RESPONSE OF THE CONSULTATIVE PANEL OF THE SPANISH SECURITIES AND EXCHANGE COMMISSION (CNMV) TO THE JOINT CONSULTATION BY CESR, CEBS AND CEIOPS ON THE GUIDELINES FOR THE PRUDENTIAL ASSESSMENT OF ACQUISITIONS AND INCREASE OF HOLDINGS IN THE FINANCIAL SECTOR REQUIRED BY DIRECTIVE 2007/44/EC

PRELIMINARY REMARK

The Consultative Panel of the Spanish Securities and Exchange Commission (CNMV) is grateful for the opportunity to participate in the public consultation process initiated by the Level-3 Panels of European Financial Supervisors on a subject as important for all kinds of financial institutions as the assessment criteria and procedures which may be used by the national financial supervisors in the event of proposals for the acquisition or increased participation in financial institutions.

Given that it is an organ of the CNMV, the Consultative Panel will limit its responses, observations and proposals to the competences and tasks that are mainly the responsibility of the CESR.

Nevertheless, although the Consultative Panel is an organ of the CNMV, it is (as its name implies) a consultative body, in which there are representatives of government at its various levels, as well as from different sectors and agents in the securities markets. It therefore appears advisable to state from the start that the response of the Consultative Panel does not necessarily coincide with that of the CNMV, which is a member of the CESR and as such is probably in a better position to respond to the matters included in the European Commission's questionnaire.

In particular, the Consultative Panel of the CNMV considers that, without prejudice to any observations we have made here, the assessment of the guidelines designed to help coordination and exchange of information between supervisory bodies contained in the consultation paper should mainly correspond to the supervisory authorities which will have to apply the rules it contains.

OVERALL APPROACH

As a general comment, the Consultative Panel agrees with the approach of the consultation paper, particularly in the following aspects:

a) We consider it highly appropriate to extend the objective of harmonising the assessment criteria for the prudential assessment of acquisitions and increase of holdings in financial institutions that are already included in Directive 2007/44/EC.

b) We also consider it right that there should be a joint paper including common practices for supervisors in the field of insurance, banking and financial services, given their close interconnection.

c) We also consider correct the overall approach of the paper, which clearly aims to use objective criteria; the reduction (though not complete removal) of the scope of the competent supervisor's discretionary decision; and the principle of proportionality in complying with information obligations by the acquirers.

In particular, the Consultative Panel of the CNMV would like to express its full backing of the aims of the guidelines submitted for public approval, as explained in its Background, and to the general principles stated in Section II.

This assessment is not altered by the fact that the document is fairly general in character, as the approach is determined by the fact that it is an overall document covering different sectors (insurers, banks and investment services) and that it aims to leave a necessary margin for discretion to the competent supervisors to adopt appropriate decisions for each specific case.

Despite these considerations, the Consultative Panel of the CNMV would like to make the following specific comments:

I. Background

In listing the main objectives of this Directive, it would be a good idea to add a reference to the content of the second Recital of the Directive when it states that the clarification of the criteria and prudential assessment procedures aim to "supply legal certainty, clarity and foreseeability with regard to the assessment process, as well as to the result thereof." To the extent that it deals with objectives that in the final instance favour those potential acquirers, it appears that the document should include a reference to them.

II. General principles

As indicated above, the Consultative Panel of the CNMV considers that the contents of this section of the document are highly satisfactory; in particular, the inclusion of an express reference to the principle of proportionality. In fact, a new general principle of efficiency could be established along the same lines, to ensure that the potential acquirers were not required to submit documents or information which could be obtained by the authorities through the bilateral cooperation established by the Directive itself, or that were already in the hands of the competent authorities. This principle could be linked to the European and national initiatives on the matter of simplification and rationalisation of administrative procedures, avoiding duplication and unnecessary costs when obtaining documents by entities interesting in carrying out a transaction.

Apart from the above, and in terms of the content of the document, it would be advisable if the decision of the competent authority (Number 6, section V) to oppose the acquisition, which should be communicated to the acquirer in writing within two days, contained an explanation of the reasons for adopting this decision, and in particular specify the criteria that led to its resolution. These criteria may obviously not be different from those recognised by the Directive. The specific legal grounds behind the decision adopted (its reasonable grounds) should be considered an additional guarantee of its objectivity.

Another aspect on which an additional specific point should be added (in whichever section of the document is considered opportune) is the language in which the information required from the acquirer should be drafted. This is a very specific and practical point which could give rise to problems and unnecessary time-wasting in processing the procedures if it is not dealt with in advance. A similar point could be made in terms of the form of these documents, and more

specifically, regarding whether or not they should be submitted in their original format, or in the format in which the authenticity and the accuracy of their content may be substantiated.

III. Criteria

a) Reputation of the proposed acquirer

We have a favourable view of the fact that there is a presumption of good repute that may only be removed if there is evidence to the contrary.

With regard to dealing with the cases in which there are criminal offences currently being tried related to the acquirer or his delegates, it would be advisable to qualify this by saying that in these cases legal decisions must have been made guaranteeing the existence of criminal responsibility, or even demand that such legal decisions should be binding. In the sphere of administrative procedures, the principle of the presumption of innocence is equally firm as in criminal cases. Such presumption may not be legally removed unless there is a binding legal decision establishing the responsibility for a criminal act by a natural or legal person. It is not necessary to request judicial sentences or that these are firm, but to require the existence of a previous judicial decision (in the case of the Spanish criminal process, it could be the beginning of the judicial proceeding by the presentation of a formal compliant or accusation, or the beginning act of the oral trial)

The same suggestion could be made with regard to the administrative disciplinary proceedings or any other proceedings, whatever their nature.

This point is particularly important in those cases in which the alleged infringement may have consisted of an apparent lack of cooperation or transparency with an investigation initiated by legal or administrative authorities. In the case in which the legal grounds for the refusal of the entity to submit certain information (e.g. in those Member States where such laws exist, alleging the existence of a law on banking secrecy or similar) would have been considered admissible by subsequent legal or administrative decision, it appears clear that the circumstances referred to may not affect the potential acquirer.

As an exemption to the rule proposed in the previous paragraphs, it could be appropriate to provide supervisors with the possibility of taking into account the existence of previous criminal or administrative proceedings just initiated even if no final legal or administrative decisions have been arrived at. This exemption would be applicable in cases where the proceedings were initiated by the supervisors themselves or the office of the public prosecutor as in these cases there is no doubt about the veracity of the accusations. The same rule could be applicable to those cases where the responsibility of the natural or legal persons is beyond all reasonable doubt. In these cases the provision contained in Number 27 of the consultation paper appears appropriate and sufficient.

In addition, the paper should make clear what happens in those cases where the criminal or administrative responsibilities are time-barred and the criminal or administrative records have

been expunged, even though the persons were at the time declared responsible. One possible practical solution could be only to require information relating to facts which have taken place within a certain number of years.

Another matter that should be clarified is the persons included within the scope of these regulations, and in particular the reference contained in Number 33 of the paper to “all persons who effectively run the business.” Despite the regulatory reference contained in the footnote, this is a very imprecise reference which is open to different interpretations in different Member States. The same could be said about Number 40 of the paper. In this respect, it would be appropriate for the national supervisors to prepare an official list of posts falling under the definition contained in the Directive and whereby the CESR would monitor the use of such criteria.

With regard to the declaration that should be presented by the acquirer regarding compliance with the criterion relating to the integrity of the acquirer and associated parties, it would be practical to have a harmonised format that could be used by any competent supervisor.

With regard to the criterion of professional competence, we consider the provisions of the paper (Numbers 36 and following) to be correct. However, it would be advisable to specify the means that the acquirers may have available to substantiate compliance with the requirements established in the paper.

Once again, we consider the inclusion of a section on the proportionality principle to be very positive. However, we consider that there should be clarification of what is meant by "decisive influence", particularly in Number 41.

b) Reputation and experience of those who will direct the activity of the financial entity as a result of the proposed acquisition

The specification that this criterion is only applicable in cases in which the new acquirer is in a position to appoint new directors or managers of the entity that it intends to acquire appears very appropriate.

Nevertheless, there is only a very limited development of this criterion; it would thus be advisable for the Level-3 Panels to reach agreement on its further development. Given that this agreement could be withdrawn, perhaps the current drafting should be added to by including a reference to the rules established by the document itself for interpreting the first criterion for assessment.

In any case, we consider it contrary to the principle of proportionality that the supervisor should oppose the acquisition if the person appointed to the position of director of the entity acquired is not considered fit and proper. It would be more reasonable that, in the event of the supervisor deciding that the person appointed is not fit and proper, the acquirer should have the opportunity to propose another different person for the position.

c) Financial soundness of the proposed acquirer, particularly in relation to the type of activity pursued and envisaged in the entity in which the acquisition is proposed

In this respect, the paper is in general terms correct, in particular (once more) in its explicit reference to the principle of proportionality.

However, the scope of the implications of the rule contained in Number 64 of the paper should be clarified as far as possible, when it states that the assessment of the financial soundness of the acquirer will rely heavily on the assessment made by the acquirer supervisor. This rule is completely reasonable, and should establish the presumption that the entity intending to make the acquisition is financially sound and appropriate from a prudential point of view when the acquirer supervisor formally states this to be the case. This presumption may be revised if analysis carried out by the target supervisor arrives at the opposite conclusion. In the case of a discrepancy between the two competent supervisors a system of conflict resolution would have to be introduced.

d) Capacity of the financial entity to comply and continue to comply with the prudential requirements based on the Directive and any other applicable Directives; in particular, whether the group which it will become a part of has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities

In general, we consider the provisions in the paper to be correct. However, there appears to be some uncertainty in terms of Number 74 with regard to questions of corporate governance and transparency. To the extent that the acquirer may be subject to different rules of organisation and transparency from those current in the Member State of the target entity (the codes of good governance are notably different in different jurisdictions), it should be established that these demands may not extend beyond the provisions established in the Directives applicable in each case.

e) Existence of reasonable grounds to suspect that, in connection with the proposed acquisition, money-laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof

The provisions in this section are considered reasonable and appropriate, so we are making no comment on them.

IV. Guidance to facilitate coordination and exchange of information between supervisory authorities

As stated at the start of this submission, this is a section that is mainly aimed at the competent supervisors themselves, so the Consultative Panel of the CNMV prefers not to make any comments with respect to the questions included in the consultation paper.

However, and to the extent that the right cooperation between competent supervisors may result in a reduction of the costs of compliance for acquirers and greater legal security and predictability with regard to the acquisition procedure, we consider it advisable to incorporate a general provision specifying that the cooperation mechanisms established between the competent authorities should have as their fundamental aim to "provide legal security, clarity and foreseeability to the assessment process and its result," simplifying the obligations and lowering the costs of compliance for the entities interested in acquisition, without this prejudicing the appropriate exercise of competences on the part of the supervisors.

V. Appendix I: Glossary

There are no comments.

VI. Appendix II: List of information requirements for assessing an acquisition

With regard to this appendix, the Panel is very positive in its assessment of the existence of a list of information that may be required from the acquirers as a means of avoiding unjustifiably burdensome requests for information. In addition, greater harmonisation of supervisory practices in this respect is extremely useful.

However, there are numerous examples in the lists in Appendix II in which "open lists" of information are introduced through the use of expressions such as "for example" or "among others". To ensure convergence in supervisory practices and the desired harmonisation, the possible extension of lists of information contained in this Appendix should be reduced.

More specifically, we have doubts about the broad margin for discretion granted to national supervisors in Part II, paragraph B (“Qualifying Shareholding Without a Change in Control”, when it comes to requesting more detailed information in cases in which the acquisition is of holdings of less than 20%.