

II

(Non-legislative acts)

DECISIONS

DECISION (EU) 2019/1376 OF THE EUROPEAN CENTRAL BANK**of 23 July 2019****on delegation of the power to adopt decisions on passporting, acquisition of qualifying holdings and withdrawal of authorisations of credit institutions (ECB/2019/23)**

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ⁽¹⁾, and in particular Article 4(1)(a), (b), (c) and (d), and Articles 4(3), 6(4), 14(3), 14(5), 15(3), and 17(1) thereof,

Having regard to Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) ⁽²⁾, and in particular Article 4 thereof,

Whereas:

- (1) Within the framework of Article 6 of Regulation (EU) No 1024/2013, the European Central Bank (ECB) carries out the exclusive task to supervise credit institutions with the aim to ensure a consistent application of supervisory standards, to foster financial stability and to ensure a level playing field.
- (2) Pursuant to Article 4(1)(a) of Regulation (EU) No 1024/2013, the ECB is exclusively competent to withdraw authorisations of credit institutions established in the participating Member States.
- (3) Pursuant to Article 4(1)(c) of Regulation (EU) No 1024/2013, the ECB is exclusively competent to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution.
- (4) Pursuant to Article 4(1)(b) of Regulation (EU) No 1024/2013, the ECB is exclusively competent to carry out, for prudential supervisory purposes, the tasks which the competent authority of the home Member State has under the relevant Union law for significant credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non-participating Member State. In addition, under Article 17(1) of Regulation (EU) No 1024/2013 and under Article 11(1) and (3) of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽³⁾, any significant supervised entity wishing to establish a branch within the territory of another participating Member State must notify the national competent authority of the participating Member State where the significant supervised entity has its head office, of its intention. Under Article 11(3) of Regulation (EU) No 468/2014 (ECB/2014/17), where no decision to the contrary is taken by the ECB within two months of receipt of that notification, the branch may be established and commence its activities.

⁽¹⁾ OJ L 287, 29.10.2013, p. 63.

⁽²⁾ OJ L 141, 1.6.2017, p. 14.

⁽³⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

- (5) Pursuant to Article 4(1)(b) and (d) of Regulation (EU) No 1024/2013 in conjunction with Article 34(1)(d) of Directive 2013/36/EU of the European Parliament and of the Council ⁽⁴⁾, the ECB is exclusively competent to carry out the task, which the competent authority of the home Member State has under relevant Union law, of granting consent to a (significant) credit institution that has declared its intention to jointly and severally guarantee the commitments entered into by its subsidiary financial institution, which intends to carry out activities listed in Annex I of Directive 2013/36/EU in a participating Member State or in another Member State, either by establishing a branch or by providing services.
- (6) The ECB, as the competent authority, is required to adopt a substantial number of decisions on passporting, acquisitions of qualifying holdings and withdrawals of authorisations of credit institutions each year. To facilitate the decision-making process, a delegation decision is necessary in relation to the adoption of such decisions which the ECB has to take on a regular basis and which entail only limited discretion. The Court of Justice of the European Union has recognised delegation of authority to be necessary to enable an institution required to adopt a considerable number of decisions to perform its duties. Similarly, it has recognised the need to ensure that decision-making bodies are able to function as a principle inherent to all institutional systems ⁽⁵⁾.
- (7) Delegation of decision-making powers should be limited and proportionate, and the scope of the delegation should be clearly defined.
- (8) Decision (EU) 2017/933 (ECB/2016/40) specifies the procedure to be followed for adopting delegation decisions concerning supervision and the persons who may be delegated decision-making powers. That Decision does not affect the ECB's exercise of its supervisory tasks and is without prejudice to the Supervisory Board's competence to propose complete draft decisions to the Governing Council.
- (9) Where the criteria for the adoption of a delegated decision, as laid down in this Decision, are not met, decisions should be adopted in accordance with the non-objection procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and further specified in Article 13g of Decision ECB/2004/2 ⁽⁶⁾. Furthermore, the non-objection procedure should also be used if the heads of work units have concerns regarding the fulfilment of assessment criteria due to the complexity of the assessment.
- (10) ECB supervisory decisions may be subject to administrative review pursuant to Article 24 of Regulation (EU) No 1024/2013 and as further specified in Decision ECB/2014/16 ⁽⁷⁾. In the event of such administrative review, the Supervisory Board should take into account the opinion of the Administrative Board of Review and submit a new draft decision to the Governing Council for adoption under the non-objection procedure,

HAS ADOPTED THIS DECISION:

Article 1

Definitions

For the purposes of this Decision, the following definitions shall apply:

- (1) 'passporting decision' means a decision of the ECB on the establishment of a branch by a significant supervised entity in a participating Member State or in another Member State based on national law transposing Article 35(3) of Directive 2013/36/EU, in conjunction with Article 17(1) of Regulation (EU) No 1024/2013 and Articles 11 and 17 of Regulation (EU) No 468/2014 (ECB/2014/17).

For the purposes of this Decision, a passporting decision also includes a decision of the ECB, in accordance with national law transposing Article 34(1)(d) of Directive 2013/36/EU, which grants consent to the declaration of a parent undertaking or undertakings to jointly and severally guarantee the commitments entered into by their subsidiary financial institution that intends to carry out activities listed in Annex I of Directive 2013/36/EU in a participating Member State or in another Member State, either by establishing a branch or by providing services;

⁽⁴⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁽⁵⁾ Judgment of the Court of Justice of 23 September 1986, *AKZO Chemie v Commission*, 5/85, ECLI:EU:C:1986:328, paragraph 37; and judgment of the Court of Justice of 26 May 2005, *Carmine Salvatore Tralli v ECB*, C-301/02 P, ECLI:EU:C:2005:306, paragraph 59.

⁽⁶⁾ Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

⁽⁷⁾ Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ L 175, 14.6.2014, p. 47).

- (2) 'branch' means a branch as defined in point (17) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council ⁽⁸⁾;
- (3) 'qualifying holding decision' means a decision of the ECB on the acquisition of qualifying holdings in a supervised entity (target entity) pursuant to national law transposing Article 22 of Directive 2013/36/EU in conjunction with Article 15 of Regulation (EU) No 1024/2013;
- (4) 'credit institution' means a credit institution as defined in point 1 of Article 4(1) of Regulation (EU) No 575/2013;
- (5) 'withdrawal decision' means a decision of the ECB on the withdrawal of the authorisation as credit institution based on national law transposing Article 18 of Directive 2013/36/EU in conjunction with Article 14(5) of Regulation (EU) No 1024/2013;
- (6) 'delegation decision' and 'delegated decision' have the same meaning as in points (2) and (4) of Article 3 of Decision (EU) 2017/933 (ECB/2016/40), respectively;
- (7) 'heads of work units' means the heads of work units of the ECB to whom the power to adopt passporting, qualifying holding and withdrawal decisions is delegated;
- (8) 'non-objection procedure' means the procedure set out in Article 26(8) of Regulation (EU) No 1024/2013, and further specified in Article 13g of Decision ECB/2004/2;
- (9) 'negative decision' means a decision that does not or does not fully grant the authorisation as requested by the applicant, including negative decisions pursuant to Article 34(1)(d) and Article 35(3) of Directive 2013/36/EU. A decision with ancillary provisions such as conditions or obligations shall be considered as a negative decision unless such ancillary provisions: (a) ensure that the applicant fulfils the relevant legal requirements referred to in Articles 4(2) and 5(2) and Article 6(3) and (4) and have been agreed in writing; or (b) merely restate one or more of the existing requirements that the applicant has to comply with pursuant to provisions referred to in Articles 4(2) and 5(2) and Article 6(3) and (4) or require information on the fulfilment of one or more of such requirements;
- (10) 'significant supervised entity' means a significant supervised entity as defined in point (16) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17);
- (11) 'supervised entity' means a supervised entity as defined in point (20) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17);
- (12) 'group' means a group of undertakings which consists of a parent undertaking and its subsidiaries, or undertakings linked to each other by a relationship within the meaning of Article 22 of Directive 2013/34/EU of the European Parliament and of the Council ⁽⁹⁾, including any sub-group thereof;
- (13) 'national competent authority' means a national competent authority as defined in point (2) of Article 2 of Regulation (EU) No 1024/2013;
- (14) 'ECB guide' means a document, adopted by the Governing Council upon a proposal from the Supervisory Board, which is published on the ECB's website and which gives guidance on the ECB's understanding of legal requirements.

Article 2

Subject matter and scope

1. This Decision specifies the criteria for the delegation of decision-making powers to the heads of work units of the ECB for the adoption of passporting, qualifying holding and withdrawal decisions.
2. The delegation of decision-making powers is without prejudice to the supervisory assessment to be performed for the purposes of taking passporting, qualifying holding and withdrawal decisions.

⁽⁸⁾ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁽⁹⁾ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

*Article 3***Delegation of passporting, qualifying holding and withdrawal decisions**

1. In accordance with Article 4 of Decision (EU) 2017/933 (ECB/2016/40), the Governing Council hereby delegates to the heads of work units of the ECB, nominated by the Executive Board in accordance with Article 5 of that Decision, the power to adopt passporting, qualifying holding and withdrawal decisions.
2. Passporting, qualifying holding and withdrawal decisions shall be adopted by means of a delegated decision if the relevant criteria for the adoption of delegated decisions, set out in Articles 4, 5 and 6, are fulfilled.
3. Passporting, qualifying holding and withdrawal decisions shall not be adopted by means of a delegated decision if the complexity of the assessment requires that they are adopted under the non-objection procedure.
4. Any delegation of decision-making powers shall apply both to the adoption of supervisory decisions and to the approval of positive assessments by the ECB where a supervisory decision is not required.
5. Negative passporting, qualifying holding and withdrawal decisions shall not be adopted by means of a delegated decision.
6. Where a passporting, qualifying holding or withdrawal decision may not be adopted by means of a delegated decision, it shall be adopted in accordance with the non-objection procedure.

*Article 4***Criteria for the adoption of delegated qualifying holding decisions**

1. Qualifying holding decisions shall be taken by means of a delegated decision if any of the following criteria is met:
 - (a) the acquisition of a qualifying holding is the result of the addition or removal of an intermediate layer in the acquirer's group structure;
 - (b) the acquisition of a qualifying holding is the result of a shift of ownership in the target entity from one holding entity to another holding entity within the same group;
 - (c) the acquisition of a qualifying holding is the result of the increase of an existing qualifying holding, unless there have been material changes since the last assessment that affect at least one of the assessment criteria or the acquirer acquires control over the target entity.
2. The assessment of acquisitions of qualifying holdings shall be carried out in accordance with Article 23 of Directive 2013/36/EU as transposed into national law, also taking into consideration any applicable ECB guides or similar acts as may be issued by the ECB, as well as Guidelines of the European Supervisory Authorities ⁽¹⁰⁾.

*Article 5***Criteria for the adoption of delegated withdrawal decisions**

1. Withdrawal decisions may be taken by means of a delegated decision if all of the following criteria are met:
 - (a) the decision is made on request of the supervised entity or due to a merger, which results in the supervised entity ceasing to exist;
 - (b) no deposits from the public remain with the supervised entity after the withdrawal has become effective;
 - (c) the withdrawal is linked to a reorganisation within a group.
2. The assessment of withdrawal of authorisations shall be carried out in accordance with Article 18 of Directive 2013/36/EU as transposed into national law, also taking into consideration any applicable ECB guides or similar acts as may be issued by the ECB.

⁽¹⁰⁾ European Banking Authority, European Insurance and Occupational Pensions Authority, and European Securities and Markets Authority. Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, JC/GL/2016/01.

*Article 6***Criteria for the adoption of delegated passporting decisions**

1. Passporting decisions pursuant to Article 11 and Article 17(1) of Regulation (EU) No 468/2014 (ECB/2014/17) on the establishment of a branch by a significant supervised entity may be taken by means of a delegated decision if the total assets of the branch as estimated in the programme of operations do not exceed 10 % of the total assets of the significant supervised entity.
2. Passporting decisions pursuant to national law transposing Article 34(1)(d) of Directive 2013/36/EU which grant consent to the declaration of a parent undertaking or undertakings to jointly and severally guarantee the commitments entered into by their subsidiary financial institution may be taken by means of a delegated decision if the projected liability of the parent undertaking under the guarantee, pursuant to the business plan of activities conducted under the passporting decision, does not exceed 10 % of the total assets of the parent undertaking at individual level.
3. The assessment of requests for passporting decisions pursuant to Article 11 and Article 17(1) of Regulation (EU) No 468/2014 (ECB/2014/17) shall be carried out in accordance with the relevant provisions of the national law transposing Article 35(3) of Directive 2013/36/EU, also taking into consideration any applicable ECB guides or similar acts as may be issued by the ECB.
4. The assessment of requests for passporting decisions pursuant to national law transposing Article 34(1)(d) of Directive 2013/36/EU shall be carried out in accordance with the relevant provisions of the national law transposing Articles 34, 35 and 39 of Directive 2013/36/EU, also taking into consideration any applicable ECB guides or similar acts as may be issued by the ECB.

*Article 7***Transitional provision**

This Decision shall not apply in cases where a draft proposal for a qualifying holding or withdrawal decision was submitted by the national competent authority to the ECB, or where the notification regarding the significant supervised entity's intention to establish a branch or to guarantee the commitments entered into by their subsidiary financial institution was submitted by the national competent authority to the ECB prior to the entry into force of this Decision.

*Article 8***Entry into force**

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Frankfurt am Main, 23 July 2019.

The President of the ECB

Mario DRAGHI
