CLIFFORD

CHANCE

CRD6: NEW EU RULES FOR BANK M&A AND REORGANISATIONS

JUNE 2024

CONTENTS

CRD6: NEW EU RULES FOR BANK M&A AND REORGANISATIONS

The new EU Capital Requirements Directive (CRD6) will impose additional requirements on EU banks and their holding companies to pre-notify and, in some cases, pre-clear certain M&A transactions and reorganisations with their own supervisor. These new rules will apply to acquisitions and disposals of material holdings in both financial and non-financial sector entities, material transfers of assets or liabilities, and mergers and divisions. Member States will be required to apply the new rules from January 2026.

CRD6 amends the provisions of the Capital Requirements Directive (CRD) governing the authorisation and supervision of EU banks. CRD6 is being adopted in parallel with a new EU regulation (CRR3) which amends the Capital Requirements Regulation (CRR) to implement the final elements of the Basel 3 framework for the prudential regulation of banks.

When will the new rules for bank M&A and reorganisations take effect?

CRD6 has now been **published** in the Official Journal and will enter into force on 9 July 2024.

Member States will be required to transpose the new requirements for bank M&A and reorganisations into their national legislation by 10 January 2026 (18 months after entry into force) and to apply the new requirements from 11 January 2026 (the day after the expiry of the transposition period). CRD6 does not include provisions providing relief from the new requirements for transactions agreed before - but to be completed after - the new rules take effect.

The European Banking Authority (EBA) will be tasked with developing draft regulatory technical standards (RTS) and implementing technical standards (ITS) specifying how aspects of the pre-clearance process will work. The EBA is only required to deliver these to the Commission by 10 July 2026 (24 months after CRD6 enters into force) and the Commission will still then have to adopt (and may amend) the draft standards, meaning that the final details of the pre-clearance process may not be available until well after the new rules begin to apply.

Key issues

- New supervisory pre-notification and pre-clearance process for some M&A transactions and reorganisations
- Requirements will apply to EU banks and certain EU holding companies of EU banks
- Pre-notification will apply to:
  - Acquisitions and disposals of material holdings in financial and non-financial sector entities
  - Material transfers of assets or liabilities
  - Mergers and divisions
- Pre-clearance only applies to acquisitions of material holdings and mergers and divisions
- Only limited exemptions available
- Member States to apply new rules from January 2026
- No relief for transactions agreed before rules begin to apply

What is the current EU supervisory framework for bank M&A and reorganisations?

Currently, CRD obliges Member States to require anyone acquiring a 'qualifying holding' in an EU bank to notify the bank's supervisor in advance. The acquirer must not complete the acquisition unless the supervisor has approved the transaction or an assessment period has expired without the supervisor objecting to the transaction. A qualifying holding is a direct or indirect holding of 10% or more of the capital or voting rights of the bank. Similar requirements apply where an acquirer increases a qualifying holding in an EU bank through specified thresholds and holders of qualifying holdings in an EU bank must also notify the bank's supervisor before disposing of their holding (or reducing it through specified thresholds). Additional notifications or clearances may be required where the target group includes other entities subject to EU supervisory frameworks, such as investment firms or insurance companies.

An EU entity that becomes a financial holding company or a mixed financial holding company of an EU bank as a result of an M&A transaction or reorganisation may also require specific prior supervisory approval under CRD and non-EU acquirers of EU banks also must consider the impact of the CRD rules that require them to set up an EU 'intermediate parent undertaking' for their EU bank and investment firm subsidiaries in some cases.

CRR also restricts M&A activity by requiring the consolidation of certain acquired entities or the deduction of certain non-consolidated holdings in financial and non-financial sector entities, including requirements that apply where a bank holds qualifying holdings exceeding 15% of its 'eligible capital' in certain entities outside the financial sector. CRR3 makes some changes to the definitions of financial holding company, financial sector entity, financial institution and other entities to be included in the scope of prudential consolidation which may affect the application of these rules (and, indirectly, the scope of application of the new CRD6 rules on M&A and reorganisations).

In addition, bank M&A is subject to the same EU merger control and State aid framework as M&A involving other types of target entities, as well as the new EU framework regulating M&A transactions with EU targets potentially affected by foreign subsidies.

However, the current EU regime does not require EU banks or their EU holding companies to notify their own supervisor when the bank or holding company intends to enter into a material acquisition or disposal or merger or division and does not give a bank's supervisors specific powers to intervene in those transactions where they raise prudential, money laundering or terrorist financing concerns. While the national regulatory regimes in some Member States do include notification requirements and intervention powers of this kind, the national regimes in other Member States do not include corresponding requirements or powers.

These differences in national regulatory regimes are particularly significant within the Banking Union. The European Central Bank (ECB) has the exclusive competence to approve the acquisition of qualifying holdings in all banks authorised in Member States participating in Banking Union and to approve the authorisation of any new bank in those Member States (including new banks resulting from mergers or divisions). The ECB also has, in relation to the banks that it directly supervises within the Banking Union, the exclusive competence directly to exercise any additional powers to approve M&A transactions and reorganisations conferred by national law even though not specifically envisaged by the EU framework (see ECB webpage on national powers

exercised by the ECB). However, the disparities between these additional powers under national regimes mean that the ECB's powers differ depending on where a bank or holding company is established within the Banking Union.

Which transactions will now require pre-notification?

The new rules will require EU banks and EU holding companies of EU banks within the scope of the approval requirements under CRD (institutions) to notify the relevant supervisor in advance of the following transactions:

- **Acquisitions and disposals of material holdings**. Direct or indirect acquisitions or disposals by the institution of a 'material holding' in a financial or non-financial sector entity.

- **Material transfers of assets or liabilities.** 'Material transfers' of assets or liabilities by or to an institution executed through a sale or other type of operation.

- **Mergers and divisions.** Domestic or cross-border mergers or divisions involving an institution (similar to the types of transaction covered by the provisions of the 2017 Consolidated Company Law Directive on mergers and divisions of public limited liability companies and cross-border mergers and divisions), except where the merger or division results from the application of the Bank Recovery and Resolution Directive (BRRD).

For these purposes:

- **Material holding.** A holding in an entity will be material if it amounts to 15% or more of the 'eligible capital' of the institution acquiring or disposing of the holding (regardless of the percentage that the holding represents of the subject entity's capital). If the institution is a bank this test is applied both at the individual level and on the basis of the consolidated situation of the parent institution in the EU. If the institution is a financial holding company or mixed financial holding company, the test is applied on the basis of its consolidated situation.

- **Material transfer.** A transfer of assets or liabilities will be material if it represents 10% or more of the total assets or liabilities of the institution (or 15% or more of the institution's total assets or liabilities for intragroup transactions). For financial holding companies and mixed financial holding companies, this test is applied on the basis of their consolidated situation. Transfers of non-performing assets, transfers of assets for the purpose of being included in a cover pool, transfers of assets to be securitised, and transfers in the context of the use of resolution tools under the BRRD will be excluded in calculating whether a transfer is material.

CRD6 does not include any rules providing for the aggregation of transactions when determining whether a transaction is regarded as material.

There are no exemptions from the pre-notification requirement for acquisitions or disposals of holdings or transfers of assets or liabilities in the ordinary course of business, resulting from the fulfilment of underwriting commitments or relating to shares or assets held on trading book. There are also no exemptions from the pre-notification requirement for intragroup transactions.

The pre-notification requirement for material transfers of assets or liabilities is not expressed to be limited to transfers of businesses or pools of assets or liabilities and may apply to any large payment or other transfer by or to the institution (including dividends or other distributions, fund raisings, loans, etc).

Overview of the new supervisory requirements

	Materiality threshold	Pre-notification	Pre-clearance	Main exemptions
Acquisitions of material holdings in financial or non-financial sector entities	15% of eligible capital	✓	✓ (Approval or tacit approval required)	Pre-clearance is not required for acquisitions conducted between: • 0% risk-weighted group companies; • members of qualifying institutional protection schemes.
Disposals of material holdings in financial or non-financial sector entities	15% of eligible capital	✓	✗	
Material transfers of assets or liabilities	10% of total assets or liabilities (15% for intragroup transactions)	✓	✗	Transfers of non-performing assets, transfers to a cover pool and securitisation transfers.
Mergers and divisions	None	✓	✓ (Approval or, for intragroup transactions, tacit approval required)	Pre-clearance is not required for: • mergers between institutions in the same group (including banks permanently affiliated to a central body and supervised as a group); and • mergers and divisions requiring the authorisation of an EU bank or the approval of an EU holding company under CRD.

Which supervisor is the relevant supervisor for the purposes of notifications?

In the case of acquisitions and disposals of material holdings or material transfers of assets or liabilities, the institution will have to notify its own supervisor (and/or, in relation to some acquisitions of material holdings, the consolidating supervisor of its group). In the case of mergers, the institution will have to notify the competent authorities which will be responsible for supervising the entities resulting from the transaction. In the case of divisions, the institution carrying out the transaction will have to notify its own supervisor.

When must the notification be made?

The institution will have to notify the relevant supervisor in advance of the proposed transaction. However, in relation to mergers and divisions, the institution will have to notify the relevant supervisor after the adoption of the draft terms of, but before completion of, the proposed merger or division.

The RTS to be drafted by the EBA will specify minimum requirements for the information to be included in a notification. Notifications of acquisitions or disposals of material holdings will also have to specify the size of the material holding in question.

The relevant supervisor must acknowledge receipt of a notification (or the provision of additional information required in relation to any prior assessment) within ten working days.

Which transactions will require pre-clearance?

Acquisitions of material holdings and mergers and divisions that are subject to the pre-notification requirement will also be subject to prior assessment by the relevant supervisor or supervisors notified of the transaction under the new rules. However, the requirement for prior assessment will not apply to:

- an acquisition of a material holding conducted between members of the same group subject to the 0% risk-weighting regime under CRR or between members of an institutional protection scheme qualifying under CRR;
- mergers between institutions in the same group (including banks permanently affiliated to a central body and supervised as a group); or
- mergers or divisions requiring the authorisation of an EU bank or the approval of an EU financial holding company or mixed financial holding company under CRD.

Disposals of material holdings and material transfers of assets or liabilities will not be subject to the new prior assessment requirements (although supervisors may have other powers to intervene in such transactions).

What is the process for pre-clearance of transactions?

The assessment period for acquisitions of material holdings will be 60 working days from the date of the written acknowledgement of receipt of the notification and from the receipt of all documents. In relation to a mergers or division, the relevant supervisor will notify the institutions concerned of the assessment period which will be limited to 60 working days from the date of the written acknowledgement of receipt of the notification and from the receipt of all documents in the case of assessments of mergers or divisions involving institutions in the same group.

The assessment period may be suspended for up to 20 working days if the relevant supervisor requires additional information. That suspension may be extended up to a maximum of 30 working days if the acquired material holding is in - or one of the parties to a merger or division is - an entity situated in or subject to the regulatory framework of a third country or if the relevant supervisor needs to liaise with EU anti-money laundering or counter-terrorist financing authorities to make its assessment.

The assessment period for a proposed acquisition of a material holding will be suspended until the decision is taken on any concurrent application for approval of an EU financial holding company or mixed financial holding company under CRD. If the material holding being acquired is a qualifying holding in an EU bank subject to the existing assessment requirements under CRD, the period for supervisors to carry out both assessments will expire only when the later of the relevant assessment periods expires.

When making their assessment, supervisors will be required to assess the sound and prudent management of the acquirer of a material holding or of the institutions party to the merger and division after the transaction and in particular of the risks to which they

are or might be exposed by reference to whether they will be able to continue to comply with the applicable EU prudential requirements and whether there are reasonable grounds to suspect that the transaction involves or increases the risk of money laundering or terrorist financing. In relation to mergers and divisions, the supervisor will also have to consider the reputation and financial soundness of the institutions party to the transaction and whether the implementation plan for the transaction is realistic and sound from a prudential perspective.

Where two or more acquirers have notified proposed acquisitions of material holdings in the same entity, supervisors will have to treat the competing acquirers in a non-discriminatory manner.

The supervisor will be required to consult with other EU supervisors, including anti-money laundering and counter-terrorist financing authorities, and supervisors will have to share information and, where more than one supervisor is assessing the transaction, seek to coordinate their assessments. The relevant supervisor may rely on a negative assessment from EU anti-money laundering and counter-terrorist financing authorities as a reasonable basis for refusing its approval for a transaction.

Where the transaction is subject to prior assessment, the institution may be subject to penalties or other supervisory measures if it completes the transaction before the supervisor has approved the transaction or (for acquisitions of material holdings and for mergers or divisions involving institutions in the same group) before the assessment period has expired without the supervisor objecting to the transaction ('tacit approval').

Will the new rules apply to large investment firms?

An EU entity will be treated as an EU bank for the purposes of the new rules if it is classified as a credit institution under CRR. This will mean that some EU investment firms will be subject to the new rules, even though they do not take deposits, where they meet the size and other criteria under the extended definition of 'credit institution' in CRR (as amended by CRR3).

Are there changes to the existing rules regulating the acquisition of qualifying holdings?

CRD6 will extend the time within which supervisors assessing an acquisition of a qualifying holding in an EU bank must acknowledge receipt of information (from two working days to ten working days). In addition, as already mentioned, if a material holding being acquired is a qualifying holding in an EU bank subject to the existing assessment requirements under CRD, the period for supervisors to carry out both assessments will expire only when the later of the relevant assessment periods expires.

CRD6 will require supervisors assessing an acquisition to consult EU anti-money laundering and counter-terrorist financing authorities and allow them to rely on a negative assessment from those authorities as a reasonable basis for refusing approval. It will also allow those supervisors to refuse approval where the proposed acquirer is from a non-EU state listed as a high-risk country that with strategic deficiencies in its regime on anti-money laundering and counter-terrorist financing or in a country subject to EU restrictive measures, if they assess that this affects the capacity of the proposed acquirer to have appropriate practices and processes to comply with the requirements of the anti-money laundering and counter-terrorist financing regime.

In addition, CRD6 will task the EBA with drafting RTS to specify a minimum list of information to be provided to supervisors assessing an acquisition of a qualifying holding.

What should EU banks do now?

EU banks planning to engage in M&A transactions or reorganisations that might close after the new rules take effect should ensure that the agreements relating to the transaction include appropriate conditions and that the timetable allows adequate time to obtain clearance where this is required. Banks will also need to consider whether internal policies and procedures should be adopted or amended to ensure that the bank or its holding company or their group companies do not enter into transactions that may inadvertently trigger the new requirements.

CONTACTS

Steve Jacoby
Regional Managing Partner CE
Luxembourg
T: +352 48 50 50 219
E: steve.jacoby@cliffordchance.com

Monica Sah
Partner
London
T: +44 207006 1103
E: monica.sah@cliffordchance.com

María Luisa Alonso
Counsel
Madrid
T: +34 91 590 7541
E: marialuisa.alonso@cliffordchance.com

Marc Benzler
Partner
Frankfurt
T: +49 69 7199 3304
E: marc.benzler@cliffordchance.com

Anna Biała
Counsel
Warsaw
T: +48 22429 9692
E: anna.biala@cliffordchance.com

Diego Ballon Ossio
Partner
London
T: +44 207006 3425
E: diego.ballonossio@cliffordchance.com

Lucio Bonavitacola
Partner
Milan
T: +39 02 8063 4238
E: lucio.bonavitacola@cliffordchance.com

Simon Crown
Partner
London
T: +44 207006 2944
E: simon.crown@cliffordchance.com

Lounia Czupper
Partner
Brussels
T: +32 2 533 5987
E: lounia.czupper@cliffordchance.com

Caroline Dawson
Partner
London
T: +44 207006 4355
E: caroline.dawson@cliffordchance.com

Miloš Felgr
Partner
Prague
T: +420 222 55 5209
E: milos.felgr@cliffordchance.com

Frédérick Lacroix
Partner
Paris
T: +33 1 4405 5241
E: frederick.lacroix@cliffordchance.com

Caroline Meinertz
Partner
London
T: +44 207006 4253
E: caroline.meinertz@cliffordchance.com

Jurgen van der Meer
Partner
Amsterdam
T: +31 20 711 9340
E: jurgen.vandermeer@cliffordchance.com

Chris Bates
Special Counsel
London
T: +44 207006 1041
E: chris.bates@cliffordchance.com

Sara Evans
Senior Associate Knowledge Lawyer
London
T: +44 207006 2557
E: sara.evans@cliffordchance.com

CLIFFORD

CHANCE

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

2404-010853