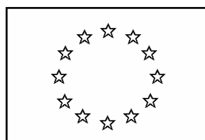

EUROPEAN COMMISSION
INTERNAL MARKET DIRECTORATE GENERAL
FINANCIAL INSTITUTIONS
BANKS & FINANCIAL CONGLOMERATES

Brussels, 18 January 2005

CALL FOR TECHNICAL ADVICE (N0. 1) FROM THE COMMITTEE OF EUROPEAN BANKING SUPERVISORS (CEBS)

Subject: review of Article 16 of Directive 2000/12/EC

1. Background

The informal ECOFIN in Scheveningen on 11 September 2004 considered the issue of cross-border consolidation in the banking sector. As a result of that discussion, the Commission undertook to consider the impact of existing supervisory rules in all the financial services sectoral directives that could impact cross-border consolidation in the EU[1]. The Commission also agreed to examine other possible obstacles to cross-border consolidation across all financial sectors.

As a first step, the Commission last November prepared a document on Cross border mergers and acquisitions in the banking sector. This paper outlined 5 possible options to ensure that Article 16 of directive 2000/12/EC on Qualifying holding in a credit institution does not improperly curb mergers and acquisitions in the EU. This paper was discussed by the Banking Advisory Committee on 24 November 2004. BAC Members and Observers expressed their views on the proposed options. The BAC agreed to look at all options, although some attracted more support than other. There was overall support for the roadmap for further work on Article 16, including the preparation of a call for advice from CEBS, with a focus on the criteria used by national authorities to block the acquisition of a qualifying shareholding when they believe that the acquisition could threaten the "sound and prudent management" of the target institution.

2. Specific call for technical advice

Following discussion in the Banking Advisory Committee, the Commission services wish to seek the technical advice of CEBS on the following points:

1. ***making explicit the criteria which would apply when reviewing "qualifying shareholdings"***: the concept of 'sound and prudent management' is not defined in the Directive, nor is the process that supervisory authorities should follow when they receive applications under Article 16. Obviously, only prudential criteria may be taken into account when reviewing applications. There will be benefits in clarifying the scope of any supervisory review and identifying a set of relevant criteria for the

[1] In the insurance sector, the Commission issued a similar call for advice from CEIOPS on the concept of "fitness and propriety" in December 2004 (see Request number 16).

review. These could include, for example, the core features of the applicant (e.g. is the applicant a regulated entity?) and any potential threat to the stability of risk management processes, or management oversight more generally, in the institution as a result of a merger or acquisition. **What are the relevant criteria that should apply when reviewing qualifying shareholdings?**

2. ***considering mutual recognition arrangements between Member States***: if the competent authorities of one Member State accept a shareholder as eligible to acquire a qualifying shareholding in a bank, it ought to be possible for the competent authorities of all other Member States to accept the decision of that Member State without resorting to a supplementary review of the soundness of the management and shareholders of the acquiring institution. In order for national authorities to be comfortable with such arrangements it will be important that relevant information can be exchanged on request, possibly through adoption or adaptation of MoU's between the relevant authorities. It may also be possible to consider the creation of a category of "qualified shareholder" whose information could be maintained on a database accessible to all relevant national authorities. **Is mutual recognition appropriate here? If so, what steps need to be taken in order for mutual recognition to work effectively in practice?**

3. Further areas on which advice from CEBS is welcome

In addition to the areas listed in the specific call for technical advice, CEBS may wish to provide advice on the other options identified in the BAC document Cross border mergers and acquisitions:

3. ***reviewing the thresholds at which supervisors must be informed of a "qualifying shareholding" and time limits within which they have to respond***: there is merit in reviewing whether an acquisition of 10% or 20% of voting rights, where it is not accompanied by an intention on the part of the acquirer to make a bid for control of the bank, ought to be subject to a notification procedure at all. For the 33% and 50% shareholdings, there may likewise be a case for reviewing whether supervisors need a full three months to reach a well-informed decision on the 'soundness' and 'prudence' of management of the institution in which a "qualifying shareholding" has been taken. Listed companies will in any case of course have notification requirements under existing disclosure rules and the Transparency Directive (when implemented). **Under which circumstances could the thresholds for notification requirements be amended?**

4. ***adding transparency provisions***: where a national authority decides not to agree to allow a prospective shareholder to acquire a "qualifying shareholding" it might be possible to consider requiring the relevant national authority to post a public notification of the refusal and to provide a detailed reasoning for its decision. Such a transparency requirement could impose a useful discipline on the process and remove some of the potential for unsound decision-making. When assessing the desirability of such disclosure requirements, the interests of the prospective acquirer should also be considered: applicants may wish to avoid the public disclosure of their strategic intentions and the negative publicity of a refusal by the supervisory authorities. **How could greater transparency be introduced?**

5. ***making a clear redress mechanism available***: as a supplement to a transparency obligation, shareholders could benefit from an objective redress mechanism that would allow them to challenge negative decisions taken by national authorities with regard to qualifying shareholdings. A clear, explicit and independent redress mechanism would ensure that decisions taken by authorities were duly motivated, and would likewise ensure an element of accountability for decisions that would have the effect of blocking a cross-border merger or acquisition of a bank. Article 33 of Directive 2000/12/EC already foresees a right to apply to the courts. **Is there merit in establishing an out-of-court review or mediation mechanism for applicants who have not been authorized to acquire a qualifying shareholding? If so, how could such mechanisms be made to work most effectively?**

The CEBS may wish to put forward additional issues on their own initiative.

4. Timetable

CEBS is invited to provide advice on the above issues by 31 May 2005. The Commission services will consider that advice with Finance Ministry representatives in the Banking Advisory Committee/European Banking Committee. Given the cross-sectoral nature of the issue of qualifying shareholdings and suitability of managers and directors the Commission may also inform the Financial Services Committee of its findings. The Council may also wish to resume its consideration of this issue in the light of CEBS' views and further work that will be undertaken by the Commission.

Annex 1

Article 16, Directive 2000/12/EC

1. The Member States shall require any natural or legal person who proposes to hold, directly or indirectly, a qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of the intended holding. Such a person must likewise inform the competent authorities if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20%, 33% or 50% or so that the credit institution would become his subsidiary.

Without prejudice to the provisions of paragraph 2, the competent authorities shall have a maximum of three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the credit institution, they are not satisfied as to the suitability of the person referred to in the first subparagraph. If they do not oppose the plan referred to in the first subparagraph, they may fix a maximum period for its implementation.

2. If the acquirer of the holding referred to in paragraph 1 is a credit institution authorised in another Member State or the parent undertaking of a credit institution authorised in another Member State or a natural or legal person controlling a credit institution in another Member State and if, as a result of that acquisition, the institution in which the acquirer proposes to hold a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be the subject to the prior consultation referred to in Article 12.

3. The Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of his intended holding. Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital held by him would fall below 20%,33% or 50% or so that the credit institution would cease to be his subsidiary.

4. On becoming aware of them, credit institutions shall inform the competent authorities of any acquisition or disposals of holding in their capital that cause holding to exceed or fall below one of the thresholds referred to in paragraphs 1 and 3.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

5. The Member States shall require that, where the influence exercised by the persons referred to in paragraph 1 is likely to operate to the detriment of the prudent and sound management of the institution, the competent authorities shall take appropriate measures to put an end to that situation. Such measures may consist for example in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting right attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information, as laid down in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

6. For the purposes of the definition of qualifying holding and other levels of holding set out in this Directive, the voting rights referred to in Article 7 of Directive 88/627/EEC shall be taken into consideration.