

EBA/CP/202/16

25 July 2023

Consultation Paper

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

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in Section 5.3.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 25/10/2023. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive summary

The application of the group capital test (GCT) provision pursuant to Article 8 of Regulation (EU) 2019/2033 (IFR) appear 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 jurisdictions, 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 is developing guidelines addressed to competent authorities on the application of the group capital test for investment firm groups.

The guidelines deemed to set objective threshold and criteria that competent authorities should consider for the purpose of assessing whether the conditions set out in Articles 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 allow for some deviations from the given thresholds. The overall aim being to provide clear criteria for competent authorities for the application of the GCT.

The guidelines are structured as follows:

- the first part (Section 4.1) 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 4.2) discusses on 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 intra-group arrangements) that the competent authority should assess before granting the use of the GCT;
- the third part (Section 4.3) discusses the conditions to assess the significance of the risks to clients or to market stemming from the investment firm group as a whole. This section introduces the ratio between own funds calculated according to the GCT and to the 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 the prudential consolidation). The same section considers other criteria, such as the presence of clearing members in the group, the issuance of financial instruments that are not listed on a regulated exchange to retail clients, as well as the presence of enforcement proceedings on any undertakings of the group;

- the fourth part (Section 4.4) 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 notions of ‘notional own funds’ and ‘satisfactory level of prudence’ not fully clarified in that Article;
- the fifth part (Section 4.5) lists the minimum set of information that competent authorities should require when assessing 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;
- Annex I provides a flow chart of the structure of these guidelines with reference to relevant criteria.

Several questions have been included as part of the consultation process to gather feedback from the relevant stakeholders on whether these proposed guidelines ensure that the regulatory framework around the group capital test is implemented in a harmonized way.

3. Background and rationale

3.1 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 IFR, consists in applying the relevant Parts of the IFR to the investment firm group, as if the Union parent¹ 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 the 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 their holdings and of the total amount of all of their 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 market.
5. Competent authorities may allow a Union parent and other parent undertakings of the group to hold 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 on a case-by-case assessment.

3.2 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 the 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 authorization to derogate, the competent authority should assess that the group structure is sufficiently simple and that the group as a whole does not pose significant risks to clients and to 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 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 notions of ‘notional own funds’ and ‘satisfactory level of prudence’ referred to in this article.
10. Among other criteria, these guidelines introduce the ratio 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 ratio”) as a measure of the significance of the risks to clients or to 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 as not posing a significant risk to clients and to market when the ratio 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 when 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 significant amount of trading positions or business activities within undertakings of the group, and the transparency of the intra-group 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 when authorised by the competent authority. The own funds requirement is 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 undertakings have reporting obligations encompassing their “subgroup” of undertakings) and of the supervision, since competent authorities would have to consider multiple sub-groups 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.
15. The supervision on a consolidated basis allows the supervisor to have a clear view on the intra-group 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 client’s assets deposited at an undertaking of the group and transferred to a different undertaking of the group for the safeguard and administration should be an indicator of the complexity of the group structure. The mechanics of the GCT do not take into account these arrangements, thus these guidelines provide that when the transferring of AUM, ASA and CMH within 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. In order to take into account the dimension 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, when there is more than one undertaking for which AUM is higher than zero. To provide stability and predictability on the fulfilment of the requirements of the IFR for the investment firm group, 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 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 a third country as they would be under MiFID, and rely on the concept of “notional own funds” and “satisfactory level of prudence” developed in these guidelines when relevant.

16. In case of transfers within the group of positions subject to K-NPR or K-CMG, including intra-day transfers, the investment firm group should be considered as not meeting the criteria set out in these guidelines when 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 fulfilment of these guidelines for the investment firm group, 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.
17. In case of an extraordinary operation affecting the group structure or the business activities, as a result, in particular, of mergers and acquisitions or request or withdrawal of the license 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. When the competent authority assesses 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.
18. Another element of complexity of an investment firm group is represented by the capital ties, the ownership structure, and the contractual agreements among the undertakings of the group: a group may seem simple in terms of number of undertakings and of organisational structure but could present intricately 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 the 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.
19. 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 to be considered as posing a risk to clients or to market when observed in a group: the ratio of 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 hedge trading book positions for the group, two or more undertakings in the group are clearing members, or any of the undertakings of the group are subject to enforcement proceedings by the competent authority.
20. The application of the GCT may result in a lower level of own funds requirements when compared to the application of the prudential consolidation. Own funds are used to absorb losses and to protect clients and 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 market, increasing the risk stemming from the investment firm group as a whole. The ratio between the own funds requirement calculated under Article 8 and calculated under Article 7 of the IFR is a reliable indicator of the risk posed by the group and, on a lower extent, of the level of intragroup activities that are not accurately captured under the GCT. Competent authorities should assume that there are no significant risks to clients or to market stemming from an investment firm group for the purposes of meeting the criteria set out in these guidelines when the ratio is above a certain threshold. This ratio should be assessed at the moment of granting the derogation, and upon request of the competent authority thereafter. 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 the prudential consolidation for any other aspects included in that article.

21. Notwithstanding the provisions of these guidelines, the competent authority may deem as sufficiently simple an investment firm group with a higher number of undertakings, or with a higher number of levels in the group structure. When the competent authority deems such groups as sufficiently simple, the risk posed to clients or to 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 market, the competent authority should consider raising the ratio referred to in these guidelines, provided that the group structure is consistent with the business model and the activity of the group.
22. The issuance of equity or debt instruments that are not listed on a regulated exchange to retail clients 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 market for the purposes of meeting the criteria of these guidelines.
23. The activity 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, when 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 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.
24. 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 market for the purposes of these guidelines.

25. When 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 Art. 8(1) and 8(4) of the IFR, the competent authority should analyse whether the enforcement proceeding in place may result in a significant risk to clients or to market. When any of the undertakings of the investment firm group is subject to enforcement proceedings after being granted the authorisation to derogate pursuant to Art. 8(1) and 8(4) of the IFR, the competent authority should assess whether the infringements that led to that enforcement proceeding may result in a significant risk to clients and to market, and revoke the authorisation to derogate when appropriate.
26. 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 an 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 notions of 'notional own funds requirements' and 'satisfactory level of prudence'.
27. 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 the 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 Art. 8(4) of the IFR when the ratio set out in these guidelines is above a certain threshold. The reduction of own funds granted to the investment firm group should not result in lower values of the ratio applicable to investment firm groups that do not benefit from the derogation referred to in Article 8(4) of the IFR.
28. 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.

29. 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 as 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. The satisfactory level of prudence applicable to notional own funds should not be intended as the minimum own funds requirement applicable to the third country subsidiary but represent the minimum level of own funds that the parent undertaking of the third country subsidiary should hold under Article 8(4) of the IFR.
30. A competent authority should require 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 their supervisory activities or due to reporting obligations from investment firms. The guidelines also require that a competent authority obtain any additional information that necessary for assessing whether an investment firm group meets those criteria.
31. 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 non-compliance with the requirements for the authorisation under Article 8(4) of the IFR should result in the withdrawal of that additional authorisation only, provided that all the other requirements of these guidelines are fulfilled, and that the Union parent has received two separate authorisations for the use of the GCT under Article 8(1) of the IFR and for holding lower own funds according to Article 8(4) of the IFR. 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. When an investment firm group has requested and obtained an authorisation to derogate pursuant only to Article 8(4) of the IFR, the withdrawal of that authorisation should result in the group not being allowed to use the GCT.
32. 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 close 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.

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

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010². 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. 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 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 further the criteria which competent authorities may take into account when deeming a group structure of investment firms sufficiently simple, and when assessing whether the investment firm group as a whole does not pose significant risks to clients or to market, when granting the authorisation to derogate from the application of Article 7 of Regulation (EU) 2019/2033 referred to in Article 8(1) of that Regulation. These guidelines also specify further criteria that the competent authority may take into account when granting the authorisation to derogate referred to in Article 8(4) of that Regulation, and provide clarity on the concepts of “notional own funds” and “satisfactory level of prudence” mentioned in that Article.

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) and (2)(viii) 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 investment firms, and to Union parent investment holding companies and Union parent mixed financial holding companies as referred to in Article 4, point (1)(56) and (1)(57) respectively, of Regulation (EU) 2019/2033.

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 [X] months after issuance date.

10. Competent authorities should review and, where appropriate, revoke permissions already granted on the basis of Article 8(1) or 8(4) of Regulation (EU) 2019/2033 starting from the date of application of these guidelines.

4. Guidelines

4.1 General considerations

11. Competent authorities may exempt a Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company from the application of the prudential consolidation as set out in Article 7 of Regulation (EU) 2019/2033, where the investment firm group is deemed to be sufficiently simple, provided that there are no significant risks to clients or to market stemming from the investment firm group as a whole that would otherwise require supervision on a consolidated basis. Under this derogation, the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company has the permission to apply the group capital test, as set out in Article 8 of that Regulation.
12. The criteria to deem an investment firm group to be sufficiently simple, and whether the group as a whole poses significant risks to clients or to market, are set out in these guidelines. A competent authority should assess if an investment firm group is sufficiently simple according to section 4.3, and the group as a whole does not pose significant risks to the clients or to the market as specified in section 4.4. A Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company applying for the derogation envisaged in Article 8, paragraph 4 of Regulation (EU) 2019/2033, should comply, in addition, with the requirements listed in section 4.5. In order to take into account the principle of proportionality, investment firm groups that fulfil the conditions set out in section 4.2 may be considered as having a group structure sufficiently simple and as not posing a significant risk to clients and to market.
13. When applying, the Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company, should provide all information necessary for the competent authority to assess if the criteria of these guidelines are met. That information should include all the information listed in section 4.6.
14. A competent authority should not grant the authorisation to derogate pursuant to Article 8, paragraph 1, of Regulation (EU) 2019/2033 to a Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company, when it deems that the investment firm group, though meeting all the relevant criteria set out in these

guidelines, would be better supervised under the prudential consolidation framework as a consequence, for instance, of specific risks identified by the competent authority.

4.2 Criteria to deem an investment firm group constituted of investment firms meeting the definition in Article 12(1) of Regulation 2019/2033 and ancillary services undertakings to be sufficiently simple and as not posing significant risks to clients and to market

15. For the purposes of determining whether an investment firm group that is constituted of a Union parent investment firm meeting the definition in Article 12(1) of Regulation (EU) 2019/2033, a Union parent investment holding company, or a Union parent mixed financial holding company, and includes only investment firms meeting the definition in Article 12(1) of Regulation 2019/2033, and ancillary services undertakings, is sufficiently simple and does not pose significant risks to clients and to market for the purposes of Article 8, paragraph 1, of Regulation (EU) 2019/2033, competent authorities should assess the following features of the group:
- (a) satisfactory organisational arrangements and sufficient risk control functions that are proportionate to the size and business model of the investment firm group are put in place and that the undertakings of the group have all of the voting rights in their subsidiaries;
 - (b) 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 available to the competent authority upon request;
 - (c) the capital ties, the ownership structure and the contractual agreements referred to in point (b) do not represent an impediment to the exercise of the control by the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company, on the undertakings of the group;
 - (d) the implications of the capital ties, of the ownership structure and of the contractual agreements referred to in point (b) for the governance of the group as a whole and whether it would otherwise require supervision on a consolidated basis;
 - (e) the ratio calculated according to paragraph 17(a) is equal to or higher than 85%;
 - (f) if any of the undertakings of an investment firm group no longer meets the criteria set out in paragraph 15, the competent authority should assess whether that investment firm group meets the conditions set out in paragraphs 4.3 and 4.4.

Questions for consultation

Q1. Do you consider the above criteria proportionate and relevant for groups composed exclusively of small and non-interconnected investment firms and ancillary services undertakings? If not, please provide a rationale.

4.3 Criteria to deem an investment firm group to be sufficiently simple

16. Competent authorities should deem an investment firm group that does not meet all the conditions set out in Section 4.2, sufficiently simple for the purposes of Article 8, paragraph 1, of Regulation (EU) 2019/2033 when it fulfils the following conditions:

- (a) the number of undertakings in the group referred to in Article 8, paragraph 3, of Regulation 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 6;
- (b) by way of derogation from paragraph 16(a), competent authorities may consider an investment firm group which includes more than 6 undertakings as sufficiently simple for the purposes of these guidelines, when the competent authority assesses 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);
- (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 16(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 for the purposes of these guidelines, when the undertakings of the group have a majority of the voting rights in their subsidiaries, and 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);

- (e) contracts or arrangements in place to transfer activities within the group for an amount that does not exceed 150% of the thresholds set out in Article 12(1), paragraphs (a), (c) and (d) of Regulation (EU) 2019/2033 for activities subject to K-AUM, K-ASA and K-CMH, and no more than two undertakings have positive values for these K-factors. For the purposes of this point, the transfer back to the undertakings of the group should not count towards this threshold;
- (f) when the investment firm group is constituted of more than two undertakings, the limit to the cumulative transferred business activities as referred to in paragraph 16(e) should be increased by 50% for each additional undertaking of the group that has positive values for AUM, ASA and CMH as referred to in Article 12 of Regulation (EU) 2019/2033. The values should refer to the preceding financial year. For the purposes of this point, the transfer back to the undertakings of the group should not count towards this threshold;
- (g) if contracts or arrangements to transfer trading positions within 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, paragraph 1, point (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) when 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 structure, including mergers and acquisitions, the value of transferred activities should not count towards the limits set out in paragraphs 16(e), (f) and (g) for the financial year in which the restructuring of the group structure has 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 competent authority should assess that the capital ties, the ownership structure and the contractual agreements referred to in point (i) do not represent an impediment to the exercise of the control by the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company on the undertakings of the group;
- (k) the competent authority should assess the implications of the capital ties, of the ownership structure and of the contractual agreements referred to in paragraph (i) for the governance of the group as a whole and whether it would otherwise require supervision on a consolidated basis.

Questions for consultation

Q2. 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.

Q3. Are there other criteria that should be considered for the assessment of the simplicity of the group structure of an investment firm group? If yes, please provide a rationale.

4.4 Criteria to assess whether an investment firm group poses, as a whole, significant risks to clients or to market

17. Competent authorities should deem an investment firm group that does not meet the criteria set out in Section 4.2, not to pose significant risk to clients or market for the purposes of Article 8, paragraph 1, of Regulation (EU) 2019/2033 when it fulfils all the following criteria:

(a) the ratio between the own funds requirement of the investment firm group calculated according to Article 8, paragraph 3, and calculated according to Article 7 of Regulation (EU) 2019/2033, is equal to or higher than 90%;

(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, paragraph 1, point 11 of Directive 2014/65/EU, but excluding 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, paragraph 1, point 3 of Regulation (EU) 2019/2033;

(d) when 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 transfers 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) when a competent authority deems that an investment firm group has a sufficiently simple structure but does not meet the criteria in either paragraph 16(a) or paragraph 16(c), it should apply, where relevant, paragraphs 17(a) of these guidelines increasing the ratio to 95%. When a competent authority deems that an investment firm group has a sufficiently simple structure but does not meet any of the criteria in paragraphs 16(a) and 16(c), it should apply paragraphs 17(a) of these guidelines increasing the ratio to 100%.

18. In case any of the undertakings of the group is subject to enforcement proceedings pursuant to Article 18, paragraph 1, of Directive (EU) 2019/2034, the competent authority should assess whether the infringements related to the enforcement proceeding pose significant risks to clients or to market.
19. For the purposes of calculating the ratio referred to in paragraphs 17(a) of these guidelines, competent authorities may waive the Union parent investment firm, Union parent investment holding company or Union parent mixed financial holding company from calculating the own funds requirements of the investment firm group according to Article 7 or Regulation (EU) 2019/2033 when it deems that the effort required to perform such calculation would be disproportionate. When the competent authority allows for this waiver, 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 listed in Article 8, paragraph 3 of that Regulation. When an undertaking is not an investment firm, the individual own funds requirements are those applicable under the relevant prudential framework. When an undertaking is a subsidiary undertaking located in a third country, the individual own funds requirement should be calculated in accordance with paragraph 22.

Questions for consultation

- Q4. Do you consider the above criteria to be relevant for the assessment of the significance of the risk to clients or to market? If not, please provide a rationale.
- Q5. 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 paragraph 17(a) to 85%? If yes, please provide a rationale.
- Q6. Are there other criteria that should be considered for the assessment of the significance of the risk to clients or to market? If yes, please provide a rationale.

4.5 Criteria to grant the derogation pursuant to Article 8, paragraph 4 of Regulation (EU) 2019/2033 to an investment firm group

20. Competent authorities may grant the authorisation to derogate pursuant to Article 8, paragraph 4 of Regulation (EU) 2019/2033 when the ratio referred to in paragraph 17(a) is equal to or higher than 125%, and the investment firm group meets the criteria set out in Section 4.2, or in Sections 4.3 and 4.4 where relevant.
21. For the purposes of these guidelines, “notional own funds requirements” referred to in Article 8, paragraph 4, subparagraph 2 of Regulation (EU) 2019/2033, means the level of own funds calculated according to a methodology, or a prudential framework that may be different from

those applicable to the third countries' subsidiary undertakings under the local regulation. The calculation of the notional own funds requirements should be performed by the parent undertaking of the third countries' subsidiary undertakings, or by any other parent undertaking, including the Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company, if required by the competent authority.

22. For the purposes of these guidelines, “satisfactory level of prudence” referred to in Article 8, paragraph 4, subparagraph 2 of Regulation (EU) 2019/2033, means that the level of notional own funds requirements of the third countries subsidiary undertakings is equal or higher than the own funds requirements calculated according to Parts Three and Four of that Regulation.
23. When a parent undertaking of third countries subsidiary undertakings 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, when set out by competent authorities, the Union parent investment firm, Union parent investment holding company, or Union parent mixed financial holding company does not fulfil the criteria of paragraph 22.
24. When granting the authorisation to derogate pursuant to Article 8, paragraph 4 of Regulation (EU) 2019/2033, competent authorities should not allow a reduction of own funds that would result in the ratio referred to in paragraph 17(a) to be lower than the amount specified in paragraphs 15(e), 17(a) or 17(e) of these guidelines, as applicable to the investment firm group.

Questions for consultation

Q7. Do you consider the above criteria to be relevant for granting the derogation pursuant to Art. 8(4) IFR? If not, please provide a rationale.

Q8. Are there other criteria that should be considered for the purposes of granting the derogation pursuant to Art. 8(4) IFR? If yes, please provide a rationale.

Q9. Do you agree with the provided elaborations on the definitions of “notional own funds” and “satisfactory level of prudence”? If not, please provide a rationale.

Q10. 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 case where such goodwill, if considered in own funds, would lead to breach the minimum requirements determined under 8(4) IFR). Do you agree with this potential additional criterion? If no, please provide a rationale.

4.6 Information to be provided

25. For the purpose of the assessment referred to in sections 4.3 and 4.4, competent authorities should obtain all relevant information, including:
- (a) description of the group activities;
 - (b) the up-to-date group structure of the investment firm group;
 - (c) the up-to-date overview of the intra-group transferring 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 19 of these guidelines;
 - (e) the calculation of the actual own funds available at the level of each parent 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 in a Member State in the group in accordance with Article 8, paragraph 3 of that Regulation;
 - (g) the calculation of the ratio referred to in paragraph 17(a) of these guidelines;
 - (h) a statement detailing the fulfilment of the conditions set out in sections 4.3 and 4.4 of these guidelines;
 - (i) evidence that the book value of each parent undertaking in a subsidiary reflects fairly the valuation assigned by the parent undertaking to that subsidiary. When 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 the materiality should be assessed taking into account both the size and the risk of the subsidiaries within the investment firm group.
26. When the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company has requested the authorisation to derogate according to Article 8, paragraph 4 of Regulation (EU) 2019/2033, for the purpose of the assessment referred to in Section 4.5, in addition to the information enlisted in paragraph 25 of these guidelines, the competent authority should obtain all relevant information, including:
- a. the calculation of the notional own funds requirements that ensure a satisfactory level of prudence for each third countries subsidiary undertakings, when the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company has requested the derogation according to Article 8, paragraph 4 of Regulation (EU) 2019/2033 and has subsidiary undertakings located in third countries;
 - b. a statement detailing the fulfilment of the conditions set out in Section 4.5.
27. When section 4.2 is applicable to the investment firm group, competent authorities may limit the information requests to those listed under letters a), b), d), e) and f) of paragraph 25.
28. For the purpose of the assessment referred to in sections 4.3 and 4.4, and when applicable sections 4.2 and 4.5, competent authorities should use all relevant available information,

including: regulatory reporting, accounting and financial reporting, internal investment firm's accounts, ICARAP conclusions, the investment firm's wind-down plans.

29. Granting, amending and withdrawing the authorisation

30. The Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company should inform the competent authority if there have been material changes, since an authorisation is granted on the basis of Article 8(1) or (4) of Regulation (EU) 2033/2019, in the circumstances of the group's structure or activities which would concern the criteria of these guidelines.
31. When the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company does not fulfil anymore the criteria set out in sections 4.3 or 4.4, or when the competent authority considers necessary that the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company applies the requirements set out in Article 7 of Regulation (EU) 2033/2019, competent authorities should notify the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company of its decision to withdraw the authorisation based on Article 8(1) or (4) of that Regulation (EU).
32. When the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company has obtained two separate exemptions pursuant to Article 8, paragraph 1, and paragraph 4 of Regulation (EU) 2019/2033, respectively, the withdrawal of the derogation issued pursuant to Article 8, paragraph 4 of that Regulation should not automatically result in the withdrawal of the derogation issued pursuant to Article 8, paragraph 1 of that Regulation.
33. When the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company has obtained two separate exemptions pursuant to Article 8, paragraph 1, and paragraph 4 of Regulation (EU) 2019/2033, respectively, the withdrawal of the derogation issued pursuant to Article 8, paragraph 1 of that Regulation should result in the investment firm group applying Article 7 of that Regulation.
34. When the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company has obtained a single derogation covering both Article 8, paragraph 1, and paragraph 4 of Regulation (EU) 2019/2033, the withdrawal of the derogation issued pursuant to either Article 8, paragraph 1, or paragraph 4 of that Regulation should result in the investment firm group applying Article 7 of that Regulation.
35. When the investment firm group is no longer meeting the criteria of section 4.2 of these guidelines, the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company should inform immediately the competent authority. The competent authority should assess if the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company meets the criteria of these guidelines including, if necessary, gathering

updated information in accordance with Section 4.6. If the Union parent investment firm, the Union parent investment holding company, or the Union parent mixed financial holding company no longer meets the criteria of these guidelines, the competent authority should withdraw the authorisation grounded on Article 8, Paragraph 1 of Regulation (EU) 2019/2033.

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

According to Article 7 of the IFR, investment firm groups shall comply with the capital requirements under IFR on a consolidated basis. However, Article 8 provides for a derogation from the application of the 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 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 a 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 jurisdiction 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 the 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 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, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Croatia, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, Slovakia. In Belgium, data were received from two different competent authorities.

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

However, IFR does not provide harmonised conditions on what constitutes a sufficiently simple group structure nor 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 unlevel 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 specified in these guidelines.

B. Baseline scenario

Out of the 28 NCAs participating in the data collection, 9 NCAs have in place criteria to assess the simplicity of the group structure and/or the significance of the risk posed to the 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 are the risk to clients and risk to market relative to the regulatory capital and how big are the K-factor at individual level 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 level of controls 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 if none of the subsidiaries is authorised to carry out MiFID activity (3) or (6) or hold client money.
- **Other criteria:** These include criteria assessing if there are no “empty boxes” structures (i.e. companies in countries where the group does not carry out economic activities), if investment firms in the group are not subject to enforcement proceedings and if subsidiaries comply with transparency requirements.

Moreover, 2 NCAs have in place criteria when taking a decision on the reduction of the own funds according to Art. 8(4) of the IFR. These include checking if the own funds under Art. 8(4) of the IFR are not disproportionate relative to the ones under Art. 8(3) of the IFR. Additionally, on ensuring a satisfactory level of prudence for the notional own funds requirements when 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 is subject to 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 are to establish common universal 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 EU.

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

Generally, these draft guidelines aim to create a level playing field, promote convergence of supervisory practises and enhance comparability of own funds requirements across the EU. Overall, these draft 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 proposes a number of qualitative and quantitative criteria to assess if 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 practises 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 9 NCAs for which a derogation according to Article 8 of the IFR was granted (24), refused (7), or is being processed (2). Moreover, some additional information was received for 10 investment firm groups for which a derogation under Article 8(4) of the IFR was granted (5), refused (2) or is being processed (3).

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
IE	0	1	2	3	0	0	2	1

Country	Article 8				Of which: Article 8(4)			
	Granted	Refused	Being processed	Total	Granted	Refused	Being processed	Not submitted
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 to consider an investment firm group as sufficiently simple and not posing a significant risk to clients and to 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 sufficiently simple and as not posing a significant risk to clients and to market. A precondition is for the investment firm group to only consists of Class 3 firms. Once this is met, additional conditions are set on the group structure and the ratio referred to in paragraph 17(a).

According to the data received, out of the 33 investment firm groups, 7 consists 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 2 levels of ownership and a maximum of 4 undertakings in the group. None of these groups consists of undertakings in third countries. Finally, only one investment firm group provided information on the ratio referred to in paragraph 17(a), which is above the 85% proposed in the guidelines.

Criteria to assess if an investment firm group is sufficiently simple

For groups which fail any of the conditions under section 4.2, the guidelines proposes a set of quantitative criteria to assess if 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 6 entities are part of investment firm groups for which a derogation was granted, while the median number is somewhat lower with 3 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 7, with the median at 6 entities. The guidelines set the threshold for the number of entities to 6 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 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, 7 investment firm groups have more than 6 entities in their group. However, the guidelines allow for a derogation from the number of entities when the competent authority assesses 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 2 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 2 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 5. For investment firm groups for which a derogation was not granted, the average number of levels is 3, with the median and maximum level standing also at 3. The guidelines set the threshold for the number of levels to 3, which is equal to the average number of levels for investment firm groups with a derogation (2) plus one additional level in order not to put in a disadvantage the groups which have as an 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 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, 3 investment firm groups have more than 3 levels in their group. Similarly with the number of entities, the guidelines allow for a derogation from the number of levels when (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 2 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 shows 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), (d) of the IFR. Hence, the criteria will not affect the authorisation for the 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 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 total 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 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.

Notes: 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 jurisdictions. 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 to assess if an investment firm group does not pose significant risks to the clients or to the market

For groups which fail any of the conditions under section 4.2, the guidelines proposes a set of criteria to assess if 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 requirement 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 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 of 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 total are not shown for confidentiality reasons.

The guidelines set the ratio to be equal to or higher than 85% if they comply with the condition under section 4.2 or 90% to comply with the conditions under section 4.3. This ratio is increased up to 100% in case the investment firm group derogates from some of the default criteria. Therefore, all investment firm groups reporting the data for the ratio will satisfy the criteria.

Criteria on retail clients, clearing member and centralised hedging

According to Table 7 none of the investment firm groups that was granted the derogation under Article 8 of the IFR had issued debt/equity instruments to retail clients, has a clearing member in the group or had centralised hedging of positions subject to K-NPR. Among the ones that were refused the derogation, 2 issued debt/equity to retail clients, but none had a clearing member in the group nor 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, allows 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 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.

Notes: Some investment firm groups did not report the requested data.

Derogation under Article 8(4) of the IFR

Table 8 shows the ratio between the own funds requirement 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 be 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 of 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 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 of 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 their 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 costs. 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 ratio lower than 85% if the conditions under section 4.2 are met or 90% if the conditions under section 4.3 and 4.4 are met (a higher capital ratio is used if some condition are not met).

Overall impact assessment

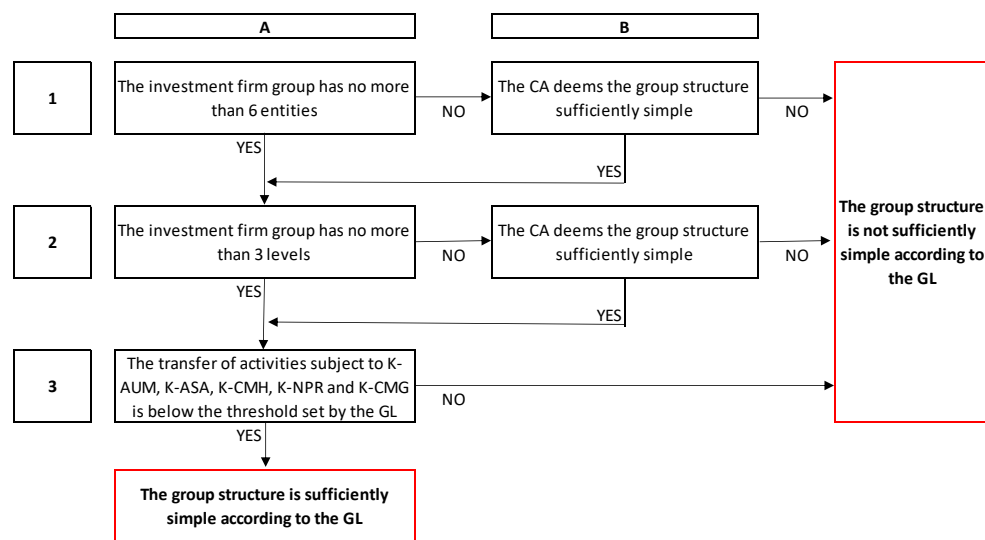
Most of the investment firm groups which provided sufficient information in the EBA GCT data collection to assess the criteria in the guidelines and have been granted the derogation under Article 8 of the IFR are expected to remain eligible for the derogation if the guidelines enter into force. On the other hand, the data suggests that some investment firm groups which have been granted the derogation under Article 8(4) may no longer be eligible for such 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. On the other hand, the benefits of harmonising supervisory practices across the EU are considered important and outweigh the limited costs.



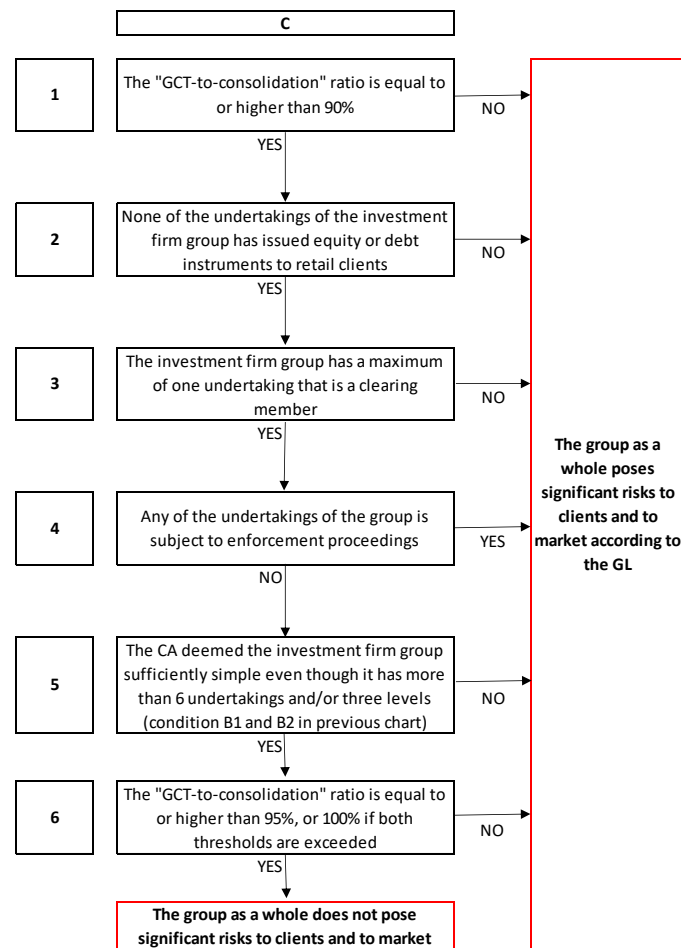
5.2 Annex I – Structure of the guidelines

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

GROUP STRUCTURE SUFFICIENTLY SIMPLE



SIGNIFICANT RISKS TO CLIENTS AND TO MARKET



5.3 Overview of questions for consultation

Q1. 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.

Q2. 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.

Q3. Are there other criteria that should be considered for the assessment of the simplicity of the group structure of an investment firm group? If yes, please provide a rationale.

Q4. Do you consider the above criteria to be relevant for the assessment of the significance of the risk to clients or to market? If not, please provide a rationale.

Q5. 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 paragraph 17(a) to 85%? If yes, please provide a rationale.

Q6. Are there other criteria that should be considered for the assessment of the significance of the risk to clients or to market? If yes, please provide a rationale.

Q7. Do you consider the above criteria to be relevant for granting the derogation pursuant to Art. 8(4) the IFR? If not, please provide a rationale.

Q8. Are there other criteria that should be considered for the purposes of granting the derogation pursuant to Art. 8(4) the IFR? If yes, please provide a rationale.

Q9. Do you agree with the provided elaborations on the definitions of “notional own funds” and “satisfactory level of prudence”? If not, please provide a rationale.

Q10. 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 case where such goodwill, if considered in own funds, would lead to breach the minimum requirements determined under 8(4) the IFR). Do you agree with this potential additional criterion? If no, please provide a rationale.