



EUROPEAN CENTRAL BANK

BANKING SUPERVISION

## Guide on qualifying holding procedures

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# 1 Foreword

The prudential assessment of acquisitions and increases of qualifying holdings in credit institutions is an essential tool to ensure effective supervision of the European financial system. Confidence in the financial system requires public awareness that the owners of qualifying holdings in credit institutions comply with certain minimum requirements.

In line with Article 23 of the Capital Requirements Directive (CRD),<sup>1</sup> the assessment of acquisitions and increases of qualifying holdings includes an analysis of: (i) the reputation of the proposed acquirer; (ii) the reputation, knowledge, skills and experience of any member of the management body who will direct the business of the credit institution as a result of the proposed acquisition; (iii) the financial soundness of the proposed acquirer; (iv) the impact of the proposed acquisition on the target's ability to maintain compliance with all prudential requirements, including any potential impact on the possibility of exercising effective supervision in future; and (v) whether the proposed acquisition involves money laundering or terrorist financing or could increase the risk thereof. The overarching goals of the analysis are to ensure ongoing sound and prudent management of the target credit institution and to reduce the risk that entities and shareholders circumvent banking regulation and supervision.

Since 4 November 2014, the European Central Bank (ECB) has been exclusively competent to assess acquisitions and increases of qualifying holdings in all credit institutions established in the EU Member States participating in the Single Supervisory Mechanism (SSM), i.e., all countries in the euro area and, since 1 October 2020, Bulgaria, whose respective national competent authority (NCA) has entered into close cooperation with the ECB under Article 7 of the SSM Regulation.<sup>2</sup> In Bulgaria this competence is exercised in close alignment with the NCA of the Member State of the target credit institution.

This Guide aims to clarify the supervisory approach taken by NCAs and the ECB in the assessment of qualifying holding procedures. It covers: (i) the scope of the persons required to undergo an assessment; (ii) how the assessment criteria are applied; and (iii) further guidance on some of the key documentation required in the assessment of qualifying holding procedures. It also provides more information on complex acquisition structures, the application of proportionality and specific procedural aspects.

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<sup>1</sup> 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).

<sup>2</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63). In countries under the "close cooperation" regime, the ECB addresses instructions to NCAs, which are responsible for adopting the final decision on the proposed acquisition or increase of qualifying holdings.

Unless otherwise indicated, the Guide uses the terminology employed in the Capital Requirements Regulation (CRR),<sup>3</sup> the CRD and the Joint Guidelines.<sup>4</sup>

The policies, practices and processes set out here may have to be adapted over time. The Guide is not legally binding and seeks to provide a practical tool to support proposed acquirers and all entities involved in the process of acquiring or increasing qualifying holdings, to ensure procedures and assessments run smoothly and efficiently. It will be updated regularly to reflect new developments and experience gained in practice.

## **Coordination between this Guide and the ECB Guide on the supervisory approach to consolidation in the banking sector**

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For qualifying holding acquisitions which are part of a banking consolidation project, please also refer to the [ECB Guide on the supervisory approach to consolidation in the banking sector](#), which provides clarifications on the overall approach, supervisory expectations and key prudential aspects arising within consolidation projects, as well as on the ongoing supervision of the newly combined entities resulting from such transactions. The present Guide is meant to provide general information on legal and policy aspects common to all qualifying holding assessments, in particular as have emerged in practice from past procedures. Both Guides can provide useful assistance in cases of banking sector consolidation transactions involving a qualifying holding assessment, as they focus on different aspects.

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<sup>3</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p.1).

<sup>4</sup> European Banking Authority, *Final report on Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (JC/GL/2016/01)*, Frankfurt, December 2016.

## 2 Framework for the assessment of acquisitions and increases of qualifying holdings in credit institutions in the SSM

### 2.1 The SSM Regulation and the SSM Framework Regulation

In this document, the term “proposed acquirer” refers to any natural or legal person that has made the decision to directly or indirectly acquire or increase a qualifying holding.

The ECB’s exclusive competence to assess acquisitions and increases of qualifying holdings in credit institutions in the countries participating in the SSM is laid down in Article 4(1)(c) of the SSM Regulation.<sup>5</sup> Article 6(4) stipulates that this competence is applicable to both significant institutions and less significant institutions.<sup>6</sup> The competence is exercised in close alignment with the NCAs. The latter serve as the entry points for notifications, which are received through the IMAS portal (where applicable), and must submit a proposal to the ECB to oppose or not oppose the acquisition or increase of a qualifying holding.<sup>7</sup> Article 15 of the SSM Regulation clarifies the procedure that proposed acquirers, NCAs and the ECB have to follow for the assessment of acquisitions and increases of qualifying holdings in credit institutions, which is further specified in Articles 85 to 87 of the SSM Framework Regulation.<sup>8</sup>

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.<sup>9</sup>

#### EU and national law

The requirements for the assessment of acquisitions and increases of qualifying holdings<sup>10</sup> are covered in Articles 22 to 27 of the CRD.

The EU legislative provisions aim to achieve maximum harmonisation, meaning that national law cannot set requirements more stringent than those set out in the CRD.<sup>11</sup> Nevertheless, the EU framework does not define certain key concepts, such as

<sup>5</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

<sup>6</sup> Significant and less significant banks in resolution are exempted.

<sup>7</sup> The IMAS portal may be used to submit information related to the supervisory process; see Section 4.3

<sup>8</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

<sup>9</sup> Article 4(3) also states that where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for EU Member States, the ECB shall apply the national legislation exercising those options.

<sup>10</sup> As defined in Article 4(1)(36) of the CRR (also referred to in Article 3(1)(33) of the CRD).

<sup>11</sup> Article 22(8) of the CRD.

indirect holding, acting in concert and significant influence. Consequently, when assessing acquisitions and increases of qualifying holdings in the countries participating in the SSM, the ECB must apply relevant national legislation governing the effective application of the CRD rules on qualifying holdings.

## 2.2 Implementing/regulatory technical standards (ITSs/RTSs) on procedures and forms; the Joint Guidelines

The ECB applies all relevant EU acts adopted by the European Commission, including those issued on the basis of proposals by the European Supervisory Authorities, which are called regulatory or implementing technical standards, (RTSs/ITSs). Of particular relevance are the ITSs specifying the forms and templates that competent authorities in the European Union should use when consulting one another on acquisitions and increases of qualifying holdings in credit institutions. The objective of these is to streamline information exchange and ensure effective communication between the relevant authorities on both a cross-border and cross-sector basis. They also provide guidance on the process and timeframes for information requests and the associated responses and provide a set of relevant templates for this purpose.

Besides Union and national law, the ECB also complies with the Joint Guidelines.

## 3 General principles for qualifying holdings

### 3.1 Transparency

In this document, the term “supervisors” refers to both NCAs and the ECB.

Proposed acquirers are legally obliged to prepare their notifications accurately and completely and share information openly and swiftly to support supervisors in reaching an informed judgement. The information required is based on lists published by the Member States (Article 23(4) of the CRD), taking into consideration the recommendations in the Joint Guidelines.

Pre-notification contacts between the proposed acquirer and the supervisor are welcome as a way of facilitating the assessment process.<sup>12</sup>

### 3.2 Consistency

This Guide explains in detail the policies, practices and processes applied by the ECB when assessing qualifying holding notifications to ensure all cases are treated consistently throughout the SSM. However, consistent application of these policies and practices is still subject to the relevant provisions of national law.

### 3.3 Case-by-case assessment and proportionality

The principle of proportionality applies to the assessment of qualifying holdings. This general principle of EU law ensures that acts of European institutions do not go beyond what is necessary to achieve the aim pursued. It is laid down in Article 5 of the Treaty on European Union,<sup>13</sup> as interpreted by the European Court of Justice (CJEU) and further explained in the Joint Guidelines.

For qualifying holding procedures, all relevant circumstances will be taken into account and assessed on a case-by-case basis, including proportionality considerations in line with the nature, scale and complexity of the proposed transaction.

**Please refer to the relevant side notes throughout this Guide for detailed information on the application of the principle of proportionality and specific features concerning the assessment of specific acquirers and complex structures.**

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<sup>12</sup> See Title II, Chapter 2, Paragraph 9.3. of the Joint Guidelines.

<sup>13</sup> See the Consolidated version of the Treaty on European Union (OJ C 202 7.6.2016, p 13).

## 4 Obligation to notify

### 4.1 General

Any natural or legal person that has taken the decision to acquire or increase a qualifying holding is required to notify the competent authority responsible for supervising the relevant credit institution.<sup>14</sup> The notification should be made when the decision has been taken. Therefore, as a general principle, a proposed acquirer should always notify the NCA prior to the intended transaction.<sup>15</sup> The principle of proportionality does not apply to the obligation to notify.

#### Side note

##### Supervisory measures applied to non-authorised qualifying shareholders

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According to Article 22 of the CRD, Member States shall require any natural or legal person who has taken a decision either to acquire a qualifying holding in a credit institution, directly or indirectly, or to further increase so that a relevant threshold is crossed, to notify the competent authorities in writing in advance of the acquisition. Consequently, the assessment of qualifying holdings in credit institutions should take place prior to any acquisition or increase. Failing to comply with this obligation, either intentionally or unintentionally, would result in having non-authorised qualifying shareholders in the credit institution.

In such cases, without prejudice to the possibility to conduct an ex post qualifying holding assessment, there are supervisory measures available to the competent authority to address the concern that non-authorised qualifying shareholders may exercise their corporate rights before an assessment by the competent authority has taken place or while the assessment is still pending. According to Article 26(2) of the CRD and subject to national law, such measures may consist of injunctions, penalties, subject to Articles 65 to 72 of the CRD, against members of the management body and managers, or the suspension of the exercise of the voting rights attached to the shares held by the shareholders or members of the credit institution in question. In some jurisdictions, failure to give notification of the acquisition or increase of a qualifying holding leads to the proposed acquirer's voting rights being automatically suspended.

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### 4.2 What is a qualifying holding?

The term “qualifying holding” is defined in Article 4(1)(36) of the CRR (as cross-referenced in Article 3(1)(33) of the CRD) in conjunction with Article 22(1) of the CRD as a direct or indirect holding in an undertaking which:

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<sup>14</sup> Article 22 of the CRD.

<sup>15</sup> See also Title II, Chapter 1, paragraph 7.2 of the Joint Guidelines and Section 4.3 below.



- represents 10% or more of the capital or of the voting rights of the undertaking; or
- makes it possible to exercise a significant influence over the management of the undertaking; or
- results in the credit institution becoming the proposed acquirer's subsidiary.

The European Banking Authority (EBA) has clarified that the existence of a holding that fulfils one of these criteria is required.<sup>16</sup>

Additionally, Article 22 of the CRD provides that “Member States shall require any natural or legal person<sup>17</sup> or such persons acting in concert (the “proposed acquirer”), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the credit institution would become its subsidiary (the “proposed acquisition”), to notify the competent authority of the credit institution in which they are seeking to acquire or increase a qualifying holding”. The definition of “subsidiary” is provided in Article 4(1)(16) of the CRR, which refers to the cases of parent-subsidiary relationship specified in the Accounting Directive<sup>18</sup> and the concept of “dominant influence”.

#### 4.2.1 How to determine the thresholds for “voting rights”

As indicated in Article 27 of the CRD, the “voting rights” referred to in Articles 9, 10 and 11 of Directive 2004/109/EC<sup>19</sup> and the conditions regarding the aggregation thereof set out in Article 12(4) and 12(5) of the same Directive should be taken into account when assessing if a relevant threshold has been crossed.

#### 4.2.2 Significant influence

As indicated in the definition of “qualifying holding” contained in Article 4(1)(36) of the CRR, a holding of less than 10% in capital or voting rights can be a qualifying

<sup>16</sup> Please see the EBA's [website](#).

<sup>17</sup> The term “legal person” is to be read broadly and also includes, for example, a limited partnership/Kommanditgesellschaft/société en commandite, stichting, maatschap, etc.

<sup>18</sup> The definition included in Article 4(1)(16) of the CRR makes reference to Articles 1 and 2 of the Seventh Council Directive previously in force, now to be read as referring to Article 22 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

<sup>19</sup> 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).

holding if it enables the holder to exercise a significant influence over the management of a credit institution.

The assessment as to whether or not a significant influence over the management of a credit institution can be exercised always comes down to a case-by-case analysis in which all relevant facts and circumstances should be taken into account. The Joint Guidelines include a non-exhaustive list of factors for assessing whether significant influence could be exercised;<sup>20</sup> the existence of one factor may lead to a determination of significant influence, or a combination of relevant factors may be taken into account.

### 4.2.3 The nature of a qualifying holding: direct and indirect holdings

According to Article 22 of the CRD, qualifying holdings in a credit institution can be acquired or increased directly or indirectly. However, the CRD does not provide guidance on how to identify indirect qualifying holdings. The Joint Guidelines set out two criteria that can be used to determine indirect holdings: the “control” criterion and the “multiplication” criterion.<sup>21</sup>

The control criterion, which should be applied as a first step, is based on the principle that all natural or legal persons that exercise control over a holder of a qualifying holding in a supervised entity must be considered indirect acquirers of that qualifying holding. Consequently, all natural or legal persons that acquire control over an existing holder of a qualifying holding in a credit institution, or that already control the proposed acquirer of such a holding, are required to notify the competent authorities of their status as indirect proposed acquirers. Regarding the notion of control, the Joint Guidelines make reference to the parent-subsidiary relationship identified in the Accounting Directive.<sup>22</sup>

The multiplication criterion, which is to be applied in a second step, involves multiplying the percentages of holdings along the corporate chain, starting from the stake held directly in the credit institution and continuing up the corporate chain as long as the result of multiplication continues to be at least 10%. A qualifying holding is then deemed to have been acquired indirectly by all natural or legal persons for which the result of the multiplication equals 10% or more, and additionally by each natural or legal person holding direct or indirect control over these.

In the absence of any binding indication in EU law, the approach recommended in the Joint Guidelines is applied unless applicable national law foresees otherwise.

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<sup>20</sup> See Title II, Chapter 1, Section 5 of the Joint Guidelines.

<sup>21</sup> See Title II, Chapter 1, Section 6 of the Joint Guidelines.

<sup>22</sup> Article 22 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

## Side note

### Specific acquirers and complex acquisition structures

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Since the start of the SSM, the ECB has dealt with several qualifying holding procedures involving “specific acquirers”. These are often characterised by complex corporate structures and governance, short-term investment strategies and/or the use of substantial debt, and often seek control of the credit institution. These specific acquirers are mainly private equity firms, sovereign wealth funds and conglomerates.

Whenever an acquisition structure comprises several layers, all indirect proposed acquirers for each layer (as determined applying the two criteria described above) are required to notify the competent authorities individually, without any exception for intermediate layers as this is not foreseen in the CRD.<sup>23</sup> In cases involving complex acquisition structures (such as private equity groups), verification of the exact scope of the persons required to submit notification is therefore necessary. This requires checking – for all natural and legal persons in the holding chain between the ultimate beneficial owner and the direct acquirer of the qualifying holding – whether each person will reach or exceed the 10% threshold or be able to exercise significant influence over the target after the proposed acquisition. In the case of investment vehicles set up in the form of limited partnerships, this check must be conducted for all limited and general partners and all intermediate companies. Responsibility for carrying out an initial analysis of which natural and/or legal persons fall under the criteria above lies with the proposed acquirers.

Where a proposed acquirer is composed of a holding chain comprising a direct acquirer and several layers of indirect acquirers, or where several proposed acquirers acting in concert are required to notify, submissions should ideally be combined into one single collective notification on behalf of all the acquirers to simplify the process. The acquirers may also appoint one of their number or a third party to ensure compliance with the obligation to notify, in which case the corresponding power of attorney or equivalent document must be sent to the supervisor together with the notification.

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#### 4.2.4 Acting in concert

The concept of “acting in concert” provides that holdings of multiple persons must be aggregated if they have entered into an agreement aiming to establish the conditions for an acquisition or increase of a qualifying holding.<sup>24</sup> Accordingly, these persons must disclose in their notification(s) to the competent authority that they are acting in concert and are jointly acquiring or increasing a qualifying holding.

The supervisors deem any legal or natural persons that decide to acquire or increase a qualifying holding in accordance with an explicit or implicit (written or oral) agreement between them to be acting in concert.<sup>25</sup> The Joint Guidelines list certain

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<sup>23</sup> This does not preclude the possibility that a parent undertaking may also notify on behalf of the intermediate layers, as indicated in Title II, Chapter 1, Paragraphs 6.4 and 6.5 of the Joint Guidelines.

<sup>24</sup> According to Title II, Chapter 1, Paragraph 4.6(a) of the Joint Guidelines, the mere fact that parties jointly enter into a sale and purchase agreement should not be sufficient to automatically conclude that parties are acting in concert.

<sup>25</sup> See Title II, Chapter 1, Paragraph 4.1 of the Joint Guidelines.

factors that must be considered when assessing if persons have entered into an agreement to act in concert.<sup>26</sup>

#### 4.2.4.1 Agreements to act in concert

##### Acting in concert on the basis of explicit shareholder agreements

In some cases, the proposed acquirers explicitly declare that they aim to act in concert and therefore already aggregate the capital and/or voting rights they intend to acquire jointly in their notification(s) to the supervisors. Explicit agreements to act in concert are contracts in which the proposed acquirers, for example, commit to consistently exercise similar voting patterns or exercise voting rights unanimously, follow the decisions of a consortium or establish a joint holding company for the purposes of acquiring and managing the target jointly.

In cases where existing shareholders of the target decide to create a consortium to act in concert and their combined existing holdings amount to a qualifying holding in a credit institution, they are obliged to notify the supervisors of this change before doing so and provide the relevant documentation for their assessment.<sup>27</sup>

##### Acting in concert on the basis of implicit agreements or concerted practices

An assessment as to whether or not the proposed acquirers have entered into an implicit agreement to act in concert is conducted on a case-by-case basis, taking into consideration in particular the factors listed in the Joint Guidelines. In some cases, the existence of only one factor could lead to the determination that persons are acting in concert; in others a combination of relevant factors may be taken into consideration.

#### Side note

##### Specific acquirers and complex structures

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Acquirers' group structures comprising multiple holdings, layers and investment vehicles steered by the same ultimate indirect owners (often defined as ultimate beneficial owners) are subject to analysis to determine whether parties are acting in concert. Ultimate beneficial owners are usually required to submit notification as proposed acquirers by virtue of the control and multiplication criteria mentioned above.

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<sup>26</sup> See Title II, Chapter 1, Paragraph 4.6 of the Joint Guidelines.

<sup>27</sup> Such cases have to undergo a qualifying holding procedure even for existing shareholders (who have not changed their holding in the target) once they decide to act in concert, unless a specific provision in national law stipulates a different dedicated procedure.

#### 4.2.4.2 Passive shareholder agreements

Passive shareholder agreements can also constitute acting in concert.<sup>28</sup> This is where several shareholders (the “passive shareholders”) explicitly or implicitly agree with other shareholders (the “active shareholders”) that the passive shareholders, for example, abstain from voting, or that the active shareholders or an appointed “pool leader” vote on behalf of the passive shareholders at shareholder meetings.

#### Side note

##### Shareholder activism versus shareholders acting in concert

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Despite the broad definition of the term, not all common actions taken by shareholders in relation to their shares constitute “acting in concert”. In general, shareholders may cooperate to protect their interests by monitoring the management of a credit institution (for example, rejecting a proposal for the remuneration of directors or approving/rejecting an acquisition or disposal proposed by the credit institution’s management body). This shareholder activism or effective shareholder control is considered essential to sound corporate governance. Shareholder activism can take different forms, ranging from private discussions prior to a shareholder meeting to calling a shareholder meeting and including items on the agenda.

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### 4.3 Decision to acquire

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 once it makes an unconditional offer to the current shareholder(s) to enter into a legally binding transfer agreement. The submission of a final bid (unconditional offer) to the seller(s) by the proposed acquirer is therefore the latest point in time at which the decision to acquire materialises and triggers the obligation to notify.

#### 4.3.1 Obligation to notify for involuntary acquisitions

It is possible for a proposed acquirer to reach or exceed a threshold without taking an active decision to acquire or increase a holding, sometimes even without being aware of the acquisition or increase. This could for example be the case as a result of share repurchases. These passive or involuntary acquisitions are still subject to assessment by the supervisor and therefore need to be notified as soon as the proposed acquirer becomes aware they have exceeded a threshold.<sup>29</sup> Responsibility

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<sup>28</sup> According to Title II, Chapter 1, Paragraph 4.1, Sentence 2 of the Joint Guidelines, “supervisors should not be precluded from concluding that certain persons are acting in concert merely due to the fact that one or several such persons are passive, as inaction may contribute to creating the conditions for an acquisition or increase of a qualifying holding or for exercising influence over the target undertaking”.

<sup>29</sup> This indication is in line with the Joint Guidelines (see Title II, Chapter 1, Paragraph 7.3).

for verifying if a threshold has been reached or exceeded lies with the proposed acquirer.

#### 4.3.2 Obligation to notify for temporary acquisitions

As a general rule, temporary acquisitions where ownership of the target credit institution changes for a short time (e.g. a few business days) are subject to notification. However, in particular cases of temporary acquisitions supervisors may deem there is no decision to acquire, e.g. where the intention is to acquire ownership only momentarily, with subsequent transfer to a third party occurring immediately.

In such cases, the NCA, after consultation with the ECB, may refrain from a formal procedure if the following three conditions are fulfilled:

- the final shareholding structure is not affected by the temporary acquisition;
- a formal agreement or commitment from the temporary acquirer outlining the immediate transfer of shares and the timing of the transfer is provided to the competent authority;
- a formal agreement or commitment from the temporary acquirer is provided to the competent authority stating that it has no ability to exercise any kind of rights over the capital or voting rights or other de facto influence that could have an impact on the target (e.g. its organisation, governance, financial soundness or compliance with prudential ratios).

#### 4.3.3 Obligation to notify for conditional and optional acquisitions

Transfer of the ownership of shares may be subject to events beyond the control of the proposed acquirer or to options that the proposed acquirer can exercise at a later stage. The proposed acquirer should notify the competent authorities as soon as it becomes aware or can expect that the proposed acquisition will take place. In exceptional cases where notification in advance is not possible (e.g. due to automatic conversion of contingent convertible bonds), notification should be submitted immediately upon becoming aware that the acquisition has happened.

## 5 Assessment

### 5.1 The principle of proportionality

Legal basis	Article 23 of the CRD
Joint Guidelines	Title II, Chapter 1, Section 8

Once the natural or legal persons obliged to make a notification have been identified, the proposed acquisition will be assessed against the five assessment criteria specified in the CRD and transposed into relevant national laws. The depth of the assessment tends to vary, taking a proportionate approach.

Proportionality applies to both the information that needs to be submitted by the proposed acquirer and the substantive assessment. When applying this principle, supervisors consider: (i) the nature of the transaction (is it an intragroup reorganisation or a simplification of the shareholding structure?); (ii) the nature of the proposed acquirer (are they a supervised institution or a shareholder that has already been approved?); (iii) the objective of the proposed transaction (what is the stake that will be acquired and is the acquisition merely one of several steps in a transaction or momentary?); and (iv) the particularities of the proposed transaction as well as the extent to which the proposed acquirer may exercise an influence over the target.

Information requirements are stipulated by national law. As a general rule, the ECB does not require already available information unless there is a specific requirement foreseen in national law.

### 5.2 Assessment criteria

#### 5.2.1 Reputation of the proposed acquirer (criterion A)

Legal basis	Article 23(1)(a) of the CRD
Joint Guidelines	Title II, Chapter 3, Section 10

The assessment of reputation covers two distinct elements: the integrity of the proposed acquirer and their professional competence.

In general terms, all natural and legal persons that are required to submit a notification should be assessed with regard to their reputation, and so too should the natural persons who effectively direct the business of these legal persons.<sup>30</sup>

### 5.2.1.1 Integrity and professional competence

A proposed acquirer is considered to be of good repute if there is no reliable evidence to suggest otherwise and the supervisor has no reasonable grounds to doubt their good repute.

Under the Joint Guidelines, the integrity requirements are applicable irrespective of the size of the qualifying holding the proposed acquirer intends to acquire, their involvement in management or the influence they are planning to exercise on the target.

The professional competence of the proposed acquirer covers both management competence and technical competence in financial services, and may be based on their previous experience, demonstrating due skill, care, diligence and compliance with the relevant standards.<sup>31</sup>

While integrity must be established for all proposed acquirers (including natural and legal persons in a holding chain), the professional competence requirements are reduced for those who are not in a position to exercise, or who undertake not to exercise, significant influence over the target (i.e., determine the strategy for the qualifying holding in the target).

#### Side note

##### Criminal records

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**General rule:** Criminal records certificates issued in the country of residence<sup>32</sup> are the minimum proof required for the assessment of reputation. Official records are required, i.e., a criminal record extract from an official authority for natural persons and criminal records and/or a certificate of good standing for legal persons. In jurisdictions where multiple levels of criminal systems exist (e.g. federal and local), official records must be submitted from all levels unless there is a cumulative certification system. It should be noted that the issuance of criminal records can take an extended period of time. Therefore, proposed acquirers are advised to request the issuance of criminal records as early as possible.

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<sup>30</sup> 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.

<sup>31</sup> See Title II, Chapter 3, Paragraph 10.23 et seq. of the Joint Guidelines.

<sup>32</sup> Unless national law foresees stricter rules (i.e., a longer time frame), individuals who have moved to a jurisdiction within the previous 12 months must provide a certificate for all previous countries of residence.



**Exceptions:** In exceptional cases it may not be possible for legal reasons either to obtain criminal record extracts at all or to share records obtained with a third party. If either of these situations applies, alternative solutions must be discussed with the competent authority on a case-by-case basis.

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### 5.2.1.2 Pending investigations and legal proceedings

In criminal procedures, the presumption of innocence applies until a trial has been concluded with a conviction. However, the reputation assessment in a qualifying holding procedure must establish whether the proposed acquirer's reputation is beyond doubt, which may result in a negative assessment even if a trial is still ongoing.

All pending proceedings should be adequately described by the proposed acquirer in the notification in order to provide the supervisors with a comprehensive overview on its status. Supervisors will also pay particular attention to publicised reputational issues that have received attention in national and/or international media (cases of financial fraud, corruption, etc.) and that may be linked to the proposed acquirer or persons acting as its managers, shareholders or persons otherwise in a position of control. In such cases, proposed acquirers are requested to provide information that clarifies whether such a link exists and if it may lead to future investigations. Facts that are discussed in the course of criminal proceedings may have an impact on the assessment of both the integrity and the professional competence of the proposed acquirer. For example, even where an executive is not found to be criminally liable for deficiencies, lack of oversight, etc., at an institution, the facts that emerge in proceedings may be used by supervisors to conclude that their integrity or professional competence is affected.

#### **Side note**

##### Specific acquirers and complex structures

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Where there are complex holding chains with a large number of layers notifying as proposed acquirers, these all have to be assessed in terms of reputation and are required to provide detailed information (curriculum vitae, criminal record, pending investigations and assessments from other authorities, etc.; see Section 3). In these cases, the proposed acquirer may wish to consider simplifying the holding chain.

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

Legal basis	Article 23(1)(b) of the CRD
Joint Guidelines	Title 2, Chapter 3, Section 11

According to Article 23(1)(b) of the CRD, the competent authority must perform an assessment of the reputation, knowledge, skills and experience, as set out in Article 91(1) of the CRD (“fit and proper assessment” or FAP), of any member of the management body who will direct the business of the target as a result of the proposed acquisition. An assessment has to be conducted as part of the qualifying holding procedure if the proposed acquirer intends to appoint new members of the management body who will direct the business.

Three scenarios are possible:

- the proposed acquirer has already identified at least one new member to be appointed to the management body as a result of the proposed acquisition;
- the proposed acquirer has not decided whether to change any members of the management body or has not yet identified potential new members;
- the proposed acquirer does not intend to change any members of the management body.

Where the proposed acquirer has already identified a new member to be appointed to the management body of the target, the information required for the FAP assessment should be attached to the notification. Otherwise, it will be considered incomplete.

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 assessed on the basis of the following criteria: (i) experience; (ii) reputation; (iii) conflicts of interest; (iv) collective suitability; and (v) time commitment.

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.

Where the proposed acquirer has not yet decided whether to appoint or has not yet identified any new member of the management body who will direct the business of the target, the notification can be considered complete without naming them, provided no other item in the qualifying holding notification is missing.<sup>33</sup>

<sup>33</sup> See Section 6.2 (Acknowledgement of receipt).

If the proposed acquirer does not intend to appoint any new members, no assessment of this criterion is conducted.

### 5.2.3 Financial soundness of the proposed acquirer (criterion C)

Legal basis	Article 23(1)(c) of the CRD
Joint Guidelines	Title II, Chapter 3, Section 12
Commission Delegated Regulation (EU) 241/2014 <sup>34</sup>	Articles 8 and 9
Implementing technical standards on common procedures <sup>35</sup>	

The third assessment criterion set out in Article 23(1)(c) of the CRD requires verification of the financial soundness of the proposed acquirer, particularly in relation to the type of business pursued with and/or planned for the target.

The Joint Guidelines provide a definition of financial soundness that contains two dimensions:

1. the capacity of the proposed acquirer to finance the acquisition (purchase price or capital increase);
2. the capacity to maintain a sound financial structure at the proposed acquirer and at the target for the foreseeable future (usually three years).

The assessment of financial soundness is partly linked to the assessment of the business plan of the target (relative financial soundness), as – without prejudice to the requirements of criterion d) – the financial resources needed by the proposed acquirer to maintain a sound financial structure at the target depend on whether or not the target may need additional capital in the foreseeable future. Proposed acquirers are also required to show that they are in financial good shape in absolute terms. (This applies even in cases where a fully-fledged business plan assessment is not conducted, for example because the proposed acquirer is not going to acquire control over the target.)

<sup>34</sup> Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions (OJ L 74, 14.3.2014, p. 8).

<sup>35</sup> In addition to the above provisions, reference should be made to the Commission Implementing Regulation (EU) 2017/461 of 16 March 2017 laying down implementing technical standards with regard to common procedures, forms and templates for the consultation process between the relevant competent authorities for proposed acquisitions of qualifying holdings in credit institutions as referred to in Article 24 of Directive 2013/36/EU of the European Parliament and of the Council (OJ L 72, 17.3.2017, p. 57).

## Side note

### Applying the principle of proportionality

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In line with the Joint Guidelines,<sup>36</sup> the assessment of the financial soundness of the proposed acquirer is tailored to the nature of the proposed acquirer and the degree of influence over the target, taking into account the size of the holding to be acquired in the shareholding structure of the target, and in particular whether the proposed acquirer will have control<sup>37</sup> over the target. The size of the holding should be assessed in terms of both capital and voting rights. The following factors will feed into the assessment:

- whether the acquisition will lead to little or no influence vs. control;
- the percentage of the portfolio of the proposed acquirer which the holding to be acquired represents and the aim of the transaction (i.e. is it a portfolio investment vs. a strategic investment?);
- the size of the proposed acquirer compared to the target (regardless of whether the target is being acquired by another credit institution or by a natural or other legal person);
- the time horizon of the intended acquisition and any intention to increase or decrease the size of the holding in the foreseeable future;
- any special circumstances related to the proposed acquisition (e.g. recapitalisation of the target, avoidance of resolution measures, etc.).

The above does not affect the proposed acquirer's obligation to provide the standard set of information on financial soundness, as this needs to be assured in absolute terms regardless of the factors listed.

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### 5.2.3.1 Assessment of financial soundness

The nature of the proposed acquirer is taken into account when assessing its financial soundness.<sup>38</sup> Specifically, supervisors consider the following:

#### 1. If the proposed acquirer is a credit institution

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<sup>39</sup> as well as the impact the acquisition will have on its risk exposure, business model, profitability, governance structure and capital adequacy. The initial assessment of the overall risk profile will be adjusted where necessary.

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<sup>36</sup> See also Title II, Chapter 1, Paragraph 8.4 of the Joint Guidelines.

<sup>37</sup> For the definition of control, please see Article 4(1)(37) of the CRR and Title I, Paragraph 3.1(ii) of the Joint Guidelines.

<sup>38</sup> Also see Title II, Chapter 1, Paragraph 8.4 of the Joint Guidelines.

<sup>39</sup> The SREP score for SSM credit institutions.

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.<sup>40</sup>

## **2. If the proposed acquirer is not a credit institution**

If the proposed acquirer is not a credit institution, the supervisor analyses their financial documentation<sup>41</sup> to form an overall judgement of their financial soundness and ability to support the target in the foreseeable future. This includes an assessment of the overall level of debt and creditworthiness.

Depending on the findings identified during this assessment, actions or measures may be addressed in the ECB decision.

## **3. If the proposed acquirer is a natural person**

If the proposed acquirer is a natural person, an overview of their sources of revenue, assets and liabilities, pledges and guarantees granted or received<sup>42</sup> needs to be submitted to provide the supervisor with a comprehensive overview of their financial situation. Depending on national law, further documentary evidence may be requested by the competent authority to substantiate the information provided, such as:

- (a) tax declarations;
- (b) evidence of cash and cash equivalents, including cash on hand, savings accounts and certificates of deposits;
- (c) evidence of brokerage accounts, including stocks, mutual funds, bonds and retirement accounts;
- (d) evidence of long-term loans, including real estate mortgages and any debts that must be repaid in more than one year;
- (e) evidence of short-term liabilities, including all debts with a maturity of less than one year (e.g. revolving credit lines for credit cards);
- (f) additional information concerning off-balance sheet commitments (e.g. pledges and guarantees granted or received);
- (g) other information from third parties, including the credit rating and borrowing history of the proposed acquirer (the Central Credit Register, for example, usually provides an overview of all credit agreements relating to a borrower).

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<sup>40</sup> For more detailed information on this, please refer to the ECB [Guide on the supervisory approach to consolidation in the banking sector](#).

<sup>41</sup> If no financial documentation can be produced, an overview of the main components of assets and liabilities must be submitted.

<sup>42</sup> Annex I, Section 4.1 (c) of the Joint Guidelines.

#### 4. Use of debt to finance the purchase price (leverage)

The use of debt to finance the purchase price will receive particular attention from supervisors to assess whether this may potentially impact the target, e.g. by increasing the overall risk level of the target to boost short-term profits to the detriment of medium- or long-term profitability, thereby also impacting the target's business model, viability and compliance with prudential requirements. This applies both to dividend payments and any other practice to extract resources from the target.

### 5.2.4 Compliance with prudential requirements of the target (criterion D)

Legal basis	Article 23(1)(d) of the CRD
Joint Guidelines	Title II, Chapter 3, Section 13

The fourth assessment criterion set out in Article 23(1)(d) of the CRD requires an assessment of the ability of the target to comply and continue to comply with all prudential requirements, including capital and liquidity requirements, large exposure limits and those related to governance arrangements, internal control, risk management and compliance.<sup>43</sup>

#### 5.2.4.1 Submission of a business plan

Where the proposed acquisition results in control over the target, the acquirer should provide the target supervisor with a business plan comprising a strategic development plan, the projected financial statements of the target for at least three years after the proposed acquisition (from the envisaged closing date) and the impact of the acquisition on the corporate governance and general organisational structure of the target. In transactions where the proposed acquirer does not obtain de facto control over the target, it should provide information that is proportionate to the stake being acquired.

#### 5.2.4.2 Assessment of the business plan

The ultimate goal of the supervisors' business plan assessment is to evaluate if the target will be able to comply with its prudential requirements immediately after the closing of the transaction and continue to do so in the foreseeable future, by examining the credibility of the financial projections and their underlying assumptions.

<sup>43</sup> Also see Title II, Chapter 3, Paragraph 13.4 of the Joint Guidelines.

Responsibility for the business plan lies exclusively with the proposed acquirer. The supervisors need to gain an overall view of the plan submitted and the ability of the target to achieve the objectives envisaged.

The supervisors assess the evidence provided for the proposed acquirer's assumptions in the business plan and evaluate their credibility and feasibility. In addition to projections, the business plan should therefore also cover all assumptions underlying the projections and provide a narrative substantiation of these. Ideally, proposed acquirers should submit their working file in the form of an Excel spreadsheet. The supervisors then form a view on each assumption and integrate these into a "supervisory challenge scenario". Amongst other things, the assessment considers the business model of the target, its size and interconnectedness with other institutions, groups and the financial system in general, and the vulnerabilities and weaknesses of the target identified during the latest supervisory risk assessment. This includes both a qualitative and quantitative assessment, as laid out below.

The supervisory challenge scenario allows supervisors to assess the viability and sustainability of the target's business model and its capital adequacy on prudent assumptions. It represents an adjusted base case, not a stress scenario. It is not intended to serve as an alternative business plan, rather to facilitate the assessment by the supervisors with the aim of: (i) gaining a sound understanding of the assumptions used; (ii) developing follow-up questions, if necessary; and (iii) reaching a conclusion as to the credibility of the business plan and, ultimately, compliance with capital requirements.

## Qualitative assessment

As part of the qualitative assessment, the proposed acquirer's overall strategy for the target credit institution and internal and external factors (such as the economic environment) are assessed.

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 potential synergies (or lack thereof) between the target's existing activities and the activities to be added to it as a result of the acquisition, paying attention to the identification of different types of synergies, the probability of actually achieving these and the expected timing for benefiting from them;
- whether the key assumptions made by the proposed acquirer on the business environment and profit drivers are consistent with projections or other information from key third-party data providers available at the time of the assessment;

- if applicable, the exit strategy (for example in the case of short-term investments or doubtful business models).

## Quantitative assessment

The business plan assessment entails a quantitative analysis of key micro- and macro-economic assumptions, risk indicators and a comparison to peers.<sup>44</sup>

Where relevant, a specific analysis is also carried out at business line level (e.g. product line or geographical area).

Supervisors consider how the items below have evolved over recent years and identify underlying trends with the aim of understanding how the projected results might be achieved:

- profitability, viability and sustainability of the business model;
- individual risk indicators;
- capital adequacy.

Compliance with all the prudential requirements of the target is quantitatively assessed as at the time of the acquisition and on a continuous basis for the foreseeable future by integrating the above analytical steps into the supervisory challenge scenario.

### Side note

#### Applying the principle of proportionality

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When conducting the business plan assessment, supervisors will apply the principle of proportionality in line with the general considerations of a risk-based approach and adjust the depth of the assessment accordingly.

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### 5.2.4.3 The capacity of the target to comply with internal governance requirements

The target supervisor also assesses whether the proposed acquisition will have an impact on internal governance. If so, they assess whether the target will continue to have a clear organisational structure and adequate internal control mechanism after the acquisition. Special attention is given to the following items:

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<sup>44</sup> A peer comparison is an assessment where the bank at stake is compared to other entities who share similar characteristics.



- In the case of an acquisition by another credit institution, it is important to understand how the organisation of internal control functions at group level will liaise with the internal control functions at target level, following the acquisition.
- In other cases, specific attention is paid to any conflicts of interest likely to arise within the group. The analysis aims to establish whether the group has a clearly defined policy for detecting and dealing with these. This policy needs to be sufficiently formalised.

In addition, the supervisors will assess how the transaction may affect the compliance of the target's management body with the fit and proper requirements.

## 5.2.5 Suspicion of money laundering or terrorist financing (criterion E)

According to Article 23(1)(e) of the CRD, when assessing this criterion, the competent authorities should determine “whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing (...) is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof”.

Supervisors assess this criterion from a prudential perspective (i.e. whether actual money laundering (ML) or terrorist financing (TF), or the risk thereof, could endanger the sound and prudent management of the target in terms of capital, liquidity, sustainability of the business model and governance arrangements), taking into account the circumstances and information submitted in relation to the proposed acquisition. In addition, as mentioned in Paragraph 14.1 of the Joint Guidelines, “the anti-money laundering and terrorist financing assessment complements the integrity assessment and should be carried out regardless of the value and other characteristics of the proposed acquisition”.

The assessment covers not just the proposed acquirer but also “close personal or business links to the proposed acquirer, including the legal and beneficial owners of the proposed acquirer”.<sup>45</sup>

### 5.2.5.1 Scope of the assessment of criterion E

When assessing this criterion, supervisors examine whether there are reasonable grounds for knowing or suspecting that the proposed acquirer is or has been involved in money laundering or terrorist financing operations or attempts to do so, or that the proposed acquisition may increase the risk of such operations occurring. This analysis includes – for example – examining criminal convictions, final and/or pending administrative sanctions, pending criminal proceedings and/or investigations and any personal or business links of the proposed acquirer.

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<sup>45</sup> Title II, Chapter 2, Paragraph 14.2 of the Joint Guidelines.

Since the ECB is not competent to supervise anti-money laundering/countering the financing of terrorism (AML/CFT) compliance, the ECB assesses this criterion on the basis of the relevant facts and findings of competent authorities, as made available by the NCA. These are taken into consideration for the overall prudential assessment of the proposed acquisition. If needed, the ECB may request further information directly from competent authorities (AML/CFT authorities, financial intelligence units, etc.) on the basis of the cooperation instruments available.<sup>46</sup> The Joint Guidelines indicate that, in addition to any past or present involvement of the proposed acquirer in operations or attempted operations of money laundering or terrorist financing,<sup>47</sup> the assessment of the criterion specified in Article 23(1)(e) of the CRD covers the following two main aspects:

- (a) the source and chain of the funds to finance the transaction;
- (b) the impact on the target business plan and the management and organisational structure of the target from an AML/CFT perspective.

These two aspects are analysed in detail below.

### **1. Source and chain of the funds used to finance the transaction**

The source and chain of the funds used to finance the transaction are key for the assessment of this criterion, as it not only relates to Article 23(1)(e) of the CRD but also to Article 23(1)(c) – the financial soundness criterion. Supervisors assess this aspect in relation to the source of funds to pay the transaction price. They also consider any possible additional capital needs the target may have in future and whether the business of the proposed acquirer could entail a risk from a money laundering or terrorist financing perspective. Supervisors need to have assurance that any potential additional capital will be “clean” and that the proposed acquisition will not increase the risk of money laundering or terrorist financing through the target entity.

In particular, supervisors assess the origin of the funds that will be used for the transaction (i.e. the activity that generated them) and how they will be transferred from their source to the seller. To do this, supervisors verify that the funds used for the proposed acquisition will be channelled through chains of financial institutions which are all subject to effective AML/CFT supervision.

In addition, supervisors assess the information submitted on the activity that generated the funds, such as the history of the business activities of the proposed acquirer, its financing structures and whether these are consistent with the value of the transaction. In their assessment, supervisors will ensure that the funds used for the transaction have been recorded in writing and duly supported by formal

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<sup>46</sup> For example, the EBA Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units under Directive 2013/36/EU of 16 December 2013 (EBA/GL/2021/15) and the Final report on regulatory technical standards under Article 9a (1) and (3) of Regulation (EU) No 1093/2010 setting up an AML/CFT central database and specifying the materiality of weaknesses, the type of information collected, the practical implementation of the information collection and the analysis and dissemination of the information contained therein of 20 December 2021 (EBA/RTS/2021/16).

<sup>47</sup> Please refer to Section 5.2.15.

documentation, so it is possible to clearly determine their origin and ensure there are no legal doubts about the economic activity that generated them.

## **2. Impact from an AML/CFT perspective on the target business plan and the management and organisational structure of the target**

The second key aspect that supervisors consider when assessing this criterion is the impact of the proposed acquisition on the target from an AML/CFT perspective. This aspect will always be linked with the assessment of the target's compliance with prudential regulations (Article 23(1)(d) of the CRD), although the assessment also ensures that the proposed acquisition will not result in money laundering and terrorist financing being committed or attempted, and that the proposed acquisition does not increase the risk thereof. This assessment is carried out at greater depth when the proposed acquisition entails a change of control and thus enables the acquirer to change the business and organisational structure of the target. Where there is a change of control, the supervisor performs a detailed assessment to determine whether the risk profile of the target has changed from an AML/CFT perspective and the prudential implications of such changes. In particular, it is important to identify: (i) whether the target will engage in business activities that are riskier from an AML/CFT perspective; (ii) whether there will be changes to the client base and/or a shift in target clients (e.g. dealing with customers who may engage in activities that involve a higher ML/TF risk or associated with higher ML/TF risk jurisdictions, money laundering or terrorist financing); and (iii) whether the organisational structure will hamper the internal controls and checks and balances on AML/CFT in a way which could affect compliance with obligations in this regard.

When assessing the requirements under Article 23(1)(b), supervisors also always pay attention to whether any potential changes to the management board of the target as a result of the proposed acquisition could increase the risk of money laundering or terrorist financing at the target.

### **Side note**

#### **Applying the principle of proportionality**

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Supervisors will consider all aspects of the proposed acquisition in line with proportionality considerations. They will scrutinise the structure of the proposed acquisition (e.g. whether external funding is involved), whether the proposed acquirer is a financial entity subject to equivalent prudential and AML/CFT supervision, whether any specific prudential or AML/CFT concerns related to the acquirer have been noted in the past or during the examination of the file, the country of establishment of the proposed acquirer and whether the proposed acquirer has links that are considered high-risk from an AML/CFT perspective.

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## Side note

### Specific acquirers and complex structures

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The information collected to assess the reputation of the proposed acquirer is also used to assess whether the origin of the funds and means of payment facilitate money laundering or terrorist financing. The sources of funds trail should be comprehensive, making it possible to track the contribution of each ultimate beneficial owner and intermediary holding.<sup>48</sup>

Specific acquirers should disclose the names, percentages of capital and/or voting rights or other interests held in the target by at least those layers that, directly or indirectly, solely or jointly, hold more than 0.5% of the capital or voting rights in the target. Disclosure of interests below this threshold may be requested if justified in light of the circumstances of the specific case.

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<sup>48</sup> Title II, Chapter 3, Paragraph 14.6 of the Joint Guidelines.

## 6 Procedural aspects and documentation; information requirements

### 6.1 Pre-notification phase and synchronisation of procedures involving several NCAs

Legal basis	Article 22(2) of the CRD
Joint Guidelines	Title II, Chapter 2, Section 9

With complex procedures in particular, proposed acquirers are encouraged to enter into pre-notification discussions with supervisors to clarify information requirements, timelines and how to address potential supervisory concerns early on in the process.

Where multiple related qualifying holding procedures are involved (i.e. several NCAs are working together) the ECB will aim to ensure these are assessed at a harmonised manner and in a timely, synchronised process to establish consistency in decision-making. However, this does not apply to any proceedings ongoing in parallel with other authorities (e.g., competition authorities).

### 6.2 Acknowledgement of receipt and calculation of the procedural deadline

Legal basis	Article 22(2) of the CRD
Joint Guidelines	Title II, Chapter 2, Sections 9.1 and 9.2

#### 6.2.1 Incomplete notifications

Where the notification submitted is deemed incomplete after a formal check, the NCA that received it informs the proposed acquirer.

A further assessment of formal completeness will take place once the proposed acquirer or their representative has submitted the additional information required. The outcome will again be that the notification is deemed either complete or incomplete.

## 6.2.2 Complete notifications

Contact with the NCA prior to submission is recommended where relevant to reduce the risk of submitting an incomplete notification.

Where the notification submitted by the proposed acquirer is assessed as complete based on a formal check, the NCA will send an acknowledgement of receipt in writing and:

- confirm that the notification is formally complete, and the 60-working day assessment period has started;
- emphasise that the NCA and/or the ECB may request further information and define the applicable suspension period pursuant to Article 22(3) of the CRD as transposed into national law.

## 6.2.3 The IMAS portal – the digital gateway for supervisory processes

The IMAS portal contains a dedicated online questionnaire for collecting the information and documentation needed for a notification. What has to be submitted remains under the purview of the NCA and use of the IMAS portal may be mandatory or voluntary, depending on the Member State.

Use of the IMAS portal has no impact on the pre-notification phase, the mechanism for acknowledging receipt or the calculation of the procedural deadline.

## 6.3 Request for further information and suspension of the legal deadline

Legal basis	Article 8(2) of the CRD
Joint Guidelines	Title II, Chapter 2, Section 9.5; Chapter 3

Once the acknowledgement of receipt has been submitted, either the NCA or the ECB may request further/additional information from the proposed acquirer if necessary to complete the assessment.

The period for assessing a notification of a proposed acquisition or increase of a qualifying holding may only be suspended once for a maximum of 20 (or, where applicable, 30) working days. Any further requests for information will not trigger a new suspension.

## 6.4 Material changes during and after the assessment period

The CRD and the Joint Guidelines do not provide any guidance on the procedure to be followed in the event of a material change during or after the assessment period.

### 6.4.1 Material changes during the assessment period

Any material change would bring into question whether the application is complete, and therefore whether the 60-working day assessment period has started. This timeline has been set to safeguard the proposed acquirer's right to a timely conclusion of the assessment and avoid any unjustified delay by the competent authorities in handling the notification procedure.

Material changes may be defined as any new facts or circumstances arising during the assessment of a proposed acquisition or increase of a qualifying holding which relate to one or more of the five assessment criteria set out in Article 23(1) of the CRD and are deemed essential to complete the assessment. Such facts or circumstances could include new information submitted by the proposed acquirer during the assessment period, as well as information which has been brought to the attention of the ECB or the NCA by other sources during that period (e.g. with regard to reputation). Any material change to the information submitted, whether made by the proposed acquirer or otherwise, may result in a new qualifying holding procedure and the formal assessment period being restarted.

### 6.4.2 Material changes after non-objection by the ECB

Following non-objection to a proposed acquisition by the ECB, the acquirer may seek to execute the transaction on terms and conditions different from those notified to the NCA and approved by the ECB. This is particularly the case where there is an extended period of time between the ECB's assessment and the transaction completion date.<sup>49</sup> The proposed acquirer should inform the NCA and ECB of any such changes to ensure that the ECB has the opportunity to decide whether they require reassessment.

## 6.5 Ancillary provisions to the ECB's decision

A competent authority has the option to impose conditions and obligations when issuing a qualifying holding assessment. The ECB's power to impose conditions and obligations stems from Article 15(3) of the SSM Regulation and Article 22(1) of the CRD, as well as from general principles of EU administrative law.

Conditions and obligations allow non-objection decisions to be subject to ancillary provisions imposed on the proposed acquirer, its controlling entities and their

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<sup>49</sup> ECB non-objection decisions normally include a limitation on the period of validity (usually six months after issue).

ultimate beneficial owners or subsidiaries. Such ancillary provisions may relate to the target and/or the proposed acquirer and may only be imposed when necessary to ensure compliance with the criteria set out in Article 23 of the CRD. Conversely, where it emerges that a proposed acquirer is, in any case, unable to fulfil one or more of the criteria in Article 23 of the CRD, conditions and obligations cannot be used to remedy such issues, and a decision to object will be adopted.

## Conditions

An ECB non-objection decision in a qualifying holding assessment may be subject to conditions precedent, but not conditions subsequent.

The competent authority may set a maximum period for concluding the proposed acquisition<sup>50</sup> and may extend this where appropriate to a fixed maximum period of time, in accordance with Article 22(7) of the CRD. In view of this, conditions precedent need to be met within a specific timeframe. This ensures legal certainty and avoids problems in cases where enforceability is limited (e.g. if the proposed acquirer is not a supervised entity).

## Obligations

As is the case for conditions, obligations are ancillary provisions imposed on the proposed acquirer to undertake or refrain from certain actions. Obligations may be imposed as implementing measures (e.g., reporting obligations) or to address potential issues after the proposed acquisition or further increase of a qualifying holding. They therefore do not prevent the proposed acquisition from taking place. Non-compliance with these obligations may result in enforcement measures and sanctions being applied, although this would not impact the validity of the decision.

Where there are doubts concerning the ongoing fulfilment of the five assessment criteria, but the ECB finds these can be sufficiently remedied by the proposed acquirer taking certain specific actions, they may be addressed by imposing obligations or other supervisory measures as part of ongoing supervision.

In particular, obligations may be used to ensure continued compliance with the assessment criteria. They may also contain a forward-looking element, namely the assessment of financial soundness (Article 23(1)(c) of the CRD) and the ability of the target to comply with, and continue to comply with, prudential requirements (Article 23(1)(d) of the CRD).

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<sup>50</sup> If the decision includes conditions, the maximum period for the acquisition of a qualifying holding means that the conditions must be fulfilled before the acquisition takes place.



## Monitoring and enforcement of conditions and obligations

Compliance with conditions and obligations will be monitored by ongoing supervision. Failure to implement conditions precedent will result in the proposed transaction being opposed. Failure to meet obligations has no automatic effect on the proposed transaction but may lead to enforcement measures or sanctions.

## Commitments

Commitments may be defined as mechanisms to provide sufficient comfort to the supervisor that specific concerns relating to the qualifying holding criteria will be met. They are provided by the proposed acquirer on a variety of issues. They can give comfort to the competent authority that the proposed acquisition or increase of a qualifying holding will meet the relevant assessment criteria, for example maintaining the capital ratios of the target after the acquisition or increase. Commitments must be provided prior to approval and closing of the transaction.

Appropriate commitments could relate to, for example, financial support to be provided to the target by the proposed acquirer in the event of liquidity or solvency problems, corporate governance issues, the proposed acquirer's future shareholding in the target, the restructuring of the proposed acquirer or future changes to its business plan.

## Recommendations

Recommendations are not legally binding and may encompass a broad range of issues. They are addressed to the proposed acquirer in cases where all applicable criteria have been met but an issue has been identified which it would be desirable to remedy. In such cases the ECB may, at its discretion, include recommendations which spell out expectations or make statements.

## 6.6 Procedural issues relating to the qualifying holding assessment

### 6.6.1 Right to be heard

Imposition of conditions or obligations on and opposition to the acquisition or increase of a qualifying holding may have an impact on the rights of the proposed acquirer. For this reason, in principle, the proposed acquirer has the right to be heard. According to Article 31(3) of the SSM Framework Regulation, the right to be heard in cases of qualifying holding procedures is shortened to three working days.

Exceptions to the right to be heard apply in the following cases:

- where a commitment has been made unilaterally by the proposed acquirer in its initial application or during the assessment period, and the decision is adopted with conditions or obligations reflecting the commitments included in the application or otherwise confirmed by the proposed acquirer, the right to be heard need not be granted;
- where the competent authority imposes a reporting requirement on an entity that is subject to the provisions of Article 10 of the SSM Regulation (Article 31 of the SSM Framework Regulation excludes the right to be heard in relation to requests for information imposed on such entities)
- where the condition and/or obligation refers to statutory provisions the proposed acquirer must comply with.

### Breach of the notification requirement

Assessment of the acquisitions and increases of qualifying holdings in credit institutions should take place prior to any acquisition or increase. According to Article 22 of the CRD, proposed acquirers must notify the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition, indicating the size of the intended holding and including relevant information. It has been observed that in some cases proposed acquirers either intentionally or unintentionally fail to comply with this obligation and the supervisor only becomes aware of the acquisition or increase after it has been completed. In such cases, the supervisor will immediately inform the acquirers that they must provide notification of the acquisition or further increase and undergo a qualifying holding assessment. The competent authority will also assess whether any enforcement measures or sanctions need to be imposed.<sup>51</sup>

#### 6.6.2 Language of the decision

According to Article 24 of the SSM Framework Regulation, any document sent to the ECB by a supervised entity or any other legal or natural person individually subject to an ECB supervisory procedure may be drafted in any of the official languages of the Union chosen by the supervised entity or person. The ECB, the supervised entities, and any other legal or natural person individually subject to supervisory procedures may agree to exclusively use one of the official languages of the EU in their written communication, as well as in ECB supervisory decisions.

The ECB has written agreements with all significant credit institutions on the language to be used in written communication with them and ECB supervisory decisions affecting them. As a result, in cases where the proposed acquirer is a significant credit institution, the ECB decision will be communicated in the language agreed between the ECB and the relevant supervised entity. In cases where a

<sup>51</sup> In some jurisdictions, failure to give notification of the acquisition or increase of a qualifying holding may lead to immediate freezing of the proposed acquirer's voting rights.

language agreement is terminated, the termination will only affect those aspects of the ECB supervisory procedure which have not yet been completed. The new language will be used as of the date of termination.

In cases where the proposed acquirer is not a significant credit institution and, as a result, there is no pre-existing agreement, the proposed acquirer will be asked to confirm the language to be used for the procedure, including the language to be used for notification of the ECB qualifying holding decision.<sup>52</sup>

In cases where the right to be heard procedure has started and the proposed acquirers have asked to be heard in an official language of the Union which is different from the language being used for the ECB supervisory procedure, the necessary arrangements will be made.

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<sup>52</sup> If the IMAS portal is used for the notification, the proposed acquirer may indicate the desired language in the online questionnaire.

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