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comments to

CEBS/2008/40, CEIOPS-3L3-10-08, CESR/08-543 of 11July 2008

Guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by the Acquisition Directive 2007/44/EC

(referred to in the following as "**Paper**")

Original text of the Paper appears in italic. Amendments to the original text are marked up.

§ of the Paper	Comments
General remark	We appreciate the work undertaken by the 3L3 committees and welcome, after having taken the opportunity to participate in the public hearing on September 19, the opportunity to express our written comments to the Paper. **1. Principle of proportionality** We further agree with the Paper and the findings of the public hearing: the principal of proportionality is of particular importance. Acquisitions in the three financial sectors require scrutiny where the interests of the protected clients may be endangered. However on the other hand excessive administrative burden is to be avoided in cases where this can be excluded: intra-group transactions and acquisitions by regulated financial institutions or their subsidiaries. Further, cases which deserve an even more facilitated procedure (i.e. a simple notification to the supervisor without the need to provide further documents) are up-stream mergers of indirect shareholders. Such a transaction, which is quite common for tax reasons, does not affect the direct shareholder of a regulated financial institution, leads only to the abolition of an indirect shareholder and is purely intragroup. Therefore, no regulatory scrutiny should be required. **2. Indirect shareholdings** A further issue, which is of particular importance for the financial industry, is the calculation of indirect shareholdings. As of today, the legal situation is not at all harmonised within the EU. We hope that a harmonisation will be achieved by the transposition of the Acquisition Directive. But e.g. the proposed implementation by the UK[1] seems to demonstrate the opposite. According to our understanding of Art. 12 (1) (2) of the Banking Directive 2006/48/EC as amended by Art. 5 (1) Directive 2007/44/EC, which refers to the Transparency III Directive 2004/109/EC, the acquirer (A) only acquires an indirect share in the target (T), if the entity which directly holds the share is controlled by A, i.e. if such intermediate entity (IE) is a subsidiary of A. Otherwise the voting rights of IE are not attributed to A. The underlying rationale is that only in a case of control, A would be able to direct IE as how to exercise its voting rights in T. However some jurisdictions, e.g. the UK, take a different approach though. According to this approach, an indirect shareholding in T is given if A acquires a direct shareholding in T's parent, regardless of whether A will control such parent, i.e. if such parent will be A's subsidiary.

[1] See draft Art. 197 (1) FSMA as proposed by the HM Treasury's consultation document of September: http://www.hm-treasury.gov.uk/media/2/3/consult_implementation_aquisitiondirective.pdf.

	Such inconsistency leads to legal uncertainty with regard to acquisitions - which in case of cascading shareholdings - affect several member states. As stated above, we had hoped that harmonisation be achieved by the transposition of the Acquisition Directive. If this is not the case, as it appears, we recommend that supervisors also publish information on the calculation of indirect shareholdings together with the list of information required for the assessment.
8	The supervisors should publish all cases in which they in general do not require all the information in the list to be provided, e.g. intra-group transactions and acquisitions by regulated entities of the financial sector or their subsidiaries.
10	*In the event that some pieces of information are deliberately false or forged, rendering the conclusions of the competent supervisor erroneous, the competent supervisor must refuse to approve the acquisition.*
15	The para. in our view needs to be amended along the lines of Art. 12 (1) (2) of the Banking Directive, as suggested below and reasoned in more detail above (See general comments, 2.). At least it appears to be necessary that following a different transposition of the Banking Directive, the calculation of indirect shareholdings may differ. *On the other hand, if the target institution directly concerned by the proposed acquisition in turn directly or indirectly controls subsidiaries that are financial institutions subject to the supervision of other EEA competent authorities, and if the target institution would be controlled by the acquirer, each of these subsidiaries shall also be considered indirectly as 'target financial institutions'.*
18	*The Directive applies the principle of proportionality to the assessments. This principle, which is mentioned in recitals 5, 8, and 9, applies both to the composition of the required information and to the assessment procedures. The type of information and the requirements applicable to its documentation required from the acquirer may be influenced by the particularities of the acquirer (legal vs. natural person,* *supervised financial institution vs. other entity, etc.), the particularities of the proposed transaction (intra-group vs. "external" transaction etc.), the degree of involvement of the acquirer in the management of the target financial institution, or the level of the holding to be acquired.*
30	*But in all cases, the acquirer himself should attest in a signed statement that none of the situations described in points 24 to 26 occurs or has occurred in the past to the best of his knowledge.* The acquirer is not necessarily aware of investigations carried out against him.
57	*The third criterion is in any case met if an acquirer, which is supervised as financial institution in an EEA member state, can demonstrate that the group to which it belongs - including the target - would fulfill its relevant group or financial conglomerate solvency requirements. The target supervisor should oppose the acquisition if it concludes, based on its analysis of the information received, that the acquirer is likely to face financial difficulties during the acquisition process or in the foreseeable future.*

92	*Thus, when the acquirer is a supervised entity within the EEA, the overall aim of this guidance is to ensure that information related to the prudential supervision of the acquirer is made available in a timely manner to all interested supervisors, i.e., to each supervisory authority which may be concerned in the case of cascading holdings; these holdings should be understood as mentioned in paragraph 15 above. Also in the case of cascading holdings, where the target supervisor has no objections to the acquisition, it should confirm this to the acquirer as soon as practicable. This allows the acquirer to show such confirmation to supervisors of the target's subsidiaries, which in some cases are inclined to follow the target supervisor's decision.*
Appendix I	'*Qualifying holding', as defined in Directives 2002/83/EC, 2004/39/EC, 2005/68/EC, and 2006/48/EC, means a direct or indirect (via one or several controlled undertakings) holding in an undertaking which represents 10% or more of the capital or the voting rights of an undertaking or which makes it possible to exercise a significant influence over the management of the undertaking. In the case of 'indirect qualifying holders', such as cascading holdings that span different Member States, the immediate acquiring institution must notify each of the jurisdictions, while (as stipulated in the Directive) the responsibility for the final decision regarding the prudential assessment remains with the competent supervisor of the entity in which the acquisition is proposed.*
Appendix II, 1	*This appendix is divided into two sections. The first section lists 'general information requirements': all of the information which will normally be requested [17] by the target supervisor concerning the nature of the proposed acquirer and the proposed acquisition, regardless of the presumed degree of involvement (percentage of capital or voting rights) that the acquirer will have in the target financial institution. Following the principle of proportionality, less information is required if the acquisition is an intra-group transaction or the acquirer an EEA supervised financial institution.*
Appendix II	***A: CHANGE IN CONTROL*** *If there is a 'change in control' in the target financial institution, a business plan [25] should be provided, containing information on the contemplated strategic development plan ~~justifying~~ underlying the acquisition, prospective data, and details on principal modifications or changes in the target institution envisaged by the proposed acquirer:*