German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on Guidelines for the prudential assessment of acquisitions of qualifying holdings (JC/CP/2015/003)

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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Comments on Guidelines for the prudential assessment of acquisitions of qualifying holdings (JC/CP/2015/003)

Question 1: Do you have any general comments on the draft Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector?

I. General assessment

Overall, extremely extensive requirements are applied to the acquisition or increase of holdings in the financial sector at a very early stage. This applies in particular to the conditions that should trigger a notification obligation and that would need to be examined in the case of an intended acquisition. In addition to the extremely concrete criteria set out in the consultation paper for attributing capital or voting rights in excess of 10%, the conditions that would enable significant influence to be exercised on the target undertaking cover an extremely broad range of situations. For example, a notification obligation could arise merely because an acquirer enters into a significant business relationship with the target undertaking, e.g. because the acquirer provides outsourcing services in the area of payments processing or securities settlement operations or is a creditor, or if an acquirer were to be appointed to the supervisory bodies or other management bodies of a target undertaking, even if this were not associated with other, more extensive rights. Furthermore, we would ask you to consider that the Guidelines already assume that influence can be exerted via personal (i.e. actually independent) governing body appointments.

We ae not convinced that this is actually necessary. Please see the remarks below for further details.

II. B. Remarks on specific requirements

1. Re Title II. Proposed acquisition of a qualifying holding and cooperation between competent authorities
a) Acting in concert (p. 13)
A clarification is required as to what exactly “acting in concert” relates to. Our understanding is that it relates to exercising the administrative rights represented by the shares, i.e. in particular the shareholders’ voting rights. In our opinion, coordinating buying behaviour is not sufficient to constitute “acting in concert”. The same also applies to standstill agreements and coordinated sales or acquisitions of shares, in our view.

b) Significant influence (p. 16)
The list of factors that must be taken into account when assessing whether significant influence exists is extremely general. The sweeping formulations run the danger that the meaning of the term “significant influence” can be infinitely extended, and result in legal uncertainty. In particular, points 5.2 (a), (b), (c) (e), (f) and (g) should at all events be defined in more detail, and hence restricted in scope.

The criterion used in point 5.2 (a), the “existence of material and regular transactions”, entails a risk in particular for larger institutions that are engaged in a series of ongoing transaction-based relationships with other institutions (e.g. in the areas of cash management, loans, payments, or as an outsourcing service provider) that such relationships could lead to significant influence being ascribed to them. The same problem could also arise merely as a result of it sourcing and paying for substantial IT services. If Article 4 I no. 36 of the CRR puts the criterion of significant influence on an independent, equal footing to the 10% rule, the consequence would be that a check would have to be made in all cases before implementing a material transaction as to whether this (even without the acquisition of shares) would not result in a degree of influence that would require to acquirer to check whether a notification of acquisition had to be made. In particular, involuntary significant influence might be acquired extremely easily as a

result of merely minor transactions in those cases in which institutions already have a holding that has not yet triggered a notification obligation under the 10% rule. This would (see above) pose a considerable burden for institutions that have a wide range of material (and in the case of relatively small undertakings vital) contractual relationships, and could hardly be expressed in organisational terms. We therefore feel it is important to define the criterion of contractual relationships more closely and, additionally, to clarify that there must always also be an intention to acquire shares. In the case of 5.2 (c), it is not clear what is meant by “additional rights”. Without a more detailed definition, this point is too sweeping. We also think that the formulation “existence of relationships” in point 5.2 (f) is too broad.

In our opinion, there should also be no notification obligation if the sole criterion involved is “being able to appoint a representative in the management body in its supervisory function” (cf. point 5.2 d)). This applies in particular in view of the fact that such appointments are personal and independent.

c) Decision to acquire (p. 18)

In our view a clarification of the latest point in time at which a notification obligation is triggered would be desirable. We do not think that linking this to concrete contractual negotiations is a suitable criterion. Rather, it should be taken into account that, in legal terms, the decision to acquire depends on whether a governing body of the undertaking or another responsible body (e.g. a committee) to which senior management has delegated such a decision has also resolved this with internally binding effect. In this context, the individual decision-making structure of the acquirer in question must be taken into account. In our view, the latest point in time for a notification obligation should therefore not be before such a decision is taken (something that will have to be determined individually for each undertaking), even if material terms of the contract have already been negotiated. One disadvantage of this might be that the acquirer may then only be granted regulatory approval three months after the contractual negotiations were concluded. However, if the acquiring undertaking wishes to avoid this it can elect of its own accord to submit the notification at a relatively early stage, or at least when it firmly expects the acquisition to take place. However, an undertaking that prefers only to announce its intention to acquire once the acquisition is sewn up should not be accused of submitting a notification too late.

d) Proportionality principle (p. 19)

Re 8.5, third bullet point: According to the CRR/CRD IV and the latter's transposition into German law, a change in a qualifying holding from a direct to an indirect holding, or vice versa, does not have to be notified. Notification obligations only arise where thresholds are crossed in either direction. The words “if applicable” should be inserted in order to clarify that such a change does not necessarily trigger a notification obligation.

e) Assessment period (p. 20)

According to point 9.1, sentence 3, the 60-day prudential assessment period does not start running until the supervisor acknowledges formal completeness. To the extent that only a few, immaterial pieces of information are missing, the supervisory authorities should already begin the assessment, so that the 60-day period does not need to be used in full. This should be clearly formulated in the Guidelines.
In addition, we consider the 60-day period to be too long by comparison with other national requirements. In our opinion, it could be shortened to one month, which would correspond to the requirements under German anti-trust rules.

Comments on Guidelines for the prudential assessment of acquisitions of qualifying holdings (JC/CP/2015/003)

f) Reputation of the proposed acquirer (p. 21)
The consideration of factors that may cast doubt on a member's good repute (10.11) should be limited to a specified period (e.g. in the last 5 years).

The extension of the assessment to “any entities owned or directed by the proposed acquirer or in which the proposed acquirer has or had significant share” in 10.13 (b) goes too far.

2. Re Title III. Final provisions and implementation
a) Section 5
The list of persons given in point 1. (c) (1) and (2) is extremely broad. A limit (e.g. 5% of the shares or voting rights, or a “significant shareholder”) should be introduced here.

b) Section 6
Point 1 (c) requires the curriculum vitae of the proposed acquirer(s) to also include “reference persons incl. contact information and letters of recommendation”. This requirement goes too far, especially since it is not common in German business contexts to provide references.

c) Section 13
Section 13 “Reduced information requirements” defines exceptions in which a reduced volume of information is required. We understand this exemption to mean that persons subject to a notification obligation, to the extent that they are already supervised within the EU, merely have to submit the information stated if the conditions listed in section 13, no. 2 apply to the target undertaking. Initially, the presumption is that the regular case applies, i.e. that the person subject to a notification obligation and the target undertaking are assigned to different supervisors. This would be the case, for example, if they have different home countries.
We suggest using an even more differentiated set of exceptions. To the extent that the person subject to the notification obligation and the target undertaking are supervised by the same – generally national – supervisor, documents such as the financial statements for the last three financial periods, information on whether the acquirer belongs to a group, or on the senior management or shareholders, should not have to be submitted again to the supervisors. We wish to stress that companies are obliged under German law to provide the above-mentioned documents at regular intervals[1]. Alternatively, it should be made clear that the member states and national supervisors are free to create additional exemptions where the person subject to the notification obligation and the target undertaking are supervised by the same supervisor.

We propose the following hierarchy of exemptions:

- Maximum relief regarding documents and evidence to be provided in those cases in which the person subject to the notification obligation and the target undertaking are supervised by the same – generally national – supervisor. For example, German institution A wishes to acquire a qualifying holding in undertaking B, which is supervised by BaFin in Germany. In this case, we do not believe that documents such as the financial statements for the last three financial periods, information on whether the acquirer belongs to a group, or on the senior management or shareholders, needs to be submitted again to the supervisors, since A has already submitted them on a regular basis.

[1] German Banking Act (KWG) (cf. section 24(1) nos. 1 and 2 of the KWG “Reports on senior managers”, section 26 of the KWG “Submission of annual financial statements, management report and audit report”).

- A comparable approach where the person subject to the notification obligation and the target undertaking are supervised by the ECB in two different states belonging to the SSM. This is because the ECB also has the corresponding information about the person subject to the notification obligation that it supervises (in other words, it has been informed, for example, about the reliability of the senior managers, etc.).
- Potentially less extensive, but still considerable, exemptions regarding the documents and evidence should apply if an entity in another state belonging to the EEA that is supervised by the national supervisor there is to be acquired.
- In addition to the welcome exemption in 6. (p. 17), which specifies that, in the case of cascading holdings, only the proposed direct acquirer and the person or persons at the top of the corporate control chain need to be assessed on the acquirer side, the question should be considered as to whether certain evidentiary exemptions (see above) can also be applied to the direct acquirer, e.g. if the subsidiary of a bank that is supervised domestically is to make the acquisition. If the above-mentioned exemptions apply in the case of an acquisition by the person or persons at the top of the corporate control chain, one could also apply them, at least in part and to the extent that makes sense, to the situation where e.g. a subholding held by the person or persons at the top of the corporate control chain makes the acquisition. For example: exemptions in relation to the provision of evidence of a group structure, but no exemption e.g. in relation to the reliability of the senior managers.

In addition, a general clarification should be included that documents do not need to be submitted if the relevant information can be obtained from the home country supervisor. This would also be in line with our comments on 12. “Financial soundness of proposed acquirer” (p. 26).

Question 2: Do you consider the level of detail used in the draft Guidelines to be appropriate?

We think that, on the one hand, the level of detail e.g. in Annex I is extremely high. The existing exceptions should be extended further; for further details, see our remarks on Question 1). On the other hand, the list of indicators used to determine whether significant influence exists (see Question 1, II. 1. b) is too general; to this extent, greater detail or more concrete specification would be desirable.

Question 3: Which approach identified above do you consider to be the most appropriate, Option A or Option B? Please explain your answer.

We are in favour of Option A (control). An indirect qualifying holding should only exist if the indirect acquirer has control via the acquirer.
The size of the holding should be calculated solely by attributing capital and voting rights using the control criterion. We understand this to mean the question of whether control over the target undertaking can actually be exercised via the chain of cascading holdings.

The control criterion can be used to sensibly limit the number of persons subject to the notification obligation. Insofar as the target undertaking is subject to influence from other quarters, this can be captured via the additional criterion of significant influence.

By contrast, if the multiplication criterion (Option B) is used, in which only the indirect holdings in the target undertaking are calculated, we see the danger that qualifying holdings in the financial sector in excess of 10% will have to be notified even though it may not actually be possible to exercise control. Where the acquirer has a complex corporate structure, a large number of companies that, in practice, cannot exert any influence on the target undertaking would be included in the notification obligation. We

wish to stress that these target undertakings would also not even have to be reported as equity investments under the current accounting rules. Equity investments are interests held in undertakings amounting to at least 20% of the nominal capital. This means that it may not be possible to even identify an equity investment in a target undertaking from publicly available sources.

In addition, German law does not offer any legal basis for a right on the part of the person subject to the notification obligation to obtain information from a minority interest (generally less than 50% of the voting shares) where the latter intends to acquire a qualifying holding in a target undertaking. As a result, the reporting requirements may not be met in full by a person subject to the notification obligation whose qualifying holding in the target undertaking is held via a minority interest.

Furthermore, the ability to obtain information via the target undertaking is significantly impeded by the provisions of German company law (cf., among other things, section 53a of the German Stock Corporation Act (AktG) “Equal Treatment of Shareholders” in conjunction with section 131(4) of the AktG “Shareholders’ Right of Information”) where a minority interest in the form of a listed stock corporation intends to acquire a qualifying holding in the financial sector. It is not only the minority interest that intends to directly acquire the shares that is obliged to submit a notification but also the shareholder of the minority interest, since this shareholder would indirectly hold a qualifying holding in the financial sector as a result of the proposed acquisition. Information acquired as a result of a supervisory board mandate by e.g. senior managers of the person subject to the notification obligation may not be passed on to the shareholder (cf. section 116 sentence 2 of the AktG “Duty of Care and Responsibility of Members of the Supervisory Board”).

If the approach chosen were to be based on calculating the capital, we believe that the number of notifications would increase substantially. Due to the fundamental difficulties relating to the procurement of information on the target undertaking, the persons subject to the notification obligation would inevitably risk infringing the notification obligation in those cases in which the shares are held indirectly via minority interests, since the lack of information would mean that the relevant notifications of their intention could not be submitted to the supervisors responsible for the target undertakings, or could not be submitted in time. We object strongly to this. Moreover, it is not clear how exactly the combination of calculation and control is to be implemented.

Question 4: Would you propose a different test for assessing whether a qualifying holding is being acquired indirectly? Please explain your answer.

We consider the control criterion to be a sensible approach to determining the acquirer of an indirect qualifying holding subject to the notification obligation. Additionally, we would refer in this context to our answer to question 3.