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Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin)

Guidance Notice on Procedure and Notifications pursuant to Section 2c of the German Banking Act and section 104 of the German Insurance Supervision Act in conjunction with the Regulation on Notifications in Accordance with Section 2c of the German Banking Act (*Kreditwesengesetz* – KWG) and section 104 of the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz* – VAG) (Holder Control Regulation, *Inhaberkontrollverordnung* – InhKontrollV)

Bonn/Frankfurt am Main, 20 November 2015

The entry into force of the amendments to section 2c of the KWG and section 104 of the VAG due to the German Act Implementing the Acquisitions Directive (*Gesetz zur Umsetzung der Beteiligungsrichtlinie* - BRLUmsG) on 18 March 2009 not only fundamentally changed the procedures for qualifying holdings pursuant to section 2c of the KWG and section 104 of the VAG, but to a great extent harmonised them as well. The harmonisation brought about as a result of the Directive enabled BaFin to regulate the more detailed provisions on the notifications in accordance with section 2c of the KWG and section 104 of the VAG in a joint regulation, the Holder Control Regulation (InhKontrollV). It entered into force on 25 March 2009.

The aim of this guidance notice is to facilitate the preparation and submission of a notification either pursuant to section 2c of the KWG or pursuant to section 104 of the VAG to the relevant supervisory authority and, in the case of notifications pursuant to section 2c of the KWG, to the Regional Office of the Deutsche Bundesbank as well. This guidance notice only mentions BaFin as the supervisory authority. If a state supervisory authority is responsible, the explanations apply *mutatis mutandis*.

In its second edition, this guidance notice discusses issues including the new calculation method resulting from Regulation (EU) No 575/2013 for qualifying holdings in the capital of credit and financial services institutions and the new evidence requirements of certificates of good conduct and an excerpt from the Central Trade and Industry Register (*Gewerbezentralregister*) in the course of the assessment of reputation. The guidance notice has also been generally updated in the light of BaFin's practical experiences in the various affected areas.

However, the guidance notice does not claim to regulate every individual case. It can happen that the circumstances of an individual case mean that the explanations given here do not apply.

Table of Contents

I. Holder Control Regulation (InhKontrollV)

The Holder Control Regulation provides more detail on the provisions of section 2c of the KWG and section 104 of the VAG. In banking supervision, it has replaced and superseded section 2 of the Reports Regulation (*Anzeigenverordnung* – AnzV*)*. In insurance supervision, it has replaced the notes on section 104 of the VAG given in Circular R 4/98 under point II no. 2 (the rest of the Circular continues to apply).

1. Overview

The Holder Control Regulation provides information on which information, declarations and documents must be submitted in individual cases. This catalogue implements the "Joint Guidelines for the Assessment of Mergers and Acquisitions" of 18 December 2008 of the three former European supervisory committees, CESR, CEBS and CEIOPS. The stated aim of these guidelines is to create a standard catalogue of requirements across the EU.

The Holder Control Regulation is divided into three sections:

1. General Provisions (sections 1 to 5)
2. Notification of the Intention to Acquire or Increase a Qualifying Holding (sections 6 to 16) and
3. Additional Notification and Disclosure Requirements (sections 17 to 19).

Four forms are attached to the Holder Control Regulation:

- Form IEE "Acquisition/Increase"
- Form IAZ "Information on Reputation"
- Form IKB "Complex Participation Structures" and
- Form IAV "Disposal/Reduction".

All forms are available on the website of BaFin:

http://www.bafin.de/SharedDocs/Aufsichtsrecht/DE/Verordnung/InhKontrollV.html

and of the Bundesbank:

http://www.bundesbank.de/Navigation/DE/Service/Meldewesen/Bankenaufsicht_Formular_Center/bankenaufsicht_formular_center.html

2. Notes

Some of the provisions of the Holder Control Regulation will first be pointed out to simplify the process. In addition, an overview of the existing notification and disclosure requirements pursuant to section 2c of the KWG and section 104 of the VAG in conjunction with the Holder Control Regulation is given in Annex 1 to this guidance notice.

a. Official language / receiving agent

Generally, a translation of any documents and declarations that are not written in German which is officially certified or produced by an appointed or sworn interpreter or translator must be submitted. However, BaFin may waive this requirement in individual cases if the documents and declarations are provided in English (section 2 (3) of the Holder Control Regulation).

If the party subject to the notification requirement does not have a residence or domicile in Germany, a receiving agent must be appointed (section 3 of the Holder Control Regulation).

b. Complex participation structures

The Holder Control Regulation defines "complex participation structures" in section 6 (1) sentence 3. These exist in particular in the case of holdings "that are held both directly and indirectly via one or more entities, via several chains of holdings, in concert with others, in the case of trust relationships or in other cases where shares of voting rights are attributed in accordance with section 1 (9) sentence 2 and 3 of the KWG or section 7a (2) sentence 4 and 5 of the VAG, in each case in conjunction with section 22 (1) sentence 1 nos. 2 to 6 and (2) of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG)".

In the case of such complex participation structures, the form "Complex Participation Structures" and a chart of the intended participation structure, showing the respective shares of capital and voting rights, should be appended to the notification pursuant to section 6 (1) sentence 2 in order to demonstrate the structure of the participation relationships.

c. Information on reputation

The documents and declarations related to reputation must be submitted with every notification of intent. The scope of the notification includes the party subject to the notification requirement, persons defined in section 8 no. 3 or no. 7 of the Holder Control Regulation and entities that are or have been managed or controlled by the party subject to the notification requirement. Persons defined in section 8 no. 3 of the Holder Control Regulation are the personally liable partners and the natural persons who are authorised to represent the business of the party subject to the notification requirement under the law if that party is not a natural person. Persons defined in section 8 no. 7 of the Holder Control Regulation are the natural persons intended to replace members of the management board of the target entity, if such replacement is intended. A separate form ("Information on Reputation") is to be used for each natural person/each undertaking. As far as the disclosure of criminal proceedings

is concerned, there are exemptions from the notification requirement derived from section 9 (2) of the Holder Control Regulation.

(1) Certificates of good conduct

Pursuant to section 9 (4) of the Holder Control Regulation, parties subject to the notification requirement who are natural persons or persons defined in section 8 no. 3 or no. 7 of the Holder Control Regulation must submit an original of a certificate of good conduct for submission to an authority pursuant to section 30 (5) of the Federal Central Register Act (*Bundeszentralregistergesetz* – BZRG) (hereinafter referred to as a "certificate of good conduct for authorities"), a European certificate of good conduct for submission to an authority pursuant to section 30b of the BZRG (hereafter referred to as an "EU certificate of good conduct") or, if the country of residence does not issue such documents, certificates of good conduct or certificates of reputation assessments carried out by the supervisory authorities of the country of residence which are equivalent to the above-mentioned certificates of good conduct, following consultation with the respective division of BaFin. The certificate of good conduct must be up-to-date, i.e. at the time of submission to BaFin it may not be more than three months old. The date of the document's issue will be key for this purpose. In countries in which certificates of good conduct are issued by a public agency, other documents may not be used as a substitute.

So that the incoming certificates of good conduct and documents can be allocated to the correct qualifying holding procedure, the name of the undertaking in which a qualifying holding is intended to be acquired, increased or reduced and its BAK number/registration number must be indicated as the reference.

BAK number / registration number:

The BAK number/registration number is a number, of six or four digits respectively, which BaFin assigns to each supervised undertaking for internal classification purposes. It forms part of the BaFin reference number under which correspondence with an institution is registered and is listed in BaFin's database of companies as the "ID".

Excerpts from the database of companies from which the name of the institution and the BAK number/registration number may be obtained, among other things, may be found on the BaFin website:

http://www.bafin.de/DE/DatenDokumente/Datenbanken/Datenbanken_node.html

Parties subject to the notification requirement who are natural persons or persons defined in section 8 no. 3 or no. 7 of the Holder Control Regulation who have resided in different countries in the past ten years must submit certificates of good conduct and documents from each of these states. Where the documents are not in German, the original

document must be accompanied by a translation which is officially certified or produced by an appointed or sworn interpreter or translator.

Applications for a "certificate of good conduct for authorities" and an "EU certificate of good conduct" must be made to the local registration office (*Meldebehörde*) by the person concerned (section 30 (2) sentence 1 of the BZRG). German nationals who reside outside the Federal Republic of Germany may apply directly to the Federal Office of Justice (*Bundesamt für Justiz*) as the registration authority (section 30 (3) sentence 1 of the BZRG). The "certificate of good conduct for authorities" should not be confused with the "expanded certificate of good conduct" referred to in section 30a of the BZRG.

The Federal Office of Justice sends both the "certificate of good conduct for authorities" and the "EU certificate of good conduct" directly to BaFin. There is no need to request additional copies for the Deutsche Bundesbank or the auditing association, in the case of credit institutions that are members of one.

An overview of the certificates of good conduct or equivalent documents to be submitted in each individual case may be found in Annex 2 of this guidance notice. Where there are special circumstances relating to residence (e.g. country of residence changed in the last ten years) or nationality (e.g. a national of multiple EU/EEA states or non-member states) which are not covered by the situations described above, the extent of documents to be submitted must be agreed with the competent division of BaFin.

(2) Excerpt from the Central Trade and Industry Register

Pursuant to section 9 (5) of the Holder Control Regulation, parties subject to the notification requirement who are natural persons or persons defined in section 8 no. 3 or no. 7 of the Holder Control Regulation must also submit an excerpt from the Central Trade and Industry Register pursuant to section 150 of the Industrial Code (*Gewerbeordnung – GewO*), or equivalent documents from their country of residence, if these are available. The excerpt must be up-to-date, i.e. at the time of submission to BaFin it may not be more than three months old. The date of the document's issue will be key for this purpose.

Applications for an excerpt from the Central Trade and Industry Register must be made by the natural person subject to the notification requirement or the persons defined in section 8 no. 3 or no. 7 of the Holder Control Regulation themselves to the competent local authority (usually the registration office or trade supervisory office (*Gewerbeaufsichtsamt*), sections 150 (2) and 155 (2) of the GewO in conjunction with the laws of the relevant federal state). Persons who reside outside the Federal Republic of Germany may apply directly to the

Federal Office of Justice as the registration authority (section 150 (3) of the GewO).

The following notes on completion of the official form GZR 3 in the German Second General Administrative Regulation on Fulfilment of Section XI – Central Trade and Industry Register – of the Trade Regulation Code (*Zweite allgemeine Verwaltungsvorschrift zur Durchführung des Titels XI – Gewerbezentralregister – der Gewerbeordnung* – 2. GZRVwV – Ausfüllanleitung) must be complied with:

- the key code number "1" shall be entered in field 01 “Beleg-Art” (document type);
- both boxes should remain blank in field 20.

The Federal Office of Justice will not send the excerpt from the Central Trade and Industry Register directly to BaFin and will instead send it to the applicant. It should be forwarded to BaFin upon receipt. There is no need to request additional copies for the Deutsche Bundesbank or the auditing association, in the case of credit institutions that are members of one.

In the case of individuals who have never resided or worked in Germany, as a rule BaFin will not require these individuals to submit an excerpt from the German Central Trade and Industry Register or to furnish similar foreign documents. However, BaFin reserves the right to request additional documents in individual cases.

d. Credit quality and origin of funds

Since the financial position and credit quality of the party subject to the notification requirement is of particular importance in the assessment, section 13 of the Holder Control Regulation lays down in detail the information which needs to be submitted in this regard. The information and evidence to be submitted for parties subject to the notification requirement that prepare annual accounts are laid down in section 13 (2) of the Holder Control Regulation. If the party subject to the notification requirement is a natural person, the requirements for the presentation of the financial position are taken from section 13 (3) of the Holder Control Regulation. Subsection 4 complements the provisions for parties subject to the notification requirement which are part of a group. Pursuant to subsection 6, the latest rating by each rating agency must also be submitted, if such ratings are available.

In addition, an informative and complete description of the existence and economic origin of the funds that are to be used for the acquisition must be enclosed with the notification of intent. This description must be backed up with suitable and complete evidence (section 14 of the Holder Control Regulation).

e. Strategic objectives

Pursuant to section 15 of the Holder Control Regulation, the party subject to the notification requirement must submit documents showing the strategic objectives and intended future influence on the target entity.

The scope of this presentation of the strategic objectives and plans is based on the size of the shares which the party subject to the notification requirement will in future hold. Section 15 of the Holder Control Regulation differentiates between the thresholds of below 20% of the capital or voting rights (subsection 3), 20-50% of the capital or voting rights or the exertion of significant influence (subsection 2), as well as control (subsection 1).

f. Simplifications

If BaFin already has documents and declarations which are no more than a year old and whose contents have not changed, they do not have to be resubmitted. In individual, justified cases, BaFin may permit a longer period (section 16 (1) sentence 2 of the Holder Control Regulation). In the notification, the party subject to the notification requirement should indicate the reference number and/or the subject and date of the correspondence when the documents and declarations were previously submitted.

Less comprehensive presentation and evidence requirements apply to certain parties subject to the notification requirement (section 16 (2) of the Holder Control Regulation).

II. Notification requirement

1. Party subject to the notification requirement

Anyone is subject to the notification requirement, who

- intends to acquire a qualifying holding in a target entity, either alone or in concert with other persons or entities (section 2c (1) sentence 1 of the KWG and section 104 (1) sentence 1 of the VAG);
- intends, either alone or in concert with other persons or entities, to increase the amount of a qualifying holding held in such a way that the thresholds of 20%, 30% or 50% of the voting rights or capital are reached or exceeded, or that the target entity comes under their control (section 2c (1) sentence 6 of the KWG and section 104 (1) sentence 6 of the VAG);
- intends to dispose of a qualifying holding in a target entity or to reduce the amount of their qualifying holding below the thresholds of 20%, 30% or 50% of the voting rights or the capital held, or to change the holding in such a way that the target entity ceases to be

a controlled entity[1] (section 2c (3) sentence 1 of the KWG and section 104 (3) sentence 1 of the VAG).

As the law refers to "anyone", the legal form of the party which holds or intends to hold a qualifying holding is not at issue. Thus, both natural persons and entities are included. The term "entity" refers not only to legal persons but, for instance, also to commercial partnerships and non-trading partnerships.

The term "acquisition" is to be interpreted broadly. The point of the qualifying holding procedure is to inform BaFin of significant changes in the holding structure of supervised entities and to enable it to take preventive measures where necessary under its existing powers of intervention.

The legal formulation "or acting in concert with other persons or entities" makes it clear that in the case of an acquisition of a holding in concert with others, all parties to such a holding are subject to the notification requirement. The question of when the party is "acting in concert with other persons or entities" within the meaning of section 2c of the KWG or section 104 of the VAG depends on the specific circumstances of the individual case. Acting in concert may be assumed, in particular, if multiple proposed acquirers agree that they want to acquire a target entity, wholly or in part, at the same time. Acting in concert may arise through contractual agreements with other investors in the same target entity, but in individual cases it may also be assumed if the actions were merely effectively agreed upon. It is not relevant whether the parties each acquire a share of the target entity individually, which only becomes a qualifying holding as a result of the shares of the other acquirers being attributed to them, or a group of proposed acquirers gets together and, for example, founds a partnership for the acquisition which intends to acquire the qualifying holding "in one piece". The criterion "acting in concert with others" does not require the legal act carried out by the acquisition of the holding to be a joint legal act of all parties.

Example 1: Several investors acquire shares in a target entity at the same time. Each acquirer acquires a holding of just under 10%, meaning that looking at each holding in isolation, no qualifying holding procedure needs to be carried out under supervisory law. However, in this individual case it may be assumed that effectively, the parties were acting in concert with others. Consequently, all the investors must be regarded as acquirers of a qualifying holding, since the holdings of the other investors are attributed to them.

Example 2: Several financial investors found a vehicle with the aim of acquiring a qualifying holding in a target entity. The details of the acquisition and/or the future exercising of voting rights in the target

[1] In the interests of readability, only the word "change" will be used in the rest of the text for this variant.

entity by the special purpose vehicle are precisely contractually agreed during the founding of the special purpose vehicle. In this case, it may be assumed that there is regular acting in concert, so in this set-up it is not only the special purpose vehicle which must be regarded as the acquirer of a qualifying holding, but essentially all financial investors involved in the special purpose vehicle as well, regardless of the size of the holding of the individual investor in the special purpose vehicle.

If a holding is acquired in concert with other persons or entities, all persons or entities involved in this acquisition are subject to the notification requirement, regardless of the individually held share, since the purpose of this provision is to ensure that it is not possible to avoid an existing notification requirement.

From a practical point of view, in this situation there is much to be said for the acquirers who are assumed to be acting in concert submitting their notifications to BaFin as a package, since a prohibition for one acquirer could affect the acquisition prospects of the other proposed acquirers. However, from a purely legal point of view, each acquirer undergoes a separate qualifying holding procedure.

2. Time of notification requirement

The notification requirement does not arise only when the acquisition of the qualifying holding is carried out, but as soon as the intention exists to acquire such a holding. This time must be regarded as reached at the latest when sufficiently specific contractual negotiations are started to acquire the holding. However, in individual cases the notification requirement may arise even earlier. The decisive factor is that at least the basic conditions of the planned acquisition must be in place, e.g. sound projections about the size of the holding and the financing of the acquisition. If this is not the case, it will not be possible for the supervisory authority to make a final assessment, for example regarding the criterion "financial soundness of the proposed acquirer".

The same applies to changing the size of a qualifying holding or disposing of an existing holding.

Breaching an existing notification requirement pursuant to section 2c (1) sentence 1, 5, 6, or (3) sentence 1, 4 of the KWG or pursuant to section 104 (1) sentence 1, 2, 4, 5, or 6 or (3) of the VAG can be an administrative offence (cf. section 56 (2) no. 1 (a) and (b) of the KWG and section 144 (1a) sentence 1 no. 2 of the VAG). Whether and in what form action is taken against such a notification breach is decided on a case-by-case basis, largely depending on the circumstances which led to the notification breach (e.g. whether it was wilful or negligent).

III Target entity

A **target entity** (section 1 of the Holder Control Regulation) is either

- a credit or financial services institution supervised pursuant to the KWG or
- an insurance undertaking, a *Pensionsfonds* or an insurance holding company within the meaning of section 1b of the VAG.

IV. Qualifying holding

Since the entry into force of Regulation (EU) No 575/2013, the definition of "*bedeutende Beteiligung*" (significant holding) for banking supervision has been directly defined in Article 4(1) no. 36 of Regulation (EU) 575/2013, where the term "*qualifizierte Beteiligung*" (qualifying holding) is used. Consequently, the wording of the definition is no longer identical with the definition of a qualifying holding in the VAG. This affects holders of indirect qualifying holdings because indirect qualifying holdings within the jurisdiction of the KWG are now calculated differently than holdings within the jurisdiction of the VAG.

- The term qualifying holding is defined for the KWG in section 1 (9) sentence 1 of the KWG. This refers to Article 4(1) no. 36 of Regulation (EU) No 575/2013, as amended, for the definition of a qualifying holding. It reads:

  For the purposes of this Regulation, "qualifying holding" means a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking."

- The term qualifying holding is defined for the VAG in section 7a (2) sentence 3 of the VAG. It reads as follows:

  A qualifying holding shall be deemed to exist if at least 10 percent of the capital or the voting rights in an insurance joint-stock company or the initial fund of a mutual society are held directly or indirectly through one or more subsidiaries or a similar relationship or through collaboration with other persons or undertakings, in the holder's own interest or in the interests of a third party, or if a significant influence can be exercised on the management of another undertaking.

There are, therefore, various possibilities to hold a qualifying holding in a target entity. Put simply, the holder of a qualifying holding in a target entity is anyone who:

- **directly** holds at least 10% of the capital or the voting rights (or of the initial fund of a mutual society),

- **indirectly** holds at least 10% of the capital or the voting rights (or of the initial fund of a mutual society) or
- *can exercise a significant influence* on the management of the target entity.

1. Principle of multiple assignment

The alternatives by which a qualifying holding may arise are applied in parallel. This means that the share of capital or voting rights[2] held directly in the target entity by the holder/s can be assigned indirectly for multiple other natural persons, legal persons, commercial partnerships, companies with other legal forms and special purpose funds. The shares attributed to one or more other holders are not deducted from the direct holder, however. Generally, there is a multiple assignment of the shares, on the one hand for the direct holder and on the other hand for one or more indirect holders to whom the shares are attributed. The holder of a qualifying holding is anyone who is ultimately attributed or to whom at least 10% of the capital or voting rights are assigned directly or indirectly. The same applies to the intention to acquire, increase, reduce, change or dispose of such a qualifying holding. Thus, all notification and disclosure requirements must be fulfilled not only by the direct holder for whom at least 10% of the capital or the voting rights are assigned but also by the natural persons, legal persons, commercial partnerships, companies with other legal forms and special purpose funds who are ultimately attributed at least 10% of the capital or voting rights of the target entity (indirect holders).

The assignment (taking into account) of shares takes place independently of the objective connected to the (planned) shareholding. It does not depend on, for example, the holding period, the existence of the intention to acquire a holding (within the meaning of section 271 (1) of the German Commercial Code (*Handelsgesetzbuch* – HGB)), the disclosure of the shares in the balance sheet or on whether they are held in the holder's own interest or in the interests of a third party.

The purpose of the attribution of capital and/or voting rights is to exercise control over indirect holders of qualifying holdings as well, because these have the ability to exercise influence on the target entity. Therefore, for the attribution it is not relevant whether the indirect holder actually exercises influence on the target entity or intends to do so.

Each ground for attribution applies not only when the share package amounts to at least 10% of the capital or the voting rights in the target entity, but from the first share. An attribution of shares comes into consideration, therefore, even if the intermediate party holds or has been attributed less than 10% of the capital or voting rights directly. In addition, a ground for attribution may be applied more than once and

[2] For a mutual society, the shares refer to the initial fund.

various grounds for attribution may be applied in parallel or in combination. Indirectly held voting rights are only taken into consideration if one of the grounds for attribution laid down in section 22 (1) and (2) of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG) is present (cf. Annex 3 on the overview of grounds for attribution pursuant to section 22 of the WpHG). For example, pursuant to section 22 (1) sentence 1 no. 1 of the WpHG, undertakings are attributed the voting rights of their subsidiaries. These are attributed in full pursuant to section 22 (1) sentence 3 of the WpHG.

> Example 1: Three subsidiaries hold 10%, 3% and 7% of the voting rights in the same target entity. Using multiple application of section 22 (1) sentence 1 no. 1 of the WpHG, the parent company is attributed the holdings in full. This means that the parent company is attributed a 20% share of the voting rights. Both the subsidiary with a direct holding of 10% and the parent company with 20% of voting rights attributed to it are holders of a qualifying holding.
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> Example 2: The 10% of voting rights attributed to a subsidiary as trustor (a trustee holds 10% for the subsidiary) are also attributed to the parent company (combined application of grounds for attribution pursuant to section 22 (1) sentence 1 no. 1 in conjunction with no. 2 of the WpHG – so-called attribution chain); the trustee, the subsidiary and the parent company are therefore holders of a qualifying holding.

However, in exceptional cases voting rights which are to remain unconsidered pursuant to section 22 (1) sentence 1 no. 3 of the WpHG or section 23 of the WpHG are not attributed to the indirect holder.

Regarding the principle of multiple inclusion, see also the explanations on the criterion "acting in concert" above under point II.1.

2. Direct qualifying holding

It is relatively easy to determine the existence of a direct qualifying holding. A 10% share of capital or voting rights in a target entity represents a qualifying holding. Anyone with the intention of directly acquiring such a qualifying holding is subject to the notification requirement as the acquirer of such a holding.

Pursuant to section 1 (9) sentence 3 of the KWG and section 7a (2) sentence 5 of the VAG, the only exception to this principle is for voting rights and capital shares held by financial services institutions or credit institutions in connection with underwriting business pursuant to section 1 (1) sentence 2 no. 10 of the KWG. It is a condition of the non-consideration that the rights associated with the shares are not used to interfere with the target entity’s management and they are sold within one year of being acquired.

3. Indirect qualifying holding

When calculating indirect qualifying holdings, a distinction is made between a qualifying holding in the capital or in the voting rights of a target entity.

a. Indirect qualifying holding of capital

Due to the different wording of the definition of a qualifying holding pursuant to section 1 (9) of the KWG in conjunction with Article 4(1) no. 36 of Regulation (EU) No 575/2013 and pursuant to section 7a (2) sentence 3 of the VAG, when determining an indirect holding of the capital of a target entity there are different methods of calculation for a qualifying holding pursuant to the KWG and a qualifying holding pursuant to the VAG.

(1) Indirect holding of capital pursuant to section 1 (9) of the KWG

Pursuant to section 1 (9) of the KWG, which refers to Article 4(1) no. 36 of Regulation (EU) No 575/2013, the decisive factor when determining if a holding must be regarded as qualifying is, apart from the criterion of "significant influence", solely the question of whether 10% of the capital is held directly or indirectly. The removal of section 1 (9) sentence 4 of the KWG (old version) means that a proportional consideration of the shareholding relationships is carried out to determine whether an indirect holding must be regarded as qualifying.

> Example 1: Company A holds 30% of the capital of the supervised institution B. Company C holds 40% of the capital of A. Using a proportional calculation, therefore, C holds 12% of the capital of institution B (40% of 30%). Company C thus holds an indirect qualifying holding of the capital of institution B.
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> Example 2: Company A holds 10% of the capital of the supervised institution B. Company C holds 55% of the capital of A. Using a proportional calculation, therefore, C holds 5.5% of the capital of institution B (55% of 10%). Company C thus does not hold an indirect qualifying holding in the capital of institution B. However, C might hold a qualifying holding in the voting rights of institution B (see below).

(2) Indirect holding of capital pursuant to section 7a (2) sentences 3 and 4 of the VAG

Unlike in the definition pursuant to the KWG in conjunction with Regulation (EU) No 575/2013, the definition of a qualifying holding

pursuant to section 7 (2) sentence 3 of the VAG includes the addition "indirectly through one or more subsidiaries or a similar relationship". In this respect, section 7a (2) sentence 6 of the VAG makes clear that indirect holdings are attributed to the indirect holders to the full extent. Unlike in banking supervision, therefore, the existence of a subsidiary or similar relationship is the decisive criterion for an indirect holding. No proportional calculation, such as that carried out in banking supervision, is made.

The term "subsidiary" is defined in section 7a (2) sentence 7 of the VAG. Pursuant to this provision, subsidiaries are defined as undertakings that are subsidiaries within the meaning of section 290 of the HGB or undertakings over which a dominant influence can be exercised. Section 290 of the HGB applies irrespective of legal form or place of registered office. A similar relationship is present when one party can exert influence on the other party equivalent to the influence exerted by a parent undertaking on a subsidiary. This provision is designed to cover cases in which the classification of a parent-subsidiary relationship would exist were it not for the lack of corporate quality (see Bundestag printed paper 13/9874 p. 138, BAKred circular of 26 May 1998, 3.1 in fin.).

> Example 1: Company A holds 30% of the capital of the supervised insurance undertaking B. Company C holds 40% of the capital of A. Using a calculation with the criterion of the existence of a subsidiary relationship, therefore, C does not hold an indirect qualifying holding in insurance undertaking B, since A is not a subsidiary of C.
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> Example 2: Company A holds 10% of the capital of the supervised insurance undertaking B. Company C holds 55% of the capital of A. Using a calculation with the criterion of the existence of a subsidiary relationship, therefore, C holds an indirect qualifying holding in insurance undertaking B, amounting to 10% of the capital, since A is a subsidiary of C and C is therefore attributed A's share in full.

b. Indirect holding of voting rights

The calculation of qualifying holdings of the voting rights of a target entity is carried out for the KWG and the VAG in the same way. Both section 1 (9) sentence 2 of the KWG and section 7a (2) sentence 4 of the VAG specify the same calculation method for this purpose. As noted above under point IV.1, indirectly held voting rights are only taken into consideration if one of the grounds for attribution laid down in section 22 (1) and (2) of the WpHG is present (cf. Annex 3 on the overview of grounds for attribution pursuant to section 22 of the WpHG). Pursuant to section 22 (1) sentence 3 of the WpHG, the attribution of voting rights of subsidiaries is made in full.

> Example: Company A holds 10% of the voting rights of the supervised target entity B. Company C holds 55% of the voting

rights of A. Since A is, therefore, a subsidiary of C, A's voting rights are attributed to C in full pursuant to section 22 (1) sentence 1 no. 1 of the WpHG. C thus holds a qualifying holding of 10% of voting rights of the target entity B.

Moreover, when attributing the voting rights shares, the exemptions laid down in section 22 (3a) in conjunction with a Regulation pursuant to section 5 of the WpHG and laid down in section 94 (2) and (3) in conjunction with a Regulation pursuant to section 5 no. 1 of the German Investment Code (*Kapitalanlagegesetzbuch* – KAGB) must be taken into account.

4. Significant influence

Regardless of the direct or indirect holding of at least 10% of the capital or voting rights of the target entity, natural or legal persons, commercial partnerships, companies with other legal forms and special purpose funds hold a qualifying holding in the target entity if they have the ability to exercise a significant influence on the target entity. The HGB does not give a legal definition of the criterion of significant influence. Section 311 (1) sentence 2 of the HGB establishes the rebuttable presumption that a significant influence may be assumed for a holding of 20% or more. However, there may be a significant influence regardless of the size of the holding. A case-by-case consideration taking into account all facts must be carried out in this context. Relevant aspects might be personnel links, contractual influence and the availability of information, amongst other things. It must be remembered that merely the ability to exert influence is sufficient; it is not necessary for influence to be actually exerted on the target entity.

Indications of the existence of significant influence could be, for example:

- in a stock corporation (AG) or a partnership limited by shares (KGaA): a representative on the management or supervisory board
- in a limited liability company (GmbH): each partner due to the information rights held by them
- in a commercial partnership: clarification of the actual ability to exercise influence based on the economic and corporate law situation of the parties
- representation on the board of directors or equivalent governing or supervisory body
- participation in policy-making processes
- material transactions between the entity and its investee
- ability to interchange managerial personnel
- provision of essential technical information

- the existence of a control or profit transfer agreement within the meaning of section 291 (1) of the German Stock Corporation Act (*Aktiengesetz* – AktG)
- in a mutual society (VVaG): the entitlement to participate in the administration of the mutual society within the meaning of section 22 (1) sentence 2 of the VAG

However, the decision as to whether significant influence may be assumed is always made on a case-by-case basis. The existence of one of the above-mentioned criteria does not automatically mean that a significant influence is determined, nor does the lack of these criteria automatically mean that a significant influence can be ruled out.

V. Notification procedure

The forms "Acquisition/Increase" and "Disposal/Reduction", which must be used for the respective notifications, are designed so that no cover sheet is necessary.

1. Acquisition/increase of a qualifying holding

Anyone who has the intention to acquire or increase a qualifying holding in a **credit institution** or **financial services institution** must submit a notification without undue delay to BaFin and to the Deutsche Bundesbank regional office that is responsible for the ongoing monitoring of the credit institution or financial services institution in question. This applies *mutatis mutandis* to documents that are subsequently requested. Even under the Single Supervisory Mechanism, the notifications are still submitted to BaFin and the Deutsche Bundesbank, not to the European Central Bank.

For the intended acquisition or increase of a qualifying holding in an **insurance undertaking, a *Pensionsfonds* or an insurance holding company within the meaning of section 1b of the VAG**, the relevant notification must be submitted to BaFin without undue delay.

a. Notification forms

The following forms – which are Annexes to the Holder Control Regulation – must be used for the notification of intent (see above under point I.1):

- Form IEE "Acquisition/Increase"
- Form IAZ "Information on Reputation"
- Form IKB "Complex Participation Structures", if applicable.

Under points 1.1 to 1.5 of the form "Information on Reputation", the following proceedings do not need to be specified:

- criminal proceedings discontinued due to a lack of evidence or an impediment to the proceedings or if they ended in an acquittal
- criminal proceedings for which an entry in the Federal Central Criminal Register (BZRG) was deleted or cancelled
- proceedings that are not required to be disclosed in accordance with section 53 of the BZRG.
- entries required to be cancelled pursuant to section 153 of the GewO

b. Confirmation of receipt/beginning of the assessment period

Once BaFin has received a notification, it checks whether it is complete. This is the case if the necessary forms have been filled in and all necessary annexes and documents have been received by BaFin. If all the required annexes and documents cannot be enclosed, the reasons for this must be given and missing annexes and documents provided subsequently without delay. Only once these are received is the notification regarded as formally complete. In individual cases, the completeness of a notification can depend on the complete notification of another party subject to the notification requirement (e.g. of the parent company of the direct acquirer), since a final assessment of the situation of an acquisition as a rule depends on all direct and indirect acquirers being assessed together.

If the target entity is an institution, the assessment of completion depends on the receipt of the complete notification by BaFin, not by the Deutsche Bundesbank.

If the notification is complete, BaFin promptly acknowledges its receipt in writing. BaFin is obliged to issue the confirmation of receipt in writing no later than the second working day following the receipt of the complete notification. The date of this confirmation letter marks the beginning of the assessment period within which the supervisory authority has to examine the intended acquisition/increase. In its confirmation letter, the supervisory authority states the date on which the assessment period expires, i.e. the day on which the assessment must be completed and, if necessary, a prohibition decision will have to be taken.

C. Assessment period

BaFin essentially has 60 working days from the date of the confirmation letter to assess the intended acquisition/increase. The assessment period ends at midnight on the 60th working day. Working days in this context are all days except Saturdays and Sundays and public holidays declared either throughout Germany or in the two federal states, North Rhine-Westphalia and Hesse, where BaFin has its offices in Bonn and Frankfurt am Main (Corpus Christi and All Saints' Day).

BaFin may, no later than on the 50th working day of the assessment period, request further information which it considers necessary to assess the acquisition/increase. This additional information should not be confused with the information which already needs to be complete when the notification is submitted. It is required to complement the notification and provide more details on certain points in order to enable a comprehensive assessment. Information is requested in writing and the additional information required is precisely specified. BaFin must confirm the receipt of the further information to the party subject to the notification requirement promptly, no later than the second working day following its receipt, and in writing.

It should be noted that the period within which BaFin must make its assessment is suspended from the time when further information is requested and only continues when the requested information has been received by BaFin. However, the assessment period is officially still 60 working days as the time limit is paused on the day of the request and then continues the day after the documents have been provided. For example, if BaFin requests further information on the 50th working day of the assessment period, the assessment period continues with the 50th working day on the next working day following the receipt of the further information requested. BaFin is entitled to request additions to or clarifications of this further information if necessary. However, such a request does not lead to a further interruption of the assessment period, so the deadline is unaffected, see section 2c (1) sentence 8 of the KWG and section 104 (1) sentence 8 of the VAG.

The assessment period may only be suspended for a maximum of 20 working days (or 30 working days in cases pursuant to section 2c (1a) sentence 9 no. 1 and 2 of the KWG or section 104 (1a) sentence 9 no. 1 and 2 of the VAG), so BaFin must always conclude its assessment of the holding acquisition on the 80th (or 90th) working day, regardless of the receipt of additional information. Pursuant to section 2c (1a) sentence 9 no. 1 and 2 of the KWG and section 104 (1a) sentence 9 no. 1 and 2 of the VAG, the assessment period may be extended to up to 90 working days if the party subject to the notification requirement is situated or supervised in a non-EEA state or is a natural person or undertaking not subject to prudential supervision under Directive 2009/65/EC, Directive 92/49/EEC, Directive 2002/83/EC, Directive 2004/39/EC, Directive 2005/68/EC or Directive 2013/36/EU.

d. Changes during the assessment period

If information changes after the notification of intent has been submitted, section 7 of the Holder Control Regulation must be observed. Information in the documents which have already been submitted must be updated and resubmitted. As BaFin requires adequate time to examine the updated documents, such documents and declarations will only be accepted if they are submitted so that BaFin has at least five working days for its

examination during the assessment period. If this is not the case, the information in the submitted documents and declarations will be regarded as incorrect.

e. Grounds for prohibition

BaFin uses the submitted documents and declarations to assess whether there are important grounds to disallow the intended acquisition/increase of the qualifying holding. A conclusive list of grounds for prohibition is laid down in section 2c (1b) sentence 1 and 2 of the KWG and section 104 (1b) sentence 1 and 2 of the VAG.

BaFin may also, at its discretion, prohibit the acquisition or increase of the qualifying holding if the information in the notification or the additionally requested information is incomplete or incorrect or does not meet the requirements of the Holder Control Regulation. Since it is sufficient for facts to be known which warrant the assumption that grounds for prohibition are present, BaFin can also prohibit the acquisition or increase if the submitted documents do not enable it to conclusively assess whether the proposed acquirer meets the legal requirements regarding reputation and financial soundness. In such cases, the professional qualifications, the financial soundness or the reputation might have to be regarded as not sufficiently proven.

f. Conclusion of the procedure

If, once BaFin has concluded its assessment, it decides to prohibit the acquisition or increase of the qualifying holding, the party subject to the notification requirement will be informed in writing, specifying the grounds for the decision, within two working days and in compliance with the assessment period. For compliance with the assessment period, it is sufficient for the written decision to be sent within this period. If comments or reservations have been received from the competent authorities/bodies, these will be passed on with the decision.

If the acquisition/increase of the qualifying holding is not prohibited in writing within the assessment period, it can be carried out. BaFin is entitled to set a time limit, after which the party subject to the notification requirement must notify it without delay of whether or not the intended acquisition/increase has been carried out.

2. Disposal/reduction of a qualifying holding

If the holder of a qualifying holding intends to dispose of or reduce it, the following forms must be used for the notification:

- Form IAV "Disposal/Reduction",
- Form IKB "Complex Participation Structures", if applicable.

VI. Conclusion

If you still have questions about the notification procedure having read these guidance notes, please contact the BaFin division responsible for the supervision of the target entity in which it is intended to acquire, increase, dispose of, reduce or change a qualifying holding. The responsible division can be found by checking the BaFin organisation chart available on BaFin's website under "BaFin/Organisation" or requested from the telephone switchboard.

Finally, please note that all BaFin employees are subject to secrecy requirements in accordance with section 9 of the KWG and section 84 of the VAG.

Annex 1

Overview of notification and disclosure requirements

<table>
<tr><th colspan="3">Notifications of intent</th></tr>
<tr><td>Acquisition</td><td rowspan="4">of a qualifying holding
(section 1 (9) of the KWG, section 7a (2) sentence 3 of the VAG)</td><td>section 2c (1) sentence 1 of the KWG
section 104 (1) sentence 1 of the VAG</td></tr>
<tr><td>Increase</td><td>section 2c (1) sentence 6 of the KWG
section 104 (1) sentence 6 of the VAG</td></tr>
<tr><td>Reduction</td><td>section 2c (3) sentence 1, 2nd alternative of the KWG
section 104 (3) sentence 1, 2nd alternative of the VAG</td></tr>
<tr><td>Disposal</td><td>section 2c (3) sentence 1, 1st alternative of the KWG
section 104 (3) sentence 1, 1st alternative of the VAG</td></tr>
<tr><td>Loss</td><td>of control over the target entity</td><td>section 2c (3) sentence 1, 3rd alternative of the KWG
section 104 (3) sentence 1, 3rd alternative of the VAG</td></tr>
</table>

Notifications of execution (only if requested)	
Notifications of the execution of the acquisition, increase, reduction or disposal of the qualifying holding and of the loss of control	section 2c (1b) sentence 7 of the KWG section 2c (3) sentence 3 of the KWG section 104 (1b) sentence 6 and 7 of the VAG section 104 (3) sentence 3 and 4 of the VAG
Notifications of change	
Notification of newly appointed legal representative or representative according to the articles of association or new personally liable partner	section 2c (1) sentence 5 of the KWG section 104 (1) sentence 5 of the VAG
Additional disclosure and submission requirements	
Disclosure that the notified intention to acquire or increase a qualifying holding has been given up	section 7 (1) of the Holder Control Regulation (InKontrollV)
Disclosure of a change in the notified intention to acquire or increase a qualifying holding	section 7 (2) sentence 1 of the InKontrollV
Submission of updated documents	section 7 (3) sentence 1 of the InKontrollV
Disclosure of the *authorisation* of the holder of a qualifying holding as a CRR credit institution, electronic money institution, securities trading firm, primary insurer or reinsurer in another EU or an EEA country	section 19 no. 1 of the InKontrollV

Disclosure that the holder of a qualifying holding has become the *parent company* of a CRR credit institution, electronic money institution, securities trading firm, primary insurer or reinsurer authorised in another EU or an EEA country.	section 19 no. 2 of the InKontrollV
Disclosure that the holder of a qualifying holding has gained *control* of a CRR credit institution, electronic money institution, securities trading firm, primary insurer or reinsurer authorised in another EU or an EEA country.	section 19 no. 3 of the InKontrollV

Annex 2

Overview of certificates of good conduct/equivalent documents

Party subject to the notification requirement who is a natural person or person pursuant to section 8 no. 3 or 7 of the Holder Control Regulation (InKontrollV) with		**Document**
German nationality and	residing in Germany	a "certificate of good conduct for authorities" (*Behördenführungszeugnis*) issued by the Federal Office of Justice
	residing in a member state of the European Union	an "EU certificate of good conduct" (*EU-Führungszeugnis*) issued by the country of residence, if available; otherwise a "certificate of good conduct for authorities" issued by the Federal Office of Justice and "equivalent documents" from the EU member state of residence
	residing in a non-member state	a "certificate of good conduct for authorities" issued by the Federal Office of Justice and "equivalent documents" from the country of residence
nationality of a Member State of the European Union and	residing in Germany	an "EU certificate of good conduct"
	residing in a member state of the European Union	an "EU certificate of good conduct" issued by the country of residence, if available; otherwise "equivalent documents" from the EU member state of residence
	residing in a non-member state	"equivalent documents" from the country of residence
	residing in Germany	a "certificate of good conduct for authorities" issued by the Federal Office of Justice

nationality of a third country and	residing in a Member State of the European Union or in a non-Member State	"equivalent documents" from the country of residence

Annex 3

Overview of the reasons for attribution pursuant to section 22 (1) and (2) of the Securities Trading Act (*Wertpapierhandelsgesetz* - WpHG

	Voting rights attributed to	**Intermediate party of voting rights**	**Special feature**
subs. 1 no. 1	parent company	subsidiary	multiple assignment
subs. 1 no. 2	the party on whose account the shares are held by a third party (e.g. trustor)	the third party to whom the shares belong and who is holding them on another's account (e.g. trustee)	multiple assignment
subs. 1 no. 3	protection provider, provided that the protection buyer has not declared its intention to make use of its right to exercise voting rights independent of the instructions of the protection provider	otherwise protection buyer	no multiple assignment overrules no. 2, if the credit protection contract is connected with a trust agreement to safeguard the rights of the protection provider
subs. 1 no. 4	beneficial user	the party to whom the shares belong (usufruct grantor)	multiple assignment
subs. 1 no. 5	the party with the right to acquire the voting rights with a declaration of intent	the party to whom the shares belong (recipient of declaration)	multiple assignment
subs. 1 no. 6	the party to whom the voting rights have been entrusted or the appointed	the party to whom the shares belong (party represented)	multiple assignment

	representative, provided that they can exercise the voting rights at their own discretion and are not subject to any particular instructions given by the party to whom the shares belong		
subs. 2	anyone who collaborates with the party to whom the voting rights have been assigned by means of an agreement or otherwise	the party to whom the shares are assigned (third party)	multiple assignment