EUROPEAN CENTRAL BANK

BANKING SUPERVISION

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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.
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- each comment deals with a single issue only;
- you indicate the relevant article/chapter/paragraph, where appropriate;
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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				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.	As a preliminary remark, we would like to underline the context of high competition in which the acquirer operates, given that “Mergers and Acquisitions” (M&A) transaction represents a delicate and strictly confidential process. In addition to that, supervised banking institutions might face new entrants that are usually unsupervised and unregulated (e.g. FinTech companies, investment funds); hence, any additional requirement that would apply specifically to banks involved in M&A transactions could entail a real risk of competition distortion, which therefore might alter or influence the terms and structures of transaction. These characteristics should be acknowledged in the draft ECB Consultation Guide on Qualifying Holding Procedures, as we support that conditions, obligations and commitments should be asked in the same way to all market participants, whether they are supervised or not.	EBF	Publish
2	Chapter 2: Framework for the assessment of acquisitions and increases of qualifying holdings in credit institutions by the SSM						,	Publish
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 poins 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 local authority has opted to use the IMAS portal, the notification should be sent to the NCA through this tool.	EBF	Publish
4	Section 2.2: Implementing/regulatory technical standards (ITSs/RTSs) on procedures and forms; the Joint Guidelines						,	Publish
5	Chapter 3: General principles for qualifying holdings						,	Publish
6	Section 3.1: Transparency						,	Publish
7	Section 3.2: Consistency						,	Publish
8	Section 3.3: Case-by-case assessment and proportionality						,	Publish
9	Chapter 4: Obligation to notify				Eliminate requirement to notify for intragroup operations involving a higher level entity which is restructured or disappears.		,	Publish
10	Section 4.1: General						,	Publish

11	Section 4.2: What is a qualifying holding?				In this section, the ECB Guide names the control criterion as well as the multiplication criterion, as being two different ways to determine the obligation to notify. There seems to be an intended and structured hierarchy, as the control criterion has to be applied as a first step, whereas the multiplication criterion in a second step (i.e. AND connection). However, the side note on page 10, second paragraph of the Guide seems to treat these two criteria/ methods as parallel ones (i.e. OR connection) - "[…] as determined by applying one of the two criteria described above". While the control criterion is apparently consistent with the aim to ensure that the control over credit institution is only exercised by authorized parties, the sole application of the multiplication criterion could lead to situations in which entities will be forced to notify, even if having no degree of control over the qualified holding or may not even have a "need-to-know" with respect to the M&A activity (e.g. a 10.1% shareholder of an entity which itself acquires a 100% qualified holding in a target).This inconsistency entails unnecessary administrative burden with no actual merit. On the contrary, 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 requirement, which seems excessive. Therefore, the control or significant influence criterion is consistent, whereas the multiplication-criterion should be disregarded as it does not properly correlate with influence. 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 practice, complex holding and transaction structures are being 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 page 27, i.e. additional disclosure of shareholder identities with 0.5% indirect multiplied ownership, is applicable. By 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 of even 0.5% shareholders, which will in no case have influence on the entity, while sometimes they will be registered only as fund managers in the stock register. It is further questionable whether this disclosure has merit in absence of a UBO-determination. Additionally, whether acquirers are acting in-concert or not can be factually determined based on explicit shareholder agreements. However, relying on passive or implicit criteria for the determination of acting in-concert would require a great mass of judgement, which in turn would cause high uncertainty for the proposed acquirers, provided that a filing is required. Furthermore, these criteria would often only be possible to be assessed in retrospective, while it is not sufficiently clarified in the guidelines what effect this would have on the approval process. Finally, EBF raises the question whether it is accurate to include "conglomerates" into "complex structures" (reference is made to "Side note" on page 10 of the Guide), particularly when the conglomerate is subject to the SSM framework.		,	Publish
12	Section 4.3: Decision to acquire	4.3 introduction	12	Amendment	According to the guide, the decision to acquire shall be presumed at the very latest when the proposed acquirer makes an unconditional offer to the current shareholder(s) to enter into a legally binding transfer agreement. In this regard, EBF argues that the point of triggering the notification requirement comes too early in the acquisition process, thereby we suggest the following amendment by inserting the sentences in bold italics: "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 materializes and triggers the obligation to notify." The proposed acquirer must be comfortable that the seller has given a written commitment to complete the transaction before initiating the qualified participation procedure. Its offer is a unilateral act that does not guarantee on the seller's commitment. In practice, the written commitment often consists of a memorandum of understanding or call option/put option, since a binding agreement cannot be signed before the opinion given by the employee representative bodies and the decisions taken by the management/ supervisory boards. The signing of an SPA subject to the precedent condition of obtaining regulatory approvals is the very last moment for notification. Typically in M&A transactions, legally binding unconditional offers enter into force 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 (otherwise, any offer depends on the condition of missing internal approvals). In most cases, this takes place in very close proximity, or even on the same day of the actual signing of the agreements, as there exists the condition for non-objection by the supervisor(s). In fact, it is market practice for Sales & Purchase Agreements (SPAs) to contain a series of precedent conditions consisting, among others, of obtaining the respective regulatory authorizations as well as of including certain provisions with the obligations of the parties related to the submission of relevant notifications and follow-up of such regulatory processes. It is worth mentioning that binding offers are not strictly "binding", as they might be even at this stage subject to negotiation. It is important to note that, as long as there is no factual agreement between the parties or there are still multiple bidders underway, it is in the interest of the seller to keep the transaction as confidential as possible and avoid consultation of (multiple) supervisors or other parties. This could be ensured by making the participation for potential buyers in an M&A process conditional upon execution of a confidentiality agreement that prohibits non-mandatory information exchange with third parties. Having said that, we suggest that the involvement of the supervisor should take place when it is rendered mandatory, and not by way of early involvement as it has been put forward in the ECB Guide. On top of that, the reference made in this Guide regarding the "submission of a final bid to the seller", as described in paragraph 4.3, might not be appropriately characterized as a "final bid". This is because it could still be conditional or at a point in time when there are multiple bidders in the process. In our view, the obligation to notify an acquisition of a qualifying holding should be triggered only once there is absolute certainty that the acquisition will be carried out, subject to obtaining the relevant authorizations (and not at the time a final bid is being just posted, since there is still possibility that the seller does not accept it). Having said that, the most reasonable time to make the notification is upon execution of a legally binding agreement between the potential acquirer and the seller.	The proposed acquirer must be comfortable that the seller has given a written commitment to complete the transaction before initiating the qualified participation procedure. Its offer is a unilateral act that does not guarantee on the seller's commitment. In practice, the written commitment often consists of a memorandum of understanding or call option/put option, as a binding agreement cannot be signed before the opinion of the employee representative bodies and the decisions of the management/ supervisory boards. The signing of an SPA subject to the condition precedent of obtaining regulatory approvals is the last moment for notification.	EBF	Publish

12	Section 4.3: Decision to acquire	4.3.2 Obligation to notify for temporary acquisitions	13	Clarification	According to the ECB Guide, it proposes generic process simplifications for temporary acquisitions of qualified holdings under strict criteria (final shareholder structure remains unaffected by temporary ownership; contractual obligation to deliver the holding to another party; agreement to prohibit any influence over the target). In this regard, EBF believes that this section should be complemented in order to provide for those cases where a temporary acquisition has been executed intra-group (and therefore the final shareholding structure has not been modified, i.e. the top mother company would still be the final shareholder). This acquisition is being conducted for intra-group organizational purposes (such as simplified merger that requires holding 100% of the shares of the absorbed company), pursuant to which the target entity will cease to exist (a filing for the withdrawal of its license will be submitted without the additional need to also make a filing for the temporary acquisition). In this case, the temporary acquisition should be carried out only for a period which is necessary to proceed with the simplified merger (usually less than two months). This would be also in compliance with the principle of proportionality as it is being dissected in paragraph § 5.1 of the ECB Guide. Subsequently, the removal of the obligation to notify transactions which meet the entirety of requirements should be taken into consideration, in order to avoid additional administrative burden and superfluous formalities.	In line with the proportionality principle, this would allow to avoid an additional burden and formalities both for the supervisor and the proposed acquirer.	EBF	Publish
13	Chapter 5: Assessment	5.1	14	Clarification	Pursuant to Article 4 (1) (36) CRR, a 'qualifying holding' means 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”. In other words, both the indirect and the direct owner of a qualifying holding must be suitable according to the same criteria for such holding. Consequently, according to CRR, 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) should 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. EBF believes this is not in compliance with the applicable regulation and places an unnecessary burden on acquirers, e.g. in case of changes in the group structures which can arise more frequently. Moreover, it contradicts the principle of proportionality cited in section 3.3 of the ECB Guide, which is also laid down in Article 5 of the Treaty on European Union (TEU) and “ensures that acts of European institutions do not go beyond what is necessary to achieve the aim pursued”. It is also important to specify that pursuant to points i) when the proposed transaction is an intragroup reorganization or a simplification of the shareholding structure, and ii) when the proposed acquirer is a supervised entity or a shareholder that has been already approved), 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 paragraph 4.3.2). Indeed, this constitutes an additional workload for both the proposed acquirer and the supervisor, while 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). Therefore, we encourage the ECB Guide should consider that the direct acquisition of a qualifying participation formerly held indirectly by the same acquirer should not lead to a new assessment of the acquirer; or at least, this practice should apply to those acquisitions in a supervised consolidated group.	In line with the proportionality principle, this would allow to avoid an additional burden and formalities both for the supervisor and the proposed acquirer.	EBF	Publish

15	Section 5.2: Assessment criteria	5.2.1.1	16	Amendment	To begin with, a large amount of overall information and documentation with regard to (European) banks subject to supervision by the SSM supervisory authorities is already available by the latter, also including many detailed information and documentation items to be provided and submitted as mentioned in the ECB Guide. This Guide should generally acknowledge the scope and extent of such availability, requiring SSM regulated banks to only provide information that is not already available within SSM authorities. In addition, we suggest incorporating the principle of proportionality into the context of intra-group transactions (where, by way of internal merger a direct participation is acquired instead of an indirect participation) to safeguard in the context of the SSM framework the applicability of the EBA Guidelines and that information already available within the SSM authorities will be unlocked and used, avoiding that required information is (again) being requested from the institutions involved in the particular case. In line with this and at a more granular level, EBF argues that the assessment criteria provided for in paragraph 5.2.1 of the ECB Guide (Criterion A) should apply only to non-EU entities, given that the automatic mutual recognition does not apply to these institutions. On top of that, to the extent there is an ECB fit & proper assessment (hereinafter: FAP) in place, NCAs should not request any additional integrity testing, criminal records or other director's suitability-related documentation to perform their FAP at national level. On the contrary, at least SSM credit institutions filing a request of authorization for the acquisition of a qualifying holding, should not be required to provide information and documentation for the assessment of their reputation, integrity and professional competence, already available to the supervisory authorities, both national and European ones. In this regard, we would like to highlight the fact that "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 stipulate that "the professional competence requirement should be generally 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 to the Authority, that may determine a different conclusion. With a view of simplifying the assessment process and minimizing 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 – along with 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 paragraph 5.2.1: "If the proposed acquirer is an 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 update 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." Without prejudice to the above considered, we suggest amending the footnote 30 of paragraph 5.2.1 by excluding from the assessment all non-executive members of the board of directors and, for this purpose, to remove the provision "unless they are able to directly influence the day-to-day decision-making and/or represent and bind the legal person". We therefore propose the following amendment to footnote 30 of section 5.2.1: "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".	We would ask for a "lighter" file based on a previous assessment.	EBF	#VALUE!
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.	EBF	Publish
15	Section 5.2: Assessment criteria	5.2.2 paragraph 3,4,5	17	Amendment	we would suggest amending paragraph 5.2.2 of the ECB Guide (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. This provision seems to be incompatible with national legislations according to which the proposed acquired has to provide to the competent 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 proceed with the following amendment and integration to section 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 required for the FAP assessment, as provided by the national law applicable to the target, should be attached to the notification. Otherwise, it will be considered incomplete. […] Unless national laws provide otherwise, 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, and further assessment should not in principle be required once the appointment has been made. Taking the aforementioned remarks into consideration, we would like to address, on a separate basis, the main points brought up from the assessment criteria proposed in the ECB Guidelines: i. Regarding the side note on criminal records, we would like to draw the attention of the ECB to the fact that the certificate of absence of criminal records is notoriously more difficult as well as time consuming to be obtained in non-EU jurisdictions. ii. In section 5.2.3 of the ECB Guide regarding the criterion of financial soundness, it states that "supervisors will pay particular attention when an acquisition by a credit institution generates good will or bad will, and will consider the impact on the institution's total capital position, once this has been verified by the auditors". This provision contradicts the "Guide on the supervisory approach to consolidation in the banking sector", which stipulates, among others, that the "supervisory approach with regard to bad will is based on the recognition of the accounting value of bad will, unless there is specific supervisory evidence of valuation issues not yet recognised." The wording "[…] once this has been verified by the auditors" is new and seems not to reflect the practice of good will and bad will recognition. The purchaser's auditors, as part of their audit mandate, will only vet the good will/ bad will 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/bad will has been recognized in the financial statements Consequently, the "Guide on the supervisory approach to consolidation in the banking sector" refers to "duly verified accounting bad will 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 bad will 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 bad will cannot be recognized, and therefore a contemplated transaction might become practically impossible.	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 FAP before the appointment of the said management. 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.	EBF	

15	Section 5.2: Assessment criteria	5.2.3.1	19	Clarification	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)**." We would like to modify the sentence as follows : "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."~~	Where the acquisition is carried out by a Group affiliate, the assessment shall be completed at the Group's level. 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.	EBF	
15	Section 5.2: Assessment criteria	5.2.4	21	Clarification	iii.In section 5.2.4 [assessment of the business plan], ECB guideline stipulates that 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 to the target, a credible business plan for the underlying business of the target can only 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 ECB Guide requires that supervisors should challenge the assumptions of the business plan on a granular level and build an "adjusted base case", i.a. to consider the key drivers of success and competitive advantages of the target, consider synergies or identify a lack of them, perform benchmarks with third party data, etc. All these 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. In a nutshell, general understanding of financial estimates and its impact on the solvency position are reasonable, whereas we consider that the level of granular information required is excessive (e.g. the information discussed during a Board of Directors session). However, EBF argues that the involvement of third party advisers in the assessment of an M&A activity would not be acceptable from a confidentiality point of view. On top of that, in order that all described steps for the assessment be performed, it will require substantial time and resources, resulting to a potential risk for the success of M&A transactions, since the latter substantially depend on professional confidentiality and swift execution. EBF would propose to add a sentence before the section 5.2.4.1, which is read as follows: "Where appropriate, supervisors will take into account in their assessment requests related to prudential and liquidity waivers of the target submitted by the acquirer in the context of the acquisition." 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.	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.	EBF	
	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, b~~ased 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 this precision should be made 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.	EBF	
	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.	EBF	
16	Chapter 6: Procedural aspects and documentation; information requirements						,	Publish
17	Section 6.1: Pre-notification phase and synchronisation of procedures involving several NCAs				EBF does believe that a synchronization effort should be made regarding the information requirements derived from different NCAs and the ECB, where multiple related qualifying holding procedures are involved. In line with this, it stands against the proportionality principle which is put forward throughout the Guide that, in certain cases, the information requirements of NCAs qualifying holding procedures are entirely disproportionate (and even more demanding) compared to the file being analysed by ECB as part of the main transaction.	The notification at a too erly stage might interefer with the succes of the transaction, particularly when there is a bidding process in place.	EBF	Publish
18	Section 6.2: Acknowledgement of receipt and calculation of the procedural deadline				EBF argues that it would more efficient if the duplication of notification processes could have been eliminated, particularly when the IMAS Portal has been already used.	Avoid duplicate notification processes	EBF	Publish
19	Section 6.3: Request for further information and suspension of the legal deadline				EBFwould like to underline the need to keep the procedures simple and less burdensome, by avoiding interrupting the smooth execution of procedure, if a non-essential item is missing	Need to keep procedural aspects running smoothly	EBF	Publish
20	Section 6.4: Material changes during and after the assessment period						,	Publish

21	Section 6.5: Ancillary provisions to the ECB's decision						,	Publish
22	Section 6.6: Procedural issues relating to the qualifying holding assessment						,	Publish