EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Feedback statement

Public consultation on the ECB Guide on qualifying holding procedures

May 2023

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Executive summary

On 28 September 2022, the European Central Bank (ECB) launched a public consultation on the ECB Guide on qualifying holding procedures (the Guide) with the purpose of providing interested parties with the opportunity to comment. This consultation ran for six weeks until 9 November 2022. The ECB also informed the European Parliament of the public consultation.

On 19 October 2022, the ECB held a stakeholders' hearing on the Guide with around 40 participants from law firms, banks and banking associations. The purpose of the hearing was to present the Guide together with the main issues raised during assessments of qualifying holding procedures. During the meeting, several questions were posed by participants.

The ECB gratefully acknowledges the efforts of the respondents to this consultation and their active participation during the stakeholders' hearing.

As a result of the public consultation process, the ECB received seven written responses, amounting to a total of 77 comments. The ECB analysed and carefully considered all comments received and subsequently revised the Guide. The main amendments to the Guide compared with the version submitted for consultation were the following.

1. Additional text was provided to clarify at what time during a bidding process a notification needs to be submitted (decision to acquire).

2. A remark was included to remind proposed acquirers to consider requesting documentation on criminal records from relevant authorities well in advance.

3. An addition was made to highlight that, as a general rule, the ECB does not require information already available to it unless there is a specific requirement to this effect under national law.

4. Clarification was given on interdependencies between the ECB's assessment process and the decision and approval procedures of other authorities.

5. Clarification was given on the requirement to notify through the IMAS portal where applicable.

This feedback statement presents the ECB's assessment of the comments received. It is published together with the revised and final version of the Guide.

1 Comments on specific parts of the ECB Guide on qualifying holding procedures

1.1 General comments

Summary of comments: It was mentioned that the Guide cannot go beyond requirements under national law. In addition, a comment was raised asking for clarification on whether the Guide would apply to proposed acquirers intending to acquire a listed holding company owning 100% of a banking institution.

Response: Regarding requirements under national law, several sections of the Guide specify that these requirements might apply differently for each Member State. In addition, Article 4(3) of the SSM Regulation states that, for the purpose of carrying out its supervisory tasks, the ECB must apply all relevant EU law and, where the law is composed of Directives, the national legislation transposing those Directives. This Article also states that where regulations explicitly grant options for EU Member States, the ECB should apply the national legislation exercising those options. Therefore, where provided for, binding national law prevails over the Guide. The Guide applies to acquisitions or increases of a qualifying holding in a credit institution by natural or legal persons.

1.2 Comments on Chapter 2: Framework for the assessment of acquisitions and increases of qualifying holdings in credit institutions by the SSM

Summary of comments: A suggestion was made to include the obligation for the proposed acquirer to notify through the IMAS portal.

Response: Not all Member States foresee the obligation to notify through the IMAS portal. Therefore, further clarification was included in the Guide to specify that, where applicable, the proposed acquirer must submit the notification through the IMAS portal.

1.3 Comments on Chapter 4: Obligation to notify

1.3.1 What is a qualifying holding?

Summary of comments: A comment was raised with regard to determining what constitutes as "**acting in concert**". In particular, since the application of criteria regarding passive shareholders or implicit agreements would require a high degree of supervisory judgement, causing uncertainty for the proposed acquirers.

Moreover, comments were raised on the **exemptions from the obligation to notify**, in particular in the context of **intragroup reorganisations** (for instance if there are changes to a higher-level entity, or if a higher-level entity is dissolved, or if there is a change from indirect to direct ownership). It was argued that, in terms of the nature and type of the operations involved, these changes could not be considered the same as the acquisition of a qualifying holding stake, and that the principle of proportionality would apply.

Response: The determination of what constitutes "acting in concert" – including on the basis of implicit agreements – must be made on the basis of any applicable national law provision and the Joint Guidelines for the prudential assessment of acquisitions of qualifying holdings (the Joint Guidelines)[1], in particular paragraph 4.1 (according to the Joint Guidelines a case-by-case assessment must be conducted taking into consideration the factors listed in paragraph 4.6).

Furthermore, under Article 22(1) of the Capital Requirements Directive (CRD)[2], any natural or legal person or such persons acting in concert who have taken the decision to acquire or increase a qualifying holding are required to notify the competent authority of this decision. According to paragraph 8.5 of the Joint Guidelines this also applies to intragroup reorganisations. Paragraph 8.5 stipulates that a notification should be submitted by the proposed acquirer, identifying the upcoming changes to the group. This refers to the direct or indirect owners of the qualifying holding, as well as to the persons who effectively direct the business of the proposed acquirer. It should be noted that the principle of proportionality does not relieve the proposed acquirer of the obligation to submit a notification. However, it may apply to the information that needs to be submitted by the proposed acquirer.

1.3.1.1 How to determine the thresholds for "voting rights"

Summary of comments: In the context of **asset managers**, it was commented that the aggregation of holdings ex ante was seen as impracticable and would imply massive costs. It was also argued that the Transparency Directive[3] provides for ex post notification for disclosure purposes, so that ex post disclosures should also be sufficient in the context of qualifying holding procedures.

Response: Where asset managers acquire a qualifying holding in a credit institution, no general exemptions from the ex ante notification requirement apply. To determine whether or not a qualifying holding threshold has been crossed, Article 27 of the CRD and the references to the Transparency Directive need to be considered.

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1 *Final report on Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (JC/GL/2016/01),* European Banking Authority, Frankfurt am Main, December 2016.

2 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

3 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

1.3.1.2 The nature of a qualifying holding: direct and indirect holdings

Summary of comment: One comment was received on the calculation approach for indirect holdings, stating that the multiplication criterion should not be applied.

Response: It directly follows from the Joint Guidelines, in particular paragraph 6.2, that both the control and the multiplication criteria need to be applied (subject to national law) along each branch of the corporate chain. The side note on page 10 of the Guide has been amended accordingly.

1.3.2 Decision to acquire

Summary of comments: Comments were received on the question as to **when a decision to acquire has been taken** in the context of a bidding process. It was argued that a notification obligation only exists when there is absolute certainty that the acquisition will be carried out. According to this view, a decision to acquire must not be assumed to have been taken at the time a final bid is posted because there is still a possibility that the seller might not accept the bid. The most reasonable time to make the notification should be upon execution of a legally binding agreement between the potential acquirer and the seller. In addition, binding offers are not strictly “binding” as they are always subject to negotiation.

Response: As mentioned in Article 22(1) of the CRD as transposed into national law, the notification obligation is triggered as soon as the decision either to acquire or to further increase a qualifying holding has been taken. It is generally not a requirement that there should be “absolute certainty that a notified transaction will be carried out”. Acquirers are free to decide not to conclude a deal even after a non-objection decision has been issued.

Furthermore, a clarification has been added on page 12 of the Guide to the effect that the submission of a final bid in the sense of an unconditional offer by the proposed acquirer is the latest point in time at which the decision to acquire materialises and triggers the obligation to notify.

1.3.2.1 Obligation to notify for temporary acquisitions

Summary of comments: Comments were raised stating that the exemptions for **temporary acquisitions** should apply to intragroup reorganisations in which the acquisition of a qualifying holding would only be an intermediate step, as well as to asset managers, who would make a commitment only to keep the qualifying holding on a temporary basis for investment purposes (with an explicit commitment that if, and to the extent that, a certain threshold is exceeded, the position will be disposed of within a specified time frame).

Response: For temporary acquisitions, the absence of a decision to acquire is only presumed in situations where the intention to acquire exists momentarily, with subsequent transfer of the stake to a third party **occurring automatically.**

1.3.2.2 Obligation to notify for conditional and optional acquisitions

Summary of comment: With regard to conditional and optional acquisitions, it was commented that the obligation to notify should be limited to the proposed acquirer "becoming aware", and the reference to when the proposed acquirer can be expected to become aware should be deleted as this would include an element of subjectivity.

Response: The term "could have known" is a commonly accepted legal concept and is explicitly mentioned in paragraph 7.1 of the Joint Guidelines.

1.4 Comments on Chapter 5: Assessment

1.4.1 The principle of proportionality

Summary of comments: In general, the comments stated that (i) the proportionality principle differs across non-EU jurisdictions; (ii) duplicating information already available to the ECB or national competent authority (NCA) should be avoided; and (iii) further guidance was sought on the scope and interpretation of the proportionality principle, also taking national law requirements into consideration. In particular, regarding the impact and interpretation of proportionality in the supervisor's view, (iv) suggestions were made to waive information requirements in cases where the proposed acquirer is a supervised institution, where the transaction is an intragroup reorganisation or where the transaction entails a simplification of the shareholding structure.

Response: Regarding the comments received, (i) the ECB does not assess requirements in place in non-EU jurisdictions; and (ii) as a general rule, the ECB does not require already available information, unless a specific requirement to this effect is provided for in national law. This clarification will be emphasised in the Guide. As to points (iii) and (iv), the general guidance on how the proportionality principle is applied, provided on page 14 of the Guide, will be considered by supervisors during the assessment, particularly in the case of an intragroup reorganisation or a simplification of the shareholding structure.

1.4.2 The assessment criteria

1.4.2.1 Reputation of the proposed acquirer (criterion A)

Summary of comments: It was suggested that, based on the concept of mutual recognition and the criteria set out in the Joint Guidelines concerning the

professional competence requirement, the procedure should not be assessed if it involves a proposed acquirer already authorised in the EU.[4]

In addition, it was commented that providing details of all pending litigations seemed excessive as this would include litigations concerning ordinary course of business. It was suggested that a proportionate approach should be taken, so that the proposed acquirer only submits details of significant disputes. A materiality threshold should be determined.

Additional comments addressed the fact that a certificate of absence of criminal records is much more difficult and time-consuming to obtain in non-EU jurisdictions.

Further clarification of footnote 30 in paragraph 5.2.1 was requested, as the roles and responsibilities of non-executive members of the board of directors are subject to national law and do not directly influence day-to-day decision-making.

Response: The obligation to assess a proposed acquirer is a requirement under Article 23 of the CRD and therefore provides the legal basis for the assessment. Nevertheless, the ECB already takes a proportionate approach and, on a case-by-case basis, may decide not to conduct a fully-fledged assessment of an existing supervised entity. Proportionality is also applied when determining which documents should be submitted (depending on the particular features of the documents needed and subject to national law requirements).[5]

Concerning the comment about pending litigations, the Joint Guidelines mention that the proposed acquirer should provide a list of information including documents such as “criminal investigations or proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director or bankruptcy, insolvency or similar procedures), […] open investigations, enforcement proceedings, sanctions or other enforcement decisions.” All of these might, in different ways, have an impact on the reputation of the proposed acquirer and should be assessed on a case-by-case basis. In this regard, determining a threshold beforehand may prevent the competent authority from receiving information that could be important in order to reach a conclusion on the reputation of the proposed acquirer.

As to the comment regarding criminal records, the supervisory authorities understand that the principles and procedures for obtaining criminal record extracts vary in different jurisdictions. Consequently, an additional remark has been included in the Guide to remind proposed acquirers to request criminal record extracts from third countries as early as possible. However, the requirement to submit them cannot be waived.[6]

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4 In this regard, the Joint Guidelines 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”.

5 The Joint Guidelines already provide for a more “focused assessment” in cases where (i) indirect acquirers are supervised entities and (ii) the supervisor is already in possession of up-to-date information.

6 If there are legal impediments to submitting criminal record extracts, alternatives must be discussed with the supervisor on a case-by-case basis.

Finally, as stipulated in footnote 30, it is acknowledged that, in general, the persons effectively directing the business are executive board members. However, a case-by-case assessment is still necessary to take specific circumstances into consideration.

1.4.2.2 Reputation, knowledge, skills and experience of any member of the management body who will direct the business of the target (criterion B)

Summary of comments: Comments were raised on a perceived lack of harmonisation and synchronisation in qualifying holding procedures involving several NCAs and the ECB. In particular, the current process does not allow NCAs to rely on existing ECB fit and proper assessments. A suggestion was made to waive reputation requirements (integrity testing, criminal records and other suitability-related documentation) for the member of the management body at the national level where the ECB had already carried out such an assessment. Instead, the entity should provide a letter certifying that there has been no change in the situation of the potential candidate since the last update given to the supervisor.

In addition, in cases where the entity is already a credit institution in a Member State, reputation and integrity criteria should not be reassessed. EU-regulated entities should not be obliged to obtain criminal record extracts and certificates of good standing from authorities, while a requirement to obtain details of all pending litigations would be excessive. Any information updates regarding the suitability of the members of the management body should be made according to the procedure and within the time constraints provided for in the ECB Guide to fit and proper assessments.

Another comment was made stating that the requirement to submit the fit and proper documentation together with the notification may be incompatible with national legislation as the requirement in the Guide envisages an ex ante scenario. Ex ante approval is an additional hazard and would add unnecessary constraints in terms of schedule. It would mean that the director's recruitment would have to start at least one year before the departure of their predecessor. It would also entail all the difficulties that come with making projections regarding the director's situation over such a long period.

Response: In principle, the fit and proper assessment conducted as part of the qualifying holding procedure should not require a further procedure once the appointment of the members of the management body who have been assessed takes effect. However, this provision is subject to national law. Thus, if national law provides for an additional procedure, then this additional requirement will be met.

As to the second comment raised, each appointment for a new board position requires an assessment for that specific position. Thus, the information in the fit and proper questionnaire will be required for the position to be held. Regarding the reuse of documentation that has already been submitted and remains unchanged, national

law considerations apply. As to the comment relating to criminal records, certificates of good standing or pending litigations, please refer to the response given in Section 1.4.2.1 above.

As to the third comment, when referring to the timing of the fit and proper assessment, the Guide specifies that this will also be subject to national law, which the ECB will apply accordingly. In cases where the proposed acquirer does not intend to change any members of the management body or has not yet identified potential new members, the assessment will be conducted outside the qualifying holding procedure.

1.4.2.3 Financial soundness of the proposed acquirer (criterion C)

Summary of comment: A comment was made asking why proposed acquirers should be required to provide additional capital, since no obligation exists for shareholders to provide additional financing to a bank.

In addition, an observation was made in the context of the generation of goodwill or badwill by a credit institution as proposed acquirer. The phrase “once this has been verified by the auditors” would not reflect the practice of goodwill/badwill recognition, as goodwill/badwill is only recognised in the purchaser’s financial statement after the fiscal year in which the transaction was executed. The only document available at the time of the notification is an attestation by an auditor based on projections which would necessarily be subject to reserves such that the attestation would be irrelevant to the assessment of the notification.

Response: According to the Joint Guidelines, as part of the financial soundness assessment, it is necessary to assess whether the proposed acquirers are able and willing to provide additional funds if needed.

In addition, as stated in the ECB Guide on the supervisory approach to consolidation in the banking sector: “In principle, ECB Banking Supervision recognises duly verified accounting badwill from a prudential perspective, expecting it to be appropriately calculated after thorough accounting recognition and valuation of assets and liabilities. This valuation is also expected to fully reflect the adjustments required by prudential regulations and to take into account guidance provided by the ECB.” During the assessment, an auditor’s opinion regarding the **estimation** of goodwill generated by the transaction together with an assessment by the ongoing supervisor will be taken into account.

1.4.2.4 Assessment of the business plan

Summary of comments: A suggestion was made to delete the statement that it is the exclusive responsibility of the proposed acquirer to write the business plan. The current drafting of the Guide requires a significant effort on the part of the proposed acquirer, since the scenarios presented are based on the target’s information, and the transmission of this information, prior to the closing, is restricted under

competition law. In this regard, a credible business plan for the underlying business of the target would, under normal circumstances, be established by the target's own management.

A further modification of the Guide was also proposed since it currently requires the supervisors to challenge the assumptions of the business plan on a granular level and build an "adjusted base case".[7] This would only be possible with in-depth and expert knowledge about the target business and the results of the due diligence, which a potential acquirer would not normally possess. However, the involvement of third-party advisers in the assessment of an M&A transaction would not be acceptable from a confidentiality perspective.

Performing all the steps described 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. Consequently, the required level of detail of the business plan envisaged by the Guide could also be reduced to provide more effective and swifter communication between the industry and the supervisor. In addition, not all transactions are necessarily aimed at acquiring a market leader.

Finally, a drafting proposal was suggested for paragraph 5.2.4.1 regarding waiver requests made in parallel with the application for the acquisition of a qualifying holding. The purpose of the proposal would be to ensure supervisors took into account the fact that such requests would result in the target being exempted from meeting solvency and liquidity requirements on an individual basis.

Response: Regarding the first point raised, an amendment has been made to the Guide. It is important to clarify that although input from the target is accepted and useful, according to the Joint Guidelines it is the proposed acquirer's responsibility to provide the business plan. However, in their assessment the supervisory authorities consider the specific way in which a particular M&A transaction has been set up, so they take into consideration the fact that the proposed acquirer does not necessarily have access to this information.[8]

As to the second comment, the supervisory authorities need to assess a business plan that includes a strategic development plan. The strategic development plan should indicate the main goals of the proposed acquisition and the ways to achieve them. This may include elements such as the nature and scope of the planned business, the projected figures, the organisational structure, risk management, the planned internal control mechanisms and compliance with capital requirements. As to confidentiality issues, it is important to mention that in line with the applicable EU framework, all information received by a user is treated in the strictest confidence and is not shared with or divulged to any unauthorised person.

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7 Specifically, the level of detail required for the business plan for supervisory purposes is too comprehensive. In particular, covering all the individual and detailed assumptions required for the "supervisory challenge scenario" may be too burdensome in a framework of constant communication and exchange of information.

8 The authorities assess the information presented to reach a conclusion on how realistic the assumptions are.

In order to properly assess the viability and sustainability of the target's business model and its capital adequacy based on prudent assumptions, the supervisors need to obtain from the proposed acquirer the information specified in the Guide. However, subject to national law, supervisors may apply proportionality depending on the type of procedure or the qualifying holding threshold reached. In this regard, a more simplified approach can be followed, reducing the burden for proposed acquirers. In addition, an adjustment to the current text of the Guide has been included to avoid giving the misleading impression that all transactions have the purpose of acquiring a market leader.

Finally, although we appreciate the suggestion mentioned, we believe the additional clarification is not necessary in paragraph 5.2.4.1, since the business plan covers all assumptions underlying the projections, including assumptions on waivers.

1.4.2.5 Scope of the assessment of criterion E

Summary of comments: It was commented that for an EU-regulated financial institution, money laundering risks are managed within its existing legal obligations, which include ensuring that adequate anti-money laundering/countering the financing of terrorism (AML/CFT) arrangements are in place following the acquisition. Therefore, duplicative requirements should be avoided.

In addition, it was noted that complex acquisition structures are chosen for various reasons and the increase in the effort required for the supervisory assessment should not influence the selection of transaction terms. In particular, it is unclear who is subject to the requirement of disclosing the shareholder identity of those persons who hold at least a 0.5% indirect shareholding, and what the merit of this rule is, considering that those shareholders do not have any influence on the supervised entity.

Response: The requirement to assess any money laundering and terrorist financing (ML/TF) risks associated with a transaction stems directly from Article 23(1)(e) of the CRD and its national transpositions. Proportionality for EU-supervised entities is applied in line with the considerations in Section 1.4.1 above. However, this does not relieve the supervisor of the obligation to assess and reach a conclusion on the ML/TF risk (taking into account information obtained, for instance, from ongoing supervision of the proposed acquirer).

With regard to complex acquisition structures, guidance on who is considered a specific acquirer can be found in the side note on page 10 of the Guide. The information on the identity of all indirect shareholders that hold more than 0.5% of capital and/or voting rights is mainly requested in the context of the AML criterion, in order to have a comprehensive view of the origin of the funding and the ML/TF risk associated with the transaction.

1.5 Comments on Chapter 6: Procedural aspects and documentation; information requirements

1.5.1 Procedural aspects and documentation; information requirements

Summary of comments: Further harmonisation requirements should be encouraged where the ECB and several NCAs are involved in a transaction. In particular, it might be that national law provides for more stringent and burdensome requirements than those provided for by the ECB.

Response: The ECB's goal for qualifying holding procedures involving the collaboration of several NCAs is to be assessed in a harmonised, timely and synchronised process to establish consistency in decision-making. Under the applicable framework, the EU legislative provisions aim to achieve maximum harmonisation between Member States. This means that national law cannot set further requirements in addition to those provided for under the applicable framework.

Nevertheless, the EU framework does not define certain key concepts, such as indirect holding, acting in concert and significant influence. Consequently, when assessing acquisitions and increases of qualifying holdings within the Single Supervisory Mechanism framework, the ECB must apply relevant national legislation transposing the CRD rules on assessment of qualifying holdings.

1.5.2 Pre-notification phase and synchronisation of procedures involving several NCAs

Summary of comments: The pre-notification phase provides an opportunity to conduct a pre-assessment of the transaction envisaged. This phase could be used to determine the depth of the assessment according to the complexity of the group, the scope of the assessment and the obligation to notify, and also to determine whether any waiver, clearance, or exception could be applicable. This stage can provide a good opportunity to explain the existing policies.

Response: Involvement in a pre-notification phase is usually advisable. This is especially true in high-risk or complex cases, to ensure that all information necessary for the assessment is properly included in the notification. At this stage, all stakeholders are expected to exchange information about information requirements, establish timelines and coordinate the submission of information for all related procedures, if any. The pre-notification phase aims to reduce the risk of incomplete submissions and to encourage dialogue with the supervisory authorities (for example, in the case of complex structures the proposed acquirer can be advised to simplify the holding chain, which would lead to a less onerous assessment).

1.5.3 Request for further information and suspension of the legal deadline

Summary of comments: Procedures should be kept simple and should not be interrupted if non-essential items are missing.

Response: The period for assessing the notification of a proposed acquisition or increase in a qualifying holding may only be suspended once and for a maximum of 20 (or, where applicable, 30) working days. Any further request for information will not trigger a new suspension. The procedures are only suspended if information that is considered essential by the supervisor in order to complete the assessment is missing. Moreover, the aim of having a public version of the Guide is to explain what the ECB's supervisory practice is when assessing the acquisition of qualifying holdings, in order to contribute to the smooth running of the supervisory file.

1.5.4 Ancillary provisions to the ECB's decision

Summary of comments: An observation was made regarding the competence of the ECB and the NCA to impose conditions or obligations, or to ask for commitments. In particular, it was requested that no further reporting or information requirement should be included: conditions, obligations and commitments might delay the process and create a risk of distortion as they could alter or influence the terms of the transaction, particularly since they would have to be clarified, discussed and agreed after the assessment was concluded. A proposal was therefore made to encourage discussion during the assessment but for transactions to be either approved or rejected, without the possibility of adding ancillary provisions.

Response: The requirements that must be fulfilled to impose ancillary provisions such as conditions were formulated by the Court of Justice in its judgment C-18/14 of 25 June 2015[9]. As stipulated in the Guide, ancillary provisions "may only be imposed when necessary to ensure compliance with the criteria set out in Article 23 of the CRD". Otherwise, the competent authority could validly oppose a proposed acquisition.

[9] *CO Sociedad de Gestión y Participación SA and others*, C-18/14, ECLI:EU:C:2015:419, (the "Atradius case").

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For specific terminology please refer to the SSM glossary (available in English only).