute a sharing of responsibility and an additional hazard but would add unnecessary constraints in terms of schedule while the process of publication of the resolutions for the General Assembly which will approve the appointments of administrators are themselves very constrained by regulations. While the pool of potential directors is quite small, the director's recruitment should start at least one year before the departure of the person to whom he will be called to succeed with all the difficulties related to the projection of his situation over such a long period. Especially, since the regulations allow the possibility of formulating requests for additional information or documents, which can further lengthen the processing time.</p>
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15	Section 5.2: Assessment criteria	5.2.3.1	19	Clarification	<p>We suggest an assessment at the group level: "If the proposed acquirer is a credit institution, the financial soundness assessment will take into account the last assessment of the overall risk profile of the proposed acquirer as well as the impact the acquisition will have on its risk exposure, business model, profitability, governance structure and capital adequacy (to be also assessed at the group level)."</p> <p>We want to change the sentence: "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."</p>	<p>Where the acquisition is carried out by a Group's subsidiary, the assessment shall be completed at the subsidiary's level taking into account its affiliation to a group.</p> <p>The term "[...] once this has been verified by the auditors" is new and seems not to reflect the practice of goodwill/badwill recognition. The purchaser's auditors will, as part of their audit mandate, only vet the goodwill/badwill recognized 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 recognized in the financial statements. As the auditors' verification is subsequent to the assessment, it will not be available in the framework of the instruction of the application for a qualifying holding. The only document that could be provided by the auditors would be an attestation based on projections and which would necessarily be subject to reserves such that this document would be irrelevant to the assessment of the application form.</p>
15	Section 5.2: Assessment criteria	5.2.4	21	Clarification	<p>We propose to add a sentence before the 5.2.4.1 paragraph : "Where appropriate, supervisors will take into account in their assessments requests related to prudential and liquidity waivers of the target submitted by the acquirer in the context of the acquisition."</p>	<p>The supervisor should take into account that waiver requests made in parallel with the application for a qualifying holding would result in the target being exempted from meeting solvency and liquidity requirements on an individual basis.</p>

	Section 5.2: Assessment criteria	5.2.4.2 paragraph 2	22	Amendment	We suggest an amendment: "The proposed acquirer submits to the supervisor a Responsibility for writing the business plan lies exclusively with the proposed acquirer, based on the elements and data available to the acquirer and including those provided by the target within the limits allowed by the trust regulation. The supervisors need to gain an overall view of the plan submitted and the ability of the target to achieve the objectives envisaged."	We think that commitment is too strong because the scenarios presented by the purchaser are based on the target's information. However, the transmission of this information prior to the closing is restricted, by application of the rules of competition law.
	Section 5.2: Assessment criteria	5.2.4.2 Qualitative assessment	22	Clarification	We suggest and amendment: "Supervisors consider : the key drivers of success and areas of competitive advantage that make the target more effective at generating profits than its competitors. "	The operation not necessarily aimed at acquiring a market leader. We are not comfortable with this obligation imposed on supervisors and could be transferred to the acquirer, which would be a burdensome and new obligation.
16	Chapter 6: Procedural aspects and documentation; information requirements					
17	Section 6.1: Pre-notification phase and synchronisation of procedures involving several NCAs					
18	Section 6.2: Acknowledgement of receipt and calculation of the procedural deadline					
19	Section 6.3: Request for further information and suspension of the legal deadline					
20	Section 6.4: Material changes during and after the assessment period					
21	Section 6.5: Ancillary provisions to the ECB's decision					
22	Section 6.6: Procedural issues relating to the qualifying holding assessment					