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Final report

Guidelines on the application of the group capital test for investment firm groups in accordance with Article 8 of Regulation (EU) 2033/2019

Contents

1. Executive summary

The application of the group capital test (GCT) provision pursuant to Article 8 of Regulation (EU) 2019/2033 (IFR) appears to be subject to different interpretations from competent authorities. This is particularly relevant as, since the date of application of the IFR, an increasing number of investment firms appear to be interested in obtaining an authorisation for the use of the GCT. In addition, the implementation of this provision seems to be uneven across Member States, and there is a lack of clarity around the conditions necessary to fulfil the criteria set out in the IFR. To ensure a harmonised interpretation and implementation in the Union, the EBA has developed guidelines addressed to competent authorities on the application of the group capital test for investment firm groups.

The guidelines are intended to set objective thresholds and criteria that competent authorities should consider for the purpose of assessing whether the conditions set out in Article 8(1) and 8(4) of the IFR for obtaining the derogation are met. Given the wide variety of group structures and the significant diversity within the investment firm population, the guidelines introduce some flexibility allowing deviations from the given thresholds under specific conditions.

The guidelines are structured as follows:

- The first part (Section 4.2) provides a simplified and proportional approach applicable to investment firm groups constituted exclusively of small and non-complex investment firms and ancillary services undertakings.

- The second part (Section 4.3) sets out the conditions necessary to consider the structure of an investment firm group as 'sufficiently simple', providing quantitative thresholds (number of undertakings and of levels in the group, materiality of intragroup transfer of activities) and qualitative criteria (transparency of the ownership structure and of the intragroup arrangements) that the competent authority should assess before granting the use of the GCT.

- The third part (Section 4.4) sets out the conditions for assessing the significance of the risks to clients or to the market stemming from the investment firm group as a whole. This section introduces the comparison between own funds calculated according to the GCT and the own funds requirements calculated in accordance with the methods for prudential consolidation pursuant to Article 7 of the IFR (i.e. the potential premium or discount on the level of own funds granted by the application of the GCT compared to prudential consolidation). The same section considers other criteria, such as the presence of clearing members in the group, the issuance to retail clients of financial instruments that are not listed on a regulated exchange, as well as the presence of enforcement proceedings applying to any undertakings of the group.

- The fourth part (Section 4.5) sets additional conditions that competent authorities should assess when granting the authorisation to reduce own funds requirements according to Article 8(4) of the IFR, and elaborates on the concepts of 'notional own funds' and 'satisfactory level of prudence' not fully clarified in that Article.

- The fifth part (Section 4.6) lists the minimum set of information that competent authorities should assess when evaluating whether an investment firm group meets the criteria set out in these guidelines, and takes into account the principle of proportionality for groups constituted of small and non-interconnected investment firms and ancillary services undertakings.

- The sixth part (Section 4.7) elaborates on the process for granting and refusing the permission to use the group capital test, or for reassessing permission already granted.

- Annex I provides a flow chart of the structure of these guidelines with reference to relevant criteria.

- Annex II reports the feedback from the public consultation and the EBA analysis.

In the context of the public consultation on the draft guidelines, which the EBA conducted between July and October 2023, the EBA received comments from four respondents. Having assessed the arguments put forward in the consultation responses received, the EBA decided in conclusion to go ahead with the guidelines retaining the original structure and the rationale.

2. Background and rationale

2.1 Background

1. For the investment firms authorised under Directive 2014/65/EU (MiFID), Regulation (EU) 2019/2033 (IFR) lays down the harmonised rules on prudential consolidation of investment firm groups in the Union. The process of prudential consolidation, detailed in Article 7 of the IFR, consists in applying the relevant Parts of the IFR to the investment firm group, as if the Union parent[1] formed, together with other eligible undertakings in the group, a single investment firm.

2. While the process of prudential consolidation ensures a thorough and comprehensive application of the requirements of the IFR and of Directive (EU) 2019/2034 (IFD) to the investment firm group, it may be overly burdensome and disproportionate for some investment firm groups. Article 8 of the IFR provides a derogation from the application of prudential consolidation, envisaging an alternative approach called the group capital test (GCT).

3. Under the GCT, the Union parent shall hold at least enough own funds to cover the sum of the full book value of its holdings and of the total amount of all of its contingent liabilities in favour of the relevant undertakings of the group. In order to avoid potential regulatory arbitrage, also any other parent undertakings in the group referred to in Article 8(3) of the IFR shall hold the amount of own funds calculated as above, or a lower amount according to Article 8(4), subject to the approval of the competent authority.

4. The derogation laid out in Article 8(1) of the IFR may be granted by the competent authority if the investment firm group is deemed to be sufficiently simple and if the group as a whole does not pose a significant risk to clients or to the market.

5. Competent authorities may allow a Union parent and other parent undertakings of the group to hold a lower amount of own funds than the amount calculated under Article 8(3), provided that this amount is no lower than the sum of the own funds requirements imposed on an individual basis on its subsidiaries, and the total amount of any contingent liabilities in favour of those entities. For subsidiaries located in third countries, the minimum own funds requirements are the notional own funds requirements that ensure a satisfactory level of prudence to cover for the risks arising from those subsidiary undertakings, as approved by the competent authority. These guidelines set out guidance to competent authorities when granting the authorisation to derogate pursuant to Article 8(4) of the IFR and elaborate on the meaning of 'notional own funds' and 'satisfactory level of prudence'.

[1] Union parent means Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company as defined in Regulation (EU) 2019/2033.

6. In order to ensure that the derogation of the GCT is applied in a uniform way across the Union, it is important to achieve a common understanding of the criteria to be used. Therefore, these guidelines set common criteria that competent authorities should take into account when considering granting the authorisation to derogate, while allowing a sufficient degree of flexibility in order to apply the principle of proportionality to an assessment on a case-by-case basis.

2.2 Regulatory approach of the draft guidelines

7. Article 8(1) of the IFR empowers the competent authority to grant the derogation for the use of the GCT instead of applying prudential consolidation for an investment firm group. The assessment of the competent authority is triggered by the request from a Union parent to use the GCT.

8. When granting the authorisation to derogate, the competent authority should conclude that the group structure is sufficiently simple and that the group as a whole does not pose significant risks to clients and to the market.

9. In light of these considerations, the guidelines: (i) elaborate on the conditions needed to deem an investment firm group sufficiently simple and (ii) define when an investment firm group poses significant risks to clients or to the market. They also define further conditions for groups applying for the authorisation to derogate envisaged in Article 8(4) of the IFR and elaborate on the concepts of 'notional own funds' and 'satisfactory level of prudence' referred to in this article.

10. Among other criteria, these guidelines introduce the comparison of own funds requirements calculated as a ratio between the own funds requirements calculated according to Article 8(3) of the IFR and the consolidated own funds requirements calculated according to Article 7 of the IFR (hereinafter 'the comparison') as a measure of the significance of the risks to clients or to the market stemming from the investment firm group as a whole.

11. In order to take into account the principle of proportionality, an investment firm group constituted exclusively of a Union parent, small and non-interconnected investment firms and ancillary services undertakings should be considered to have a sufficiently simple group structure and not to pose a significant risk to clients and to the market if the comparison calculated according to these guidelines is equal to or higher than a given threshold. However, the competent authority should not apply Section 4.2 of these guidelines if it deems that the investment firm group should not benefit from the simplification envisaged in that section.

12. These guidelines take into account four features that the competent authority should assess in order to deem whether the investment firm group is sufficiently simple: the number of undertakings in the group, the number of levels of undertakings in the group structure, the transfer of a significant amount of trading positions or business activities within undertakings of the group, and the transparency of the intragroup arrangements.

13. A group structure may become less simple and the functioning of the GCT more complex the higher the number of undertakings in the group. For the purposes of meeting the criteria set out in these guidelines, the competent authority should consider sufficiently simple groups with no more than a given number of undertakings.

14. The GCT requires that all parent undertakings of the investment firm group hold own funds at least equal to the sum of the full book value of all their holdings and the total amount of all of their contingent liabilities, or a lower amount if authorised by the competent authority. The own funds requirements are thus calculated at the level of each intermediate parent undertaking in order to prevent the multiple use of the same own funds of the Union parent across the group. However, several parent undertakings (i.e. several levels in the group structure) increase the complexity of the group structure, of the reporting (e.g. each parent undertaking has reporting obligations encompassing its 'subgroup' of undertakings) and of the supervision, since competent authorities would have to consider multiple subgroups within the investment firm group as a whole. For the purposes of these guidelines, an investment firm group with a limited number of parent undertakings standing between the Union parent and the last undertaking in the group may be considered sufficiently simple.

15. The supervision on a consolidated basis allows the supervisor to have a clear view of the intragroup business, including the transfer of business activities among undertakings of the investment firm group. In particular, assets under management received by an undertaking of the investment firm group and transferred to a different undertaking of the group for the actual management, or clients' assets deposited at an undertaking of the group and transferred to a different undertaking of the group for safeguarding and administration should be an indicator of the complexity of the group structure. The provisions of the IFR for the application of the GCT do not take these arrangements explicitly into account, thus these guidelines provide that if the transfer of AUM, ASA and CMH among undertakings of the group is higher than the thresholds provided in Article 12(a), (c) and (d) of the IFR, this could be an indication that the group structure should not be considered simple. In fact, these guidelines stipulate that no transfer of ASA and CMH should take place among undertakings of the investment firm group.

16. In order to take into account the dimension related to asset management activities and the business model of the group, as well as the principle of proportionality, the threshold provided in Article 12(a) of the IFR should be increased by a given percentage for each additional undertaking of the group if there is more than one undertaking for which AUM is higher than zero. To provide stability and predictability on the requirements of the IFR, the threshold should be calculated using the cumulative AUM calculated at the end of the previous financial year. Furthermore, in order to avoid double counting, the transfer of AUM should be accounted for only when AUM are transferred from one undertaking to the other for the first time, while the transfer back should not be accounted for. Competent authorities should take into account if activities are transferred or delegated to an entity in a third country, as those activities may not be regulated in that third country as they would be under MiFID, and rely on the concepts of 'notional own funds' and 'satisfactory level of prudence' developed in these guidelines.

17. In the case of transfers within the group of positions subject to K-NPR or K-CMG, including intraday transfers, the investment firm group should be considered as not meeting the criteria set out in these guidelines if the value of the transferred positions, taken at absolute value for positions with negative fair value and without the application of netting among positions, is higher than twice the threshold set out in Article 94(1) point (b) of Regulation (EU) 575/2013 (CRR). For positions subject to K-NPR or K-CMG, in order to provide stability and predictability on the requirements of these guidelines, the threshold mentioned above should be calculated using the cumulative value of these positions calculated at the end of the previous financial year. Furthermore, to avoid double counting, the transfer of positions subject to K-NPR or K-CMG should be accounted for only when a position is transferred from one undertaking to the other, while the transfer back should not be accounted for.

18. In the case of an extraordinary operation affecting the group structure or the business activities, as a result, in particular, of mergers and acquisitions or a request for or withdrawal of the licence pursuant to Directive 2014/65/EU, the investment firm group may, as a consequence, transfer business activities and trading positions among entities of the group exceeding the thresholds provided in these guidelines. If the competent authority concludes that the breach of the thresholds referred to in these guidelines is the result of an extraordinary operation, it should consider the investment firm group as having a sufficiently simple group structure for the financial year in which the extraordinary operation is taking place, provided that the investment firm group meets all other conditions set out in these guidelines.

19. Another element of complexity of an investment firm group is represented by the capital ties, the ownership structure, and the contractual arrangements among the undertakings of the group: a group may seem simple in terms of number of undertakings and of organisational structure but could present intricate capital ties or complex contractual arrangements. A competent authority should deem a group to be sufficiently simple only if the capital and ownership ties, and the contractual arrangements within the group are simple, do not represent an impediment to the exercise of control by the Union parent or the parent undertakings, and their implications for the governance of the group as a whole would not be better supervised under the prudential consolidation framework.

20. These guidelines address the notion of significant risks to the clients or to the market posed by the investment firm group as a whole, and identify five features that should result in a group being considered as posing a risk to clients or to the market when observed in a group: the difference between own funds calculated under Article 8 and Article 7 of the IFR; the issuance of equity or debt instruments to retail clients; one or more undertakings in the group hedging trading book positions for the group; two or more undertakings in the group being clearing members; or any of the undertakings of the group being subject to enforcement proceedings by the competent authority.

21. The application of the GCT may result in a lower level of own funds requirements when compared to the application of prudential consolidation. Own funds are used to absorb losses and to protect clients and the market from the potential missed obligations of the investment

firm group. A lower level of consolidated own funds reduces the safeguards in place for clients and the market, increasing the risk stemming from the investment firm group as a whole. The difference between the own funds requirements calculated under Article 8 and calculated under Article 7 of the IFR is a reliable indicator of the risk posed by the group and, to a lesser extent, of the level of intragroup activities that are not accurately captured under the GCT. Competent authorities may consider that there are no significant risks to clients or to the market stemming from an investment firm group for the purposes of meeting the criteria set out in these guidelines if the difference is below a certain threshold. This difference should be assessed at the moment of granting the derogation, and thereafter upon request of the competent authority. Competent authorities should require that an investment firm group applies Article 7 of the IFR only for the calculation of the consolidated capital requirements, without performing prudential consolidation for any other aspects included in that article.

22. Notwithstanding the provisions of these guidelines, the competent authority may deem sufficiently simple an investment firm group with a higher number of undertakings, or with a higher number of levels in the group structure. If the competent authority deems such groups to be sufficiently simple, the risk posed to clients or to the market may increase due to a possible misjudgement from the competent authority on the supposed simplicity of the group structure of the investment firm group. In order to mitigate such risk and avoid considering the group as posing a significant risk to clients and to the market, the competent authority should consider reducing the difference between own funds calculated under Article 8 and Article 7 of the IFR, provided that the group structure is consistent with the business model and the activity of the group.

23. The issuance to retail clients of equity or debt instruments that are not listed on a regulated exchange from any of the undertakings of an investment firm group, including the Union parent, should require a level of supervision that encompasses the group as a whole, since excessive risk in one undertaking may affect the solvency, the liquidity or the pricing of instruments issued by a different undertaking within the group. Therefore, if any of the undertakings of the investment firm group has outstanding issuance of equity or debt instruments that are not listed on a regulated exchange, to retail clients in the EU, the group should be considered as posing significant risks to clients or to the market for the purposes of meeting the criteria of these guidelines.

24. The role of clearing member may be carried out by two or more undertakings of an investment firm group, with potential spillover of risks between those undertakings, or between those undertakings and other undertakings of the group, and vice versa, which would be captured only with the supervision on a consolidated basis. Therefore, if an investment firm group includes two or more undertakings that are clearing members, the group should be considered as posing significant risks to clients or to the market for the purposes of meeting the criteria of these guidelines. Investment firms that clear their trades via one or more clearing members are not considered clearing members for the purposes of these guidelines.

25. In an investment firm group, the financial risk management function may be centralised within one or more undertakings of the group to hedge positions subject to K-NPR or K-TCD held in other undertakings of the group. Under the GCT, positions subject to NPR and TCD cannot be netted among entities of the group, resulting potentially in capital requirements that are higher than those calculated according to Article 7 of the IFR. As long as the investment firm group has in place adequate risk management control functions and the competent authority is satisfied that the overall risk stemming from positions hedged centrally within the group would not be better supervised under the prudential consolidation framework, the competent authority should deem that the investment firm group does not pose significant risks to clients and to the market for the purposes of these guidelines.

26. If any of the undertakings of the group is subject to enforcement proceedings from the competent authority at the time of the submission of the application to use the derogations provided under Article 8(1) or 8(4) of the IFR, the competent authority should analyse whether the enforcement proceedings in place may result in a significant risk to clients or to the market. If any of the undertakings of the investment firm group is subject to enforcement proceedings after being granted the authorisation to derogate pursuant to Article 8(1) or 8(4) of the IFR, the competent authority should assess whether the infringements that led to these enforcement proceedings may result in a significant risk to clients and to the market, and revoke the authorisation to derogate if appropriate.

27. Article 8(4) of the IFR empowers the competent authority to allow the applicant to hold a lower amount of own funds than the amount calculated under Article 8(3) of the IFR, provided that this amount is no lower than the sum of the own funds requirements imposed on an individual basis on its subsidiaries and the total amount of any contingent liabilities in their favour. For subsidiaries located in third countries, the own funds requirements should be the notional own funds requirements that ensure a satisfactory level of prudence to cover for the risks arising from those subsidiary undertakings, as approved by the relevant competent authorities. These guidelines provide objective criteria for the competent authority on whether the investment firm group should be eligible in order to be granted this further derogation and clarify the concepts of ‘notional own funds requirements’ and ‘satisfactory level of prudence’.

28. For some investment firm groups, the application of the GCT may result in a material increase of the own funds requirements compared to the application of prudential consolidation. Such a situation may arise when the book value of the holdings is updated to reflect their fair value. In order to allow those groups to benefit from the simplifications provided by the GCT, while limiting the disproportionate burden of the material increase of the own funds requirements, the competent authority may allow a reduction of own funds pursuant to Article 8(4) of the IFR by comparing and limiting the difference between the capital requirements calculated according to Article 7 of the IFR and the capital requirements calculated according to Article 8 of the IFR. The calculation of capital requirements under Article 7 of the IFR includes a capital requirement for the foreign exchange exposure risk associated with the group undertakings. Therefore, when calculating the difference in own funds requirements for the application of Article 8(4) of the IFR, the competent authority should consider the foreign exchange risk

associated with any of the undertakings of the group in order for the foreign exchange exposure risk to have an influence on the calculation of the difference. The reduction of own funds granted to the investment firm group should not result in lower values for the difference in own funds requirements applicable to investment firm groups that do not benefit from the derogation referred to in Article 8(4) of the IFR.

29. The notional own funds requirements are the result of a calculation of own funds that is different from the calculation mandated under the regulation applicable to the third-country subsidiary. The calculation of notional own funds should be performed by the parent undertaking of the third-country subsidiary, or by any other parent undertaking, including the Union parent, if required by the competent authority.

30. Subsidiaries in third countries may be subject to capital requirements that are significantly different from those envisaged in the IFR. Furthermore, a third country's regulation may change and materially affect the level of own funds in a subsidiary located in that country. In order to provide stability in the level of own funds required under Article 8(4) of the IFR, and to reduce the burden on the competent authority that should otherwise perform an assessment on the prudential regulation of a third country, these guidelines stipulate that a competent authority should deem to be a satisfactory level of prudence notional own funds requirements calculated according to the IFR, as if the third-country subsidiary was located in the Union. If a third-country prudential regime has obtained an equivalence decision by the European Commission, the capital requirements calculated according to that prudential regime should be considered as achieving a satisfactory level of prudence. The satisfactory level of prudence applicable to notional own funds should not be intended as the minimum own funds requirements applicable to the third-country subsidiary but represents the minimum level of own funds that the parent undertaking of the third-country subsidiary should hold under Article 8(4) of the IFR.

31. A competent authority should assess a minimum set of information detailing how the investment firm group meets the criteria set out in these guidelines. A competent authority should also rely on other information gathered during the course of its supervisory activities or due to reporting obligations from investment firms. The guidelines also require that a competent authority obtain any additional information that is necessary for assessing whether an investment firm group meets those criteria.

32. A competent authority should withdraw the authorisation to apply Article 8(1) or 8(4) of the IFR if an investment firm group no longer meets the criteria set out in these guidelines. The withdrawal of the authorisation to derogate granted under Article 8(1) of the IFR should result in the withdrawal of the authorisation granted under Article 8(4) of the IFR.

33. Finally, these guidelines specify that competent authorities should review, update or revoke authorisations already granted at the date of application of these guidelines, regardless of the duration of the authorisation that may have been granted. The review of past authorisations should be done through cooperation with the supervised entities, in close supervisory dialogue,

using to the extent possible the documentation already provided by the Union parent when it submitted the request to use the GCT.

3. Guidelines on the application of the group capital test under Regulation (EU) 2019/2033

EBA/GL/2024/03

11/04/2024

Guidelines

on the application of the group capital test for investment firm groups in accordance with Article 8 of Regulation (EU) 2033/2019

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010[2]. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.

2. These guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by (dd.mm.yyyy). In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website with the reference 'EBA/guidelines/2023/xx'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to the EBA.

4. Notifications will be published on the EBA website, in line with Article 16(3).

[2] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, (OJ L 331, 15.12.2010, p.12).

2. Subject matter, scope and definitions

Subject matter

5. These guidelines specify how competent authorities should implement Article 8(1) and Article 8(4) of Regulation (EU) 2019/2033 to allow investment firm groups to apply the group capital test ('group capital test permission'), or to hold a lower amount of own funds than the amount calculated under Article 8(3) of that regulation ('lower amount permission').

Scope of application

6. These guidelines apply on an individual and consolidated basis within the scope set out in Article 8 of Regulation (EU) 2019/2033.

Addressees

7. These guidelines are addressed to competent authorities as defined in Article 4, points(2)(i) of Regulation (EU) No 1093/2010, and to financial institutions as referred to in Article 4, point (1) of Regulation (EU) No 1093/2010 that are within the scope of Regulation (EU) 2019/2033 or Directive (EU) 2019/2034.

Definitions

8. Unless otherwise specified, terms used and defined in Directive (EU) 2019/2034 or Regulation (EU) 2019/2033 have the same meaning in these guidelines.

3. Implementation

Date of application

9. These guidelines apply from 1 January 2025.

10. Competent authorities should, by the time of application of these guidelines, ensure that all group capital test and lower amount permissions in force comply with these guidelines.

4. Guidelines

4.1 General considerations

11. A competent authority should not grant a group capital test or a lower amount permission despite the conditions set out in these guidelines being met, where it considers that prudential consolidation or a higher amount of own funds should be seen as appropriate for that particular investment firm group.

4.2 Simplified group capital test permission

12. A competent authority should not be prevented from deeming an investment firm group to be sufficiently simple and not to pose significant risks to clients and to the market, where all the following conditions are met:

    (a) it consists only of a Union parent investment holding company or a Union parent mixed financial holding company or a Union parent investment firm which is small and non-interconnected according to Article 12(1) of Regulation (EU) 2019/2033, of small and non-interconnected investment firms set out in Article 12(1) of that regulation and of ancillary services undertakings;

    (b) it has put in place satisfactory organisational arrangements and sufficient risk control functions that are proportionate to the size and business model of the investment firm group;

    (c) the majority of the voting rights of each group undertaking is owned by other group undertakings;

    (d) its capital ties, its ownership structure and the contractual agreements between the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company, and the undertakings of the group, as well as those among the undertakings of the group, are available to the competent authority upon request;

    (e) its capital ties, its ownership structure and the contractual agreements referred to in point (d) do not represent an impediment to the exercise of control by the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company over the undertakings of the group;

    (f) the implications for the governance of the group as a whole of the capital ties, of the ownership structure and of the contractual agreements referred to in point (d) do not require supervision on a consolidated basis;

(g) the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 remain sufficiently close to the own funds requirements calculated in accordance with Article 7 of that regulation, at an indicative percentage greater than 85% of the latter.

13. Competent authorities should not be prevented from applying Sections 4.3 and 4.4 to assess whether a group capital test permission should be granted to an investment firm group that meets the condition set out in point (a) of the previous paragraph, where that group does not meet one or more of the conditions set out in points (b) to (g) of the previous paragraph.

4.3 Group capital test permission: conditions for the investment firm group being deemed sufficiently simple

14. Competent authorities should not be prevented from deeming an investment firm group not meeting all the conditions set out in Section 4.2 to be sufficiently simple for the purposes of Article 8(1) of Regulation (EU) 2019/2033 if all the following conditions are met:

(a) the number of undertakings in the group as referred to in Article 8(3) of Regulation (EU) 2019/2033, including the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company, is equal to or lower than six;

(b) by way of derogation from paragraph 14(a), competent authorities may consider an investment firm group which includes more than six undertakings as sufficiently simple if they conclude that the group structure is consistent with the business model and with the activities of the investment firm group, and the group meets the conditions referred to in paragraph 15(e);

(c) the investment firm group includes no more than one parent undertaking between the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company, and a subsidiary;

(d) by way of derogation from paragraph 14(c), competent authorities may consider an investment firm group which includes more than one parent undertaking between the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company and a subsidiary as sufficiently simple if the majority of the voting rights of all undertakings of the group is owned by other undertakings of that group, and the group structure is consistent with the business model and with the activities of the investment firm group, in a way that risks can be contained, including risks arising from undertakings of the group dealing on own account or from group structures imposed by national laws;

(e) no activities related to ASA and CMH have been outsourced to another group undertaking;

(f) activities related to AUM are outsourced within undertakings of the group at a percentage not exceeding 150% of the threshold set out in Article 12(1)(a) of Regulation (EU) 2019/2033 for groups with no more than two undertakings with positive AUM; this percentage is increased by 50% for each additional group undertaking with positive AUM. For the purposes of this point, the values for the calculation should refer to the preceding financial year, and the transfer back of the activity should be disregarded;

(g) if contracts or arrangements to transfer trading positions among undertakings of the group are in place, the value of the transferred trading positions should be lower than twice the threshold set out in Article 94(1)(b) of Regulation (EU) 575/2013 for positions subject to K-NPR or K-CMG, on the basis of the figures of the preceding financial year. All assets and positions with negative fair value should be taken at absolute value for the purposes of this point, and netting should not be allowed. For the purposes of this point, the transfer back to the undertakings of the group should not count towards this threshold;

(h) if the transfer of activities subject to K-AUM, K-ASA, K-CMH, K-NPR and K-CMG occurs as a consequence of a restructuring of the group, including mergers and acquisitions, the value of transferred activities should not count towards the limits set out in paragraphs 14(e), (f) and (g) for the financial year in which the restructuring of the group occurred;

(i) the capital ties, the ownership structure and the contractual agreements between the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company and the undertakings of the group, as well as those among the undertakings of the group, are made available to the competent authority upon request;

(j) the capital ties, the ownership structure and the contractual agreements referred to in point (i) do not represent an impediment to the exercise of control by the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company over the undertakings of the group;

(k) the capital ties, the ownership structure and the contractual agreements referred to in point (i) have no implications as to the governance of the group as a whole such as to require supervision on a consolidated basis.

4.4 Group capital test permission: conditions for deeming that the investment firm group does not pose significant risks to clients or to the market

15. Competent authorities should not be prevented from deeming that an investment firm group not meeting the criteria set out in Section 4.2 does not pose a significant risk to clients or the market for the purposes of Article 8(1) of Regulation (EU) 2019/2033 if all the following conditions are met:

(a) the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 remain sufficiently close to the own funds requirements calculated in accordance with the Article 7 of that regulation, at an indicative percentage greater than 90% of the latter;

(b) none of the undertakings of the investment firm group, including undertakings located in third countries, have outstanding issuance of equity or debt instruments which are not listed on a regulated exchange held by retail clients in the EU, as defined in Article 4(1)(11) of Directive (EU) 2014/65; this criterion does not include the owners of the majority of the voting rights, the managers and the employees of any of the undertakings of the investment firm group;

(c) there is a maximum of one undertaking within the group that is a clearing member as defined in Article 4(1) (3) of Regulation (EU) 2019/2033;

(d) if one or more undertakings of the group hedge positions subject to K-NPR or K-TCD for other undertakings of the group via internal risk transfer agreements, there are in place, within the group, satisfactory organisational arrangements and sufficient risk control functions, proportionate to the size of the investment firm group and to the risk managed by the undertakings that hedge those positions, and the overall risk stemming from the trading positions of the investment firm group and their hedges would not be better supervised under the prudential consolidation framework;

(e) if a competent authority deems that an investment firm group has a sufficiently simple structure but does not meet the criteria in either paragraph 14(a) or paragraph 14(c), the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 remain sufficiently close to the own funds requirements calculated in accordance with Article 7 of that regulation, at a indicative percentage greater than 95% of the latter. If a competent authority deems that an investment firm group has a sufficiently simple structure but does not meet any of the criteria in paragraphs 14(a) and 14(c), the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 should preferably be at least equal to the own funds requirements calculated in accordance with Article 7 of that regulation.

16. If any of the undertakings of the group is subject to any proceedings referred to in Article 18(1) of Directive (EU) 2019/2034, the competent authority should assess whether the infringements related to these proceedings pose significant risks to clients or to the market.

17. For the purposes of assessing the condition referred to in paragraph 15(a), competent authorities may exempt the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company from the obligation to calculate the own funds requirements of the investment firm group according to Article 7 of Regulation (EU) 2019/2033 if they deem that the effort required to perform such a calculation would be disproportionate. If competent authorities grant this exemption, the own funds requirements

of the investment firm group according to Article 7 of that regulation should be replaced with the sum of the individual own funds requirements of all undertakings of the group that are Union parent investment firms, Union parent investment holding companies, Union parent mixed financial holding companies and any other parent undertakings that are investment firms, financial institutions, ancillary services undertakings or tied agents. If an undertaking is not an investment firm, the individual own funds requirements are those applicable under the relevant prudential framework. If an undertaking is a subsidiary undertaking located in a third country, the individual own funds requirements should be calculated in accordance with paragraph 20.

4.5 Lower amount permission: conditions for allowing a lower level of own funds

18. Competent authorities should not be prevented from granting a lower amount permission where the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 are higher than the own funds requirements calculated in accordance with Article 7 of that regulation at an indicative percentage of at least 125% of the latter, and the investment firm group meets the criteria set out in Section 4.2, or in Sections 4.3 and 4.4. For the purposes of calculating the percentage referred to in this paragraph, competent authorities should ensure that the foreign exchange risk is calculated in the same way for the own funds requirements calculated in accordance with Article 8(3) of Regulation (EU) 2019/2033 and the requirements calculated in accordance with Article 7 of that regulation.

19. The own funds requirements of any subsidiary undertaking in a third country should be determined at the level of that subsidiary with a satisfactory level of prudence as set out in the following paragraph (notional own funds requirement). The determination should be made by the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company, and by any immediate parent undertaking of that third-country subsidiary if required by the competent authority. The own funds should be held at the level of the first parent undertaking in the Union of that third-country subsidiary.

20. For a satisfactory level of prudence to be ensured, the notional own funds requirements for subsidiary undertakings established in third countries should equal at least the requirements calculated in accordance with Part Three and Part Four of Regulation (EU) 2019/2033. If the European Commission issues an equivalence decision pursuant to Article 47 of Regulation (EU) 600/2014 concerning Regulation (EU) 2019/2033 to the prudential regime of a third country, the capital requirements calculated according to that third-country prudential regime should be considered as having a satisfactory level of prudence. If a parent undertaking of a third country does not hold own funds requirements at least equal to the notional own funds requirements necessary to achieve a satisfactory level of prudence as defined in these guidelines, or at a higher level, if the competent authority has adopted a decision to allow the

reduction of own funds requirements to an amount which is higher than the one needed to achieve a satisfactory level of prudence, the lower amount permission should not be granted.

21. When applying Article 8(4) of Regulation (EU) 2019/2033, competent authorities should not allow a reduction of own funds that would result in the percentage referred to in paragraph 15(a) being lower than the amount specified in paragraphs 12(g), 15(a) or 15(e), as applicable.

4.6 Information to be assessed

22. To assess whether the investment firm group can be granted the group capital test permission in accordance with Article 8(1) of Regulation (EU) 2019/2033, or the lower amount permission in accordance with Article 8(4) of that regulation, competent authorities should assess all the necessary information provided by the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company or any other relevant parent undertaking, including:

    (a) description of the group activities;
    (b) the up-to-date group structure;
    (c) the up-to-date overview of the intragroup transfer of activities and positions subject to K-AUM, K-CMH, K-ASA, K-NPR and K-CMG;
    (d) the calculation of the consolidated capital requirements in accordance with Article 7 of Regulation (EU) 2019/2033, or the calculation of own funds requirements at individual level for the undertakings of the investment firm group if the competent authority applies paragraph 17;
    (e) the calculation of the actual own funds, including of notional own funds calculated in accordance with paragraph 20, available at the level of each undertaking of the investment firm group;
    (f) the calculation of the group capital test for the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company, and for each parent undertaking of the group in a Member State as referred to in Article 8(3) of Regulation 2019/2033;
    (g) the calculation of the percentage referred to in paragraph 15(a);
    (h) a statement detailing the fulfilment of the conditions set out in Sections 4.3 and 4.4;
    (i) information on the valuation assigned to each parent undertaking and, if relevant, the reasons for the difference against the book value of each subsidiary. If competent authorities deem that the effort needed to fulfil this information requirement would be disproportionate, they may stipulate that this information requirement should be fulfilled only for the most material subsidiaries, and materiality should be assessed taking into account both the size and the risk of the subsidiaries within the investment firm group.

23. Contractual agreements referred to in paragraphs 12(d) and 14(i) should be taken into account as provided by the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company or any other relevant parent undertaking only where they are material for the assessment of the application to use the group capital test.

24. If Section 4.2 is applicable, competent authorities may limit their assessment to the information set out in paragraph 22, points (a), (b), (d), (e), (f) and (g).

25. To assess whether the investment firm group can be granted the group capital test permission in accordance with Article 8(1) of Regulation (EU) 2019/2033, or the lower amount permission in accordance with Article 8(4) of that regulation, competent authorities should use all relevant available information, including regulatory reporting, accounting and financial reporting, internal investment firm accounts and ICARAP conclusions.

4.7 Granting, amending and withdrawing the authorisation

26. To assess whether the investment firm group can maintain its group capital test permission granted in accordance with Article 8(1) of Regulation (EU) 2019/2033, or its lower amount permission granted in accordance with Article 8(4) of that regulation, competent authorities should assess information provided by the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company or any other relevant parent undertaking on any material change occurring after such permission has been granted, in particular where such a change may affect compliance with the conditions and specifications on the basis of which the permission has been granted.

27. To assess whether the investment firm group can maintain its group capital test permission granted in accordance with Article 8(1) of Regulation (EU) 2019/2033, or its lower amount permission granted in accordance with Article 8(4) of that regulation, competent authorities should endeavour to obtain from the Union parent investment firm, the Union parent investment holding company, the Union parent mixed financial holding company or any other relevant parent undertaking any information relevant for the purpose of these authorities' monitoring of whether the conditions under which permissions have been granted are maintained.

28. Where a competent authority concludes that the conditions under which a group capital test or lower amount permission has been granted are no longer met, it should consider, without undue delay and after having heard the views of the Union parent investment firm, the Union parent financial holding company or the Union parent mixed financial holding company, whether such permission should be revoked. If the group capital test permission is revoked, any related lower amount permission granted should also be revoked and the group should be subject to consolidated supervision under Article 7 of Regulation (EU) 2019/2033.

29. If the Union parent investment firm, the Union parent investment holding company or the Union parent mixed financial holding company has been granted a group capital test permission and a distinct lower amount permission, revoking the latter should not automatically result in the revocation of the former, while the revocation of the former should always result in the revocation of the latter.

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

According to Article 7 of the IFR, investment firm groups must comply with the capital requirements under the IFR on a consolidated basis. However, Article 8 provides for a derogation from the application of prudential consolidation in the case of group structures which are deemed to be sufficiently simple, provided that there are no significant risks to clients or to the market stemming from the investment firm group as a whole that would otherwise require supervision on a consolidated basis. In those cases, the IFR envisages an alternative approach called the group capital test (GCT). These own-initiative guidelines set common criteria that competent authorities should take into account when considering granting this derogation.

Article 16(2) of Regulation (EU) No 1093/2010 (EBA Regulation) provides that any guidelines and recommendations developed by the EBA should be accompanied by an analysis of 'the potential related costs and benefits'. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

The EBA has conducted data collection to inform the impact assessment and policy choices in these guidelines. The data collection was addressed to all National Competent Authorities (NCAs) in the EEA and data were received from 27 countries (28 competent authorities).[3] NCAs were asked to:

- specify the criteria used for granting the derogation under Article 8 of the IFR (if any);
- provide basic information on the group structure and activities of all investment firm groups in their Member State for which a derogation according to Article 8 of the IFR was granted, refused, revoked, or is being processed.

This section presents the cost-benefit analysis of the provisions included in the guidelines. The analysis provides an overview of identified problems, the proposed options to address those problems and the costs and benefits of those options.

A. Problem identification

Article 8 provides for a derogation from the application of prudential consolidation in the case of group structures which are deemed to be sufficiently simple, provided that there are no significant risks to clients or to the market stemming from the investment firm group as a whole that would otherwise require supervision on a consolidated basis.

Moreover, when the derogation is granted, Article 8(4) allows NCAs to lower the amount of own funds requirements set out in Article 8(3) provided that this amount is no lower than the sum of

[3] Data were received from Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Croatia, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Sweden, Slovenia and Slovakia. In Belgium, data were received from two different competent authorities.

the own funds requirements imposed on an individual basis on subsidiary investment firms, financial institutions, ancillary services undertakings and tied agents, and the total amount of any contingent liabilities in favour of those entities. If the subsidiary undertakings are located in third countries the notional own funds requirements to be considered for the calculation of this floor must ensure a satisfactory level of prudence to cover the risks arising from those subsidiary undertakings.

However, the IFR does not provide harmonised conditions on what constitutes a sufficiently simple group structure, or information on the situations when an investment firm group poses significant risks to clients or to markets. Moreover, it does not specify what constitutes a satisfactory level of prudence for the purposes of the notional own funds of third-country subsidiaries. This can create an uneven playing field across the EU, where competent authorities use different criteria for the purposes of applying the GCT. Therefore, a set of more specific criteria are provided in these guidelines.

B. Baseline scenario

Out of the 28 NCAs participating in the data collection, nine NCAs have in place criteria to assess the simplicity of the group structure and/or the significance of the risk posed to clients or to the market. These can be grouped into the following categories:

- **Criteria based on capital and capital requirements:** these include criteria related to the distance between the capital requirements under Article 7 and Article 8 of the IFR, the capital composition of the relationships between the undertaking of the groups (CET1 only), how big the risk to clients and the risk to the market are relative to the regulatory capital, and how big the K-factors at individual level are relative to the thresholds set out in Article 12.
- **Criteria based on group structure:** these include criteria on the type of investment firms included in the group (e.g. class 3 only or absence of systematically important investment firms), the number of entities in the groups, the number of levels of control and the absence of substantial exposures between entities that are subject to group supervision.
- **Criteria based on MiFID authorisation:** these include criteria related to the authorised activities of the subsidiaries, particularly checking whether none of the subsidiaries is authorised to carry out MiFID activity (3) or (6) or to hold client money.
- **Other criteria:** these include criteria assessing whether there are no ‘empty boxes’ structures (i.e. companies in countries where the group does not carry out economic activities), whether investment firms in the group are not subject to enforcement proceedings and whether subsidiaries comply with transparency requirements.

Moreover, two NCAs have in place criteria when taking a decision on the reduction of the own funds according to Article 8(4) of the IFR. These include checking if the own funds under Article 8(4) of the IFR are not disproportionate relative to the ones under Article 8(3) of the IFR. Additionally, on ensuring a satisfactory level of prudence for the notional own funds requirements if the subsidiary is located in a third country, a comparison is made between the existing requirements and the hypothetical own funds requirements as if the subsidiary was subject to the IFR.

The results of the data collection show that the criteria used by the NCAs are very heterogeneous across the EU. Moreover, many NCAs do not have in place any specific criteria.

C. Policy objectives

The specific objective of these draft guidelines is to establish common criteria for granting the derogation of the GCT, while allowing a sufficient degree of flexibility in order to apply the principle of proportionality on a case-by-case assessment. In this way, these draft guidelines aim to ensure a consistent implementation of the IFR across the EU.

Moreover, they also aim to provide clarity to investment firms on the criteria used by the NCAs when assessing this derogation.

Generally, these guidelines aim to create a level playing field, promote convergence of supervisory practices and enhance comparability of own funds requirements across the EU. Overall, these guidelines are expected to promote the effective and efficient functioning of the EU investment firm sector.

D. Options considered, cost-benefit analysis, preferred options

The guidelines propose a number of qualitative and quantitative criteria to assess whether an investment firm group is sufficiently simple and whether the group as a whole poses significant risks to clients or to markets. The criteria were selected based on the current supervisory practices and the quantitative thresholds proposed in the guidelines were calibrated based on the data received in the EBA GCT data collection (see more details below).

Sample of EBA GCT data collection

The EBA received information for 33 investment firm groups from nine NCAs for which a derogation according to Article 8 of the IFR was granted (24), was refused (seven) or is being processed (two). Moreover, some additional information was received for ten investment firm groups for which a derogation under Article 8(4) of the IFR was granted (five), was refused (two) or is being processed (three).

Table 1: EBA GCT data collection sample, by country

Country	Article 8				Of which: Article 8(4)			
	Granted	Refused	Being processed	Total	Granted	Refused	Being processed	Not submitted
BE	5	0	0	5	0	0	1	4
CZ	4	0	0	4	0	0	0	4
ES	6	0	0	6	0	0	0	6
FR	1	0	0	1	1	0	0	0

Country	Article 8				Of which: Article 8(4)			
	Granted	Refused	Being processed	Total	Granted	Refused	Being processed	Not submitted
IE	0	1	2	3	0	0	2	1
LU	0	1	0	1	0	0	0	1
MT	0	1	0	1	0	0	0	1
NL	7	1	0	8	4	1	0	3
SE	1	3	0	4	0	1	0	3
Total	**24**	**7**	**2**	**33**	**5**	**2**	**3**	**23**

Sources: EBA GCT data collection and EBA calculations.

Conditions for considering an investment firm group as sufficiently simple and not posing a significant risk to clients and to the market

In order to take into account the principle of proportionality, the guidelines propose that investment firm groups that fulfil the conditions set out in Section 4.2 may be considered as having a group structure that is sufficiently simple and as not posing a significant risk to clients and to the market. A precondition is for the investment firm group to only consist of class 3 firms. Once this is met, additional conditions are set for the group structure and the comparison referred to in paragraph 17(a).

According to the data received, out of the 33 investment firm groups seven consist of only class 3 firms. For all these groups the derogation under Article 8 of the IFR has been granted, while none of them submitted a request for the derogation under Article 8(4) of the IFR. In terms of group structure, all these groups have an investment firm holding company as the Union parent, they have two levels of ownership and a maximum of four undertakings in the group. None of these groups consists of undertakings in third countries. Finally, only one investment firm group provided information on the comparison referred to in paragraph 17(a), which is above the 85% proposed in the guidelines.

Criteria for assessing whether an investment firm group is sufficiently simple

For groups which fail any of the conditions under Section 4.2, the guidelines propose a set of quantitative criteria to assess whether an investment firm group is sufficiently simple according to Section 4.3, which were calibrated based on the data received.

Number of entities

Table 2 shows that on average six entities are part of investment firm groups for which a derogation was granted, while the median number is somewhat lower with three entities in the group. The maximum number of entities within these groups is 32. For investment firm groups for which a derogation was not granted, the average number of entities is seven, with the median at six entities.

The guidelines set the threshold for the number of entities to six, aligning with the average number of entities for investment firm groups with a derogation.

Table 2: Number of entities in the group

Derogation under Art. 8 of the IFR	Number of investment firm groups	Minimum	Median	Maximum	Average
Granted	24	2	3	32	6
Refused	7	2	6	19	7
Total	**31**	**2**	**3**	**32**	**7**

Sources: EBA GCT data collection and EBA calculations.

Out of 24 investment firm groups which have been granted the derogation, seven investment firm groups have more than six entities in their group. However, the guidelines allow for a derogation from the number of entities if the competent authority concludes that the group structure is consistent with the business model and with the activities of the investment firm group, and the investment firm group meets the conditions referred to in paragraph 17(e). Only two investment firm groups provided data on the capital ratios, and these meet the conditions under paragraph 17(e).

Levels

Table 3 shows that on average there are two levels of ownership in investment firm groups for which a derogation was granted, with the median number being the same. The maximum number of levels within these groups is five. For investment firm groups for which a derogation was not granted, the average number of levels is three, with the median and maximum level standing also at three. The guidelines set the threshold for the number of levels to three, which is equal to the average number of levels for investment firm groups with a derogation (two) plus one additional level in order not to put at a disadvantage the groups which have as a Union parent (and hence an additional level) a holding company instead of an investment firm.

Table 3: Number of levels in the group

Derogation under Art. 8 of the IFR	Number of investment firm groups	Minimum	Median	Maximum	Average
Granted	24	2	2	5	2
Refused	7	3	3	3	3
Total	**31**	**2**	**2**	**5**	**2**

Sources: EBA GCT data collection and EBA calculations.

Out of 24 investment firm groups which have been granted the derogation, three investment firm groups have more than three levels in their group. In a similar way to the number of entities, the guidelines allow for a derogation from the number of levels if (i) the undertakings of the group have a majority of the voting rights in their subsidiaries, and (ii) the group structure is consistent with the business model and with the activities of the investment firm group, such as containment of risk stemming from undertakings dealing on own account or group structure mandated by national laws. In addition, the investment firm group should meet the conditions referred to in paragraph 17(e). Only two investment firm groups provided data on the capital ratios, and these meet the conditions under paragraph 17(e).

Transfer of activities and trading positions

Table 4 and Table 5 show that none of the investment firm groups that provided sufficient data have in place contracts or arrangements to transfer activities related to K-AUM, K-ASA and K-CMH within the group. The guidelines set a threshold for the transfer of activities for K-AUM, K-ASA and K-CMH at 150% of the thresholds set out in Article 12(1)(a), (c) and (d) of the IFR. Hence, the criteria will not affect the authorisation for Article 8 of the IFR derogation for any of these investment firm groups.

Table 4: Amount of transfer of K-AUM among entities of the investment firm group

Derogation under Art. 8 of the IFR	Number of investment firm groups	Minimum	Median	Maximum	Average
Granted	12	0	0	0	0
Refused	3				0
Total	**15**				**0**

Sources: EBA GCT data collection and EBA calculations.

Notes: Some investment firm groups did not report the requested data. Data for investment firm groups for which the derogation was refused and the totals are not shown for confidentiality reasons.

Table 5: Criteria on transfer of K-ASA and K-CMH among entities of the investment firm group

Derogation under Art. 8 of the IFR	Number of investment firm groups	K-ASA		K-CMH	
		Yes	**No**	**Yes**	**No**
Granted	24	0	13	0	13
Refused	7	0	4	0	4
Total	**31**	**0**	**17**	**0**	**17**

Sources: EBA GCT data collection and EBA calculations.

Note: some investment firm groups did not report the requested data.

The NCAs participating in the EBA GCT data collection did not provide information on the transfer of positions subject to K-NPR, K-TCD and K-CMG among entities of the investment firm groups in their Member State. Therefore, the criteria were calibrated on an expert judgement basis and are not expected to affect the authorisation of investment firm groups which have been granted derogation.

Criteria for assessing whether an investment firm group does not pose significant risks to clients or to the market

For groups which fail any of the conditions under Section 4.2, the guidelines propose a set of criteria to assess whether an investment firm group is sufficiently simple according to Section 4.3, which were informed based on the data received.

Capital ratio

Table 6 shows the ratio between the own funds requirements of the investment firm group calculated according to Article 8(3) and calculated according to Article 7 of the IFR. All investment firm groups for which the derogation was granted have a ratio above 100%, with an average ratio standing at 465%.

Table 6: Distribution of capital ratio

Derogation under Art. 8 of the IFR	Number of investment firm groups	Minimum	Median	Maximum	Average
Granted	3				465%
Refused	2				
Total	5				

Sources: EBA GCT data collection and EBA calculations.

Notes: Some investment firm groups did not report the requested data. In addition, most investment firm groups could not calculate the own funds requirements under Article 7 of the IFR and instead used a proxy equal to the sum of own funds requirements at individual level for investment firms, financial institutions, ancillary services undertakings or tied agents in the group. Data for investment firm groups for which the derogation was refused and the totals are not shown for confidentiality reasons.

The guidelines set the comparison between the own funds requirements of the investment firm group calculated according to Article 8(3) and calculated according to Article 7 of the IFR to be equal to or higher than 85% if they comply with the conditions under Section 4.2 or 90% to comply with the conditions under Section 4.3. This comparison is increased to 100% if the investment firm group derogates from some of the default criteria. Therefore, all investment firm groups reporting the data for the comparison will satisfy the criteria.

Criteria on retail clients, clearing member and centralised hedging

According to Table 7 none of the investment firm groups that were granted the derogation under Article 8 of the IFR had issued debt/equity instruments to retail clients, had a clearing member in the group or had centralised hedging of positions subject to K-NPR. Among the ones that were refused the derogation, two issued debt/equity instruments to retail clients, but none had a clearing member in the group or had centralised hedging for K-NPR positions.

The guidelines therefore propose that an investment firm group should not issue debt/equity instruments to retail clients, allow a maximum of one clearing member in the investment firm groups and, where centralised hedging takes place, the group should have satisfactory organisational arrangements and sufficient risk control functions. Hence, the investment firm groups which have been granted the derogation under Article 8 are not expected to be affected.

Table 7: Criteria on retail clients, clearing member and centralised hedging

Derogation under Art. 8 of the IFR	Number of investment firm groups	Issuance of debt/equity instruments to retail clients		Clearing member in the investment firm group		Centralised hedging of positions subject to K-NPR	
		Yes	No	Yes	No	Yes	No
Granted	24	0	13	0	24	0	24
Refused	7	2	2	0	7	0	6
Total	**31**	**2**	**15**	**0**	**31**	**0**	**30**

Sources: EBA GCT data collection and EBA calculations.

Note: some investment firm groups did not report the requested data.

Derogation under Article 8(4) of the IFR

Table 8 shows the comparison between the own funds requirements of the investment firm group calculated according to Article 8(4) and calculated according to Article 7 of the IFR. On average, investment firm groups for which the derogation was granted have a ratio of 100%. The guidelines set a threshold of 125%, which suggests that these investment firms may no longer be eligible for the derogation under Article 8(4), while still being eligible for the general derogation under Article 8. It should be noted, however, that these investment firm groups could not calculate the own funds requirements under Article 7 of the IFR with accuracy and instead provided a proxy equal to the sum of own funds requirements at individual level for investment firms, financial institutions, ancillary services undertakings or tied agents in the group. Hence, in reality the actual capital ratio may be higher.

Table 8: Distribution of capital ratio

Derogation under Art. 8(4) of the IFR	Number of investment firm groups	Minimum	Median	Maximum	Average
Granted	4				100%
Refused	0				
Total	**4**				100%

Notes: Some investment firm groups did not report the requested data. In addition, all investment firm groups could not calculate the own funds requirements under Article 7 of the IFR and instead used a proxy equal to the sum of own funds requirements at individual level for investment firms, financial institutions, ancillary services undertakings or tied agents in the group.

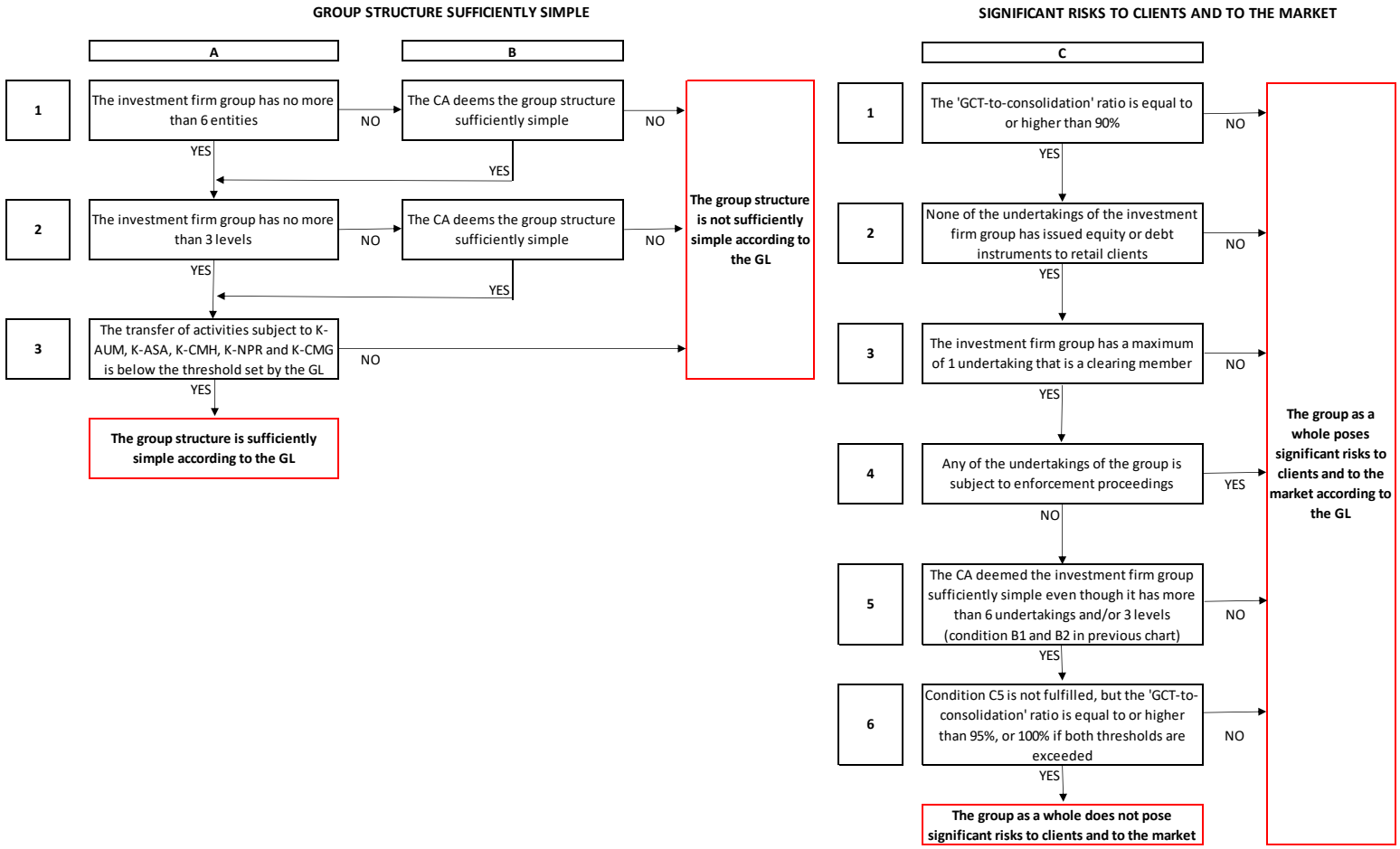
Different levels for the thresholds were also considered but setting the threshold at 125% was considered appropriate given the rationale behind this derogation. The derogation was included as a safeguard to avoid penalising investment firm groups which, complying with national law, have to update the book value of their holdings, subordinated claims and instruments referred to in point (i) of Article 36(1), point (d) of Article 56, and point (d) of Article 66 of the IFR in investment firms, financial institutions, ancillary services undertakings and tied agents in the investment firm group which can book these at historical cost. Hence, if the own funds requirements based on these updated book values are 25% higher than the own funds requirements under Article 7 of the IFR, then the disadvantage can be considered material and the NCA can grant the derogation under Article 8(4) to reduce the requirements under the group capital test. The reduction, however, cannot result in a capital comparison lower than 85% if the conditions under Section 4.2 are met or 90% if the conditions under Sections 4.3 and 4.4 are met (a higher capital ratio is used if some conditions are not met).

Overall impact assessment

Most of the investment firm groups which provided sufficient information in the EBA GCT data collection to assess the criteria in the guidelines and have been granted the derogation under Article 8 of the IFR are expected to remain eligible for the derogation if the guidelines enter into force. On the other hand, the data suggest that some investment firm groups which have been granted the derogation under Article 8(4) may no longer be eligible for such a derogation. For NCAs, there might be some costs in updating their assessment process and procedures, but these are expected to be small, as many of the criteria included in the guidelines are already being used by some of the NCAs in their current assessment process. On the other hand, the benefits of harmonising supervisory practices across the EU are considered important and outweigh the limited costs.

5.2 Annex I: Structure of the guidelines

Group structure sufficiently simple and significant risks to clients and to the market



5.3 Annex II: Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
The EBA lacks the mandate to issue guidelines pursuant to Article 8 of the IFR.	One respondent contests the power of the EBA to issue guidelines on the GCT due to the lack of a specific mandate in the IFR.	Article 16(1) of Regulation (EU) 1093/2010 (EBA Founding Regulation) states that 'the Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions'. The GCT is not applied in a consistent and uniform manner across Member States. This was confirmed by the dedicated data collection. Thus, the EBA deems that it is within its power to issue guidelines on this matter.	No amendment.
The sample of the data collection is not meaningful.	One respondent deems the size of the sample of the data collection to be insufficient for policy purposes.	The sample of the data collection encompasses 100% of the EU investment firm population currently involved in the GCT provision (either granted or refused authorisation from competent authorities). All EU competent authorities participated in the data collection.	No amendment.
The provisions of the GCT are not part of the review clause of Article 60 of the IFR.	One respondent is of the view that, since the GCT is not part of the review clause under Article 60 of the IFR, it was in the intention of the co-legislators to	The review clause of the IFR is not an indication of the willingness of the co-legislators to pursue a fragmented EU market. Furthermore, the review clause does not impair the power of the EBA to issue	No amendment.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	leave wide application powers to competent authorities.	guidelines under Article 16 of the EBA Founding Regulation.	
The guidelines go beyond the Level 1 (IFR) requirements.	Some respondents are of the view that the requirements of the guidelines go beyond the Level 1 text. In particular, setting quantitative criteria increases the complexity of the framework and no longer allows any discretionary leeway for competent authorities.	The guidelines specify some criteria that are needed to interpret the provisions of the Level 1 text, without adding any additional provisions. Quantitative criteria are needed for a uniform and objective application of the GCT. The guidelines include the possibility for some derogations, at the discretion of the competent authority, and strike the right balance between flexibility and harmonisation.	No amendment.
Permission already granted before the issuance of the guidelines should be reassessed (or should not be reassessed).	One respondent is of the view that permissions to use the GCT granted before the application of the guidelines should be reassessed.	Permissions already granted before the application of the guidelines should be reassessed, and revoked if appropriate, in order to ensure a level playing field.	No amendment.
The calculation of the ratio between own funds requirements calculated according to Article 8 and Article 7 of the IFR is too burdensome since it is required to be performed on a continuous basis.	Some respondents deem the requirement to calculate the ratio on a continuous basis as too burdensome.	The EBA acknowledges the issue. The intention of the EBA is that the ratio should be calculated at the time of the submission of the request to use the GCT (or the submission of the request to continue to use the GCT) and only upon request of the competent authority thereafter.	The guidelines are amended accordingly.
The use of the GCT is important for the simplifications offered on the governance and remuneration of the investment firm group.	Some respondents state that the simplifications on the governance and remuneration provisions are very important to allow EU investment firm groups that have subsidiaries in third countries to compete on a level playing field with non-EU groups.	The EBA acknowledges the issue. However, it is the view of the EBA that the use of the GCT is not intended to solve competition issues with non-EU groups on governance and remuneration matters.	No amendment.
The GCT should be amended in order to allow the disentanglement of the	Some respondents state that the GCT should be reformed in order to allow the disapplication of the	The EBA acknowledges the issue, however EBA guidelines cannot amend the IFR or IFD.	No amendment.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
governance and remuneration issue from the capital requirement.	governance and remuneration requirements for internationally active EU investment firm groups, while leaving unchanged the capital requirements provisions.		
Responses to questions in Consultation Paper EBA/CP/2023/16			
Question 1. Do you consider the above criteria proportionate and relevant for groups composed of small and non-interconnected investment firms and ancillary services undertakings only? If not, please provide a rationale.	No public responses received.		
Question 2. Do you consider the above criteria to be relevant for the assessment of the simplicity of the group structure of an investment firm group? If not, please provide a rationale.	Some respondents are of the view that setting a maximum number of undertakings or levels in the group structure is not a good indicator of the complexity of the group.	The EBA deems that the number of undertakings and the number of levels in the group structure have a direct influence on the simplicity of the group, since it may require more sophisticated governance and control mechanisms. The EBA also acknowledges that a group with a higher number of undertakings/levels is not necessarily more complex compared to a group with a lower number of undertakings/levels, thus the guidelines allow the competent authority to assess on a case-by-case basis whether a group is simple even if the number of undertakings/levels is higher than the one envisaged in the guidelines. Finally, the number of undertakings/levels contained in the guidelines is the result of the data collection performed by the EBA.	No amendment.

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	Some respondents are of the view that only transfers in and out of the EU should be relevant.	The EBA is of the view that the level of intragroup transfers is a direct indicator of the complexity of the group structure, regardless of whether the transfers take place within the EU or outside of the EU.	No amendment.
	One respondent is of the opinion that only material contracts should be made available to the competent authorities under paragraph 16 (i) and (j) of the guidelines.	The EBA is of the view that competent authorities should require only contracts that are material and useful for the assessment of the request to use the GCT. The assessment of the materiality should be under the responsibility of the competent authority.	The guidelines are amended accordingly.
Question 3. Are there other criteria that should be considered for the assessment of the simplicity of the group structure of an investment firm group? If so, please provide a rationale.	No responses received.		
Question 4. Do you consider the above criteria to be relevant for the assessment of the significance of the risk to clients or to the market? If not, please provide a rationale.	Some respondents state that the fixed ratio introduced in the guidelines is not a reliable measure of risk to clients and to the market. The assessment and the setting of the ratio should be performed on a case-by-case basis by the competent authority in the SREP process.	The process for the issuance of the permission to use the GCT is independent from the SREP process, even though information gathered during the latter may be used by the competent authority when taking a decision. The ratio is not a capital requirement per se, and an assessment on a case-by-case basis would not lead to a harmonised approach to the use of the GCT.	No amendment.
Question 5. Should groups constituted of undertakings holding only common equity tier 1 and additional tier 1 capital be allowed a reduction of the ratio referred to in	No response received.		

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
paragraph 17(a) to 85%? If so, please provide a rationale.			
Question 6. Are there other criteria that should be considered for the assessment of the significance of the risk to clients or to the market? If so, please provide a rationale.	No response received.		
Question 7. Do you consider the above criteria to be relevant for granting the derogation pursuant to Article 8(4) of the IFR? If not, please provide a rationale.	Some respondents are of the view that the ratio should be equal to 100% for investment firm groups that do not have to update the book value regularly. They provided an example in which, due to the FX exposures, the ratio would not be meaningful.	The EBA acknowledges the issue related to FX exposures.	The guidelines are amended accordingly.
Question 8. Are there other criteria that should be considered for the purposes of granting the derogation pursuant to Article 8(4) of the IFR? If so, please provide a rationale.	One respondent invites the EBA to publish a list of factors to consider when determining whether a non-EU prudential regime has a satisfactory level of prudence.	The EBA is of the view that competent authorities should not be expected to review the level of prudence of third countries' prudential regimes. Therefore, the publication of a list of factors that the competent authorities may use to assess the level of prudence of a non-EU regime would not be useful for the purposes of these guidelines.	No amendment.
Question 9. Do you agree with the elaborations provided on the definitions of 'notional own funds' and 'satisfactory level of prudence'? If not, please provide a rationale.	Some respondents consider that the prudential regime of some third countries should be deemed to be as prudent as the EU prudential framework.	The EBA is of the view that competent authorities should not perform an independent assessment of third-country prudential regimes for the purposes of these guidelines. However, the EBA acknowledges that third-country prudential regimes that have obtained an equivalence decision by the European Commission should be considered as having a satisfactory level of prudence.	The guidelines are amended accordingly.

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Question 10. The purpose of the GCT is to provide for a proportionate approach aiming to prevent capital gearing but also to prevent excessive leverage for simple investment firm groups which do not pose significant risks. In light of this consideration, it may be prudent to prevent the use of the derogation provided in Article 8(4) for an investment firm group where the amount of the goodwill included in the value of the participations of the parent undertaking in its subsidiaries is material (e.g. in cases where such goodwill, if considered in own funds, would lead to a breach of the minimum requirements determined under Article 8(4) of the IFR). Do you agree with this potential additional criterion? If not, please provide a rationale.	No responses received.		