

18 November 2010

Feedback document to the CP 41

Introduction

1. On 13 July 2010, the Committee of European Banking Supervisors (CEBS) submitted its draft guidelines for the convergence of supervisory practices on the application of revised Article 3 of Directive 2006/48/EC ('Article 3') for public consultation.¹
2. The consultation period ended on 27 August 2010. Six responses from European trade associations were received and published on CEBS's website.²
3. This paper includes a feedback table which presents a summary of the key points arising from the responses to the consultation and also CEBS's views on those aspects.

General comments

4. In general, respondents to the consultation supported the objective of the guidelines. However, some respondents mentioned that the guidelines should be principle-based rather than very detailed, which, in their view, would better achieve the main purposes of Article 3.
5. In general, respondents agreed that most aspects were addressed in an appropriate way in the draft guidelines set out in the consultation paper. However, clarifications or amendments were requested, in particular, regarding the scope of application of the draft guidelines, the notion of affiliation and the approach to the use of the EU passport.

¹ The CP41 is published on CEBS's website under: <http://www.c-ebs.org/Publications/Consultation-Papers/All-consultations/CP41-CP50/CP41.aspx>

² The public responses are published on CEBS's website under: <http://www.c-ebs.org/Publications/Consultation-Papers/All-consultations/CP41-CP50/CP41/Responses-to-CP41.aspx>

6. A few respondents expressed strong concerns that CEBS's guidelines on Article 3 would enlarge the current scope of the Article 3 to affiliated institutions that meet all the prudential requirements set out in the Capital Requirements Directive (hereafter 'CRD') on a solo basis and that do not use the derogations provided for in Article 3.
7. CEBS presents its response to these and other comments in the following feedback table.



ANNEX

Feedback table on CP 41: summary of the responses and suggested amendments

CP41	Summary of comments received	CEBS's response	Amendments to the guidelines N/R: No change required
Introductory sections			
1. Objective of the guidelines	<p>In general, respondents agree that the objective of CEBS's guidelines is to enhance the convergence of supervisory practices on the application of Article 3 CRD across the EU.</p> <p>In addition, one respondent agrees that the main purpose of revised Article 3 is to clarify that the central body and its affiliates form a unity and to ensure 'where appropriate, equal treatment of Groups as defined in this article vis-à-vis credit institutions with a (vast) number of branches'.</p>	CEBS acknowledges the support for its proposals.	N/R
2. Scope of application of the guidelines –	A few respondents point out that there can be different levels of consolidation within a Group and that the derogations according to Article 3 may only be applied at a	CEBS notes the concerns raised by respondents and makes it clear that the CEBS guidelines have exactly the	Paragraph 7 (new)

<p>level of consolidation</p>	<p>lower (sub-consolidated) level of consolidation (which can be regional as opposed to national). Examples of this situation are given by respondents.</p>	<p>same scope of application as Article 3, i.e. the guidelines will not apply to institutions which meet all the prudential requirements set-out in the CRD on a solo basis, including supervision on an individual basis and which do not use the derogations provided for in Article 3.</p> <p>CEBS further notes that although the use of Article 3 is now open to new structures in other Member States, the application of the exemptions is not automatic as the competent authorities will have to check the fulfilment of Article 3 conditions.</p>	<p>Paragraph 10 (new)</p>
<p>3. Scope of application of the guidelines – concept of affiliation</p>	<p>A few respondents note that the term “affiliation” in Article 3 has not been translated into the different national languages in a convergent manner. The respondents note that, as a consequence, the prudential legislation in different Member States uses the term “affiliation” in different ways. In some Member States, the term ‘affiliated’ institution is used in a broader sense to describe any member of the cooperative Group, regardless of whether they apply (or not) the derogations of Article 3. In other Member States, the term is used in a stricter sense to describe only the members of the cooperative Group which are applying the derogations under Article 3.</p> <p>These respondents call for the clarification of the scope of the application of the guidelines, the powers and instructions of the central body according to the guidelines and the use of the EU Passport.</p>	<p>CEBS notes the concerns expressed by respondents to the different national transpositions of the terms used in Article 3. In CEBS’s opinion, the guidelines will contribute to further harmonisation of the supervisory practices in the application of Article 3.</p> <p>Please see above for CEBS’s response to the respondents’ requests for clarification of the scope of the guidelines.</p>	<p>N/R</p> <p>Paragraph 7 (new)</p>
<p>4. Scope of application of</p>	<p>One respondent suggests that the guidelines should provide for different and less strict obligations towards the</p>	<p>As stated above, CEBS’s guidelines have exactly the same scope of</p>	<p>Paragraph 7 (new)</p>

the guidelines	central body for affiliated institutions which meet the prudential requirements set-out in the CRD on a solo basis.	application as Article 3, i.e. the guidelines will not apply to institutions which meet all the prudential requirements set-out in the CRD on a solo basis, including supervision on an individual basis and which are not using the derogations provided for in Article 3. However, the guidelines will apply to all institutions making use of the derogations in Article 3.	
A) Concept of 'permanently affiliated to a central body'			
5. Substance of affiliation	<p>One respondent agrees that it is necessary to have a common understanding of the concept of 'permanently affiliated' in order to clarify what the overarching aim of a Group is: the stability of the whole Group and enabling the Group to fulfill its obligations vis-à-vis its creditors. The respondent appreciates that CEBS also takes into account that the substance of affiliation in practice encompasses many more elements and arrangements as referred to in paragraph 13 of CP 41. However, the respondent highlights that the aspects referred to in paragraph 13 should be understood as illustrative examples and not as additional prudential requirements or necessary conditions falling under the concept of 'permanent affiliation'.</p> <p>Another two respondents call for further clarification of certain aspects of the term 'permanently affiliated' (e.g. on whether a contractual agreement can specify a minimum number of years during which no entity can leave the Group; and the precise meaning of 'use of integrated liquidity management' and 'use of centralized treasury functions').</p>	<p>CEBS confirms that the aspects mentioned in paragraph 13 of CP41 are illustrative examples of links between the individual affiliated institutions and the Group, that exemplify the substance of 'permanent affiliation' beyond the prudential aspects set-out in Article 3 and CEBS's guidelines.</p> <p>CEBS noted this request, but believes that the guidance provided in the guidelines is sufficient to ensure harmonised supervisory practices without unnecessarily changing the current structure and internal organisation of the existing Groups.</p> <p>Time-limits (whether those are minima or maxima) are not</p>	<p>N/R</p> <p>N/R</p>

		consistent with the inherent meaning of the wording “permanent”. CEBS has, therefore, chosen to provide examples from which the permanence of affiliation could be derived. Since it is a balancing act between clarity and generic guidance, CEBS has chosen not to be too descriptive with regard to the examples provided.	
6. Final assessment on exit	One respondent agrees that in the event that an affiliate wishes to leave the Group, the Supervisory Authorities have to ensure that there are no materially negative consequences for both the exiting affiliate and the whole (remaining) Group, taking into account the internal decisions of the Group. This respondent appreciates that the CP41 mentions that all prudential requirements have to be met by the exiting affiliate on a stand-alone basis, however, the respondent suggests introducing a reference to Directive 2006/48/EC when referring to Article 6 et seq.	CEBS has introduced a reference to Directive 2006/48/EC to avoid possible misunderstandings.	Paragraph 18
B) Guarantee			
7. Types of guarantees	<p>One respondent appreciates that CEBS describes the different possible guarantee systems that can be considered under paragraph (a) of Article 3(1).</p> <p>This respondent agrees with paragraph 19 of CP41 that one condition set out in Article 3 should be kept in mind: the stability of the Group and the need to create one joint capital against the creditors of the Group, by stating that the guarantee systems should ensure that there are no impediments to the prompt transfer of own funds. This respondent adds that guarantees, de facto, do not only result from formal guarantee arrangements, but also from legal provisions or other contractual arrangements and suggests adding a footnote to make this clear.</p> <p>This respondent agrees with the wording of paragraph 20 of CP 41.</p> <p>Two other respondents call for further clarification on the</p>	<p>In CEBS’s view the wording of paragraph 19 of CP41 already accounts for different guarantee arrangements.</p> <p>CEBS noted the request for further</p>	<p>N/R</p> <p>N/R</p>

	level of commitment and/or guarantees (e.g. on whether guarantees need to comprise 100% of capital and/or profits in each affiliated institution and if there is a limit placed on the mutual commitment)..	<p>clarification, but believes that the guidance provided in the guidelines is sufficient to ensure harmonised practices without unnecessarily changing the current structure and organisation of the existing Groups.</p> <p>As clarified in paragraph 6 of the guidelines, all elements of the guidelines should be read against the background of a level playing field between Groups as defined in Article 3 vis-à-vis credit institutions with a (significant) number of branches. In this light, CEBS considers it unlikely that partial guarantees would be accepted by the competent supervisory authorities.</p> <p>CEBS considers it out of scope to take a position on the limitation of the mutual commitments taken on by the Group.</p>	
C) Relation of the requirements and exemptions in Article 3 (1) and (2)			
8.	Most respondents appreciate the clarifications as regards the requirements and exemptions under Article 3, especially after the modification of Article 3 by CRD II.	CEBS acknowledges the support for its proposals.	N/R
D) Consolidated financial statements vs. consolidated prudential reporting			
9.	<p>Most respondents agree that the requirement for monitoring of solvency and liquidity on the basis of consolidated accounts should be seen from a prudential supervision perspective only.</p> <p>One respondent asks whether a demand for audit-trail accounting from top to bottom of the Group's structure</p>	<p>CEBS acknowledges the support for its proposals.</p> <p>In CEBS's view, accounting matters are covered by the relevant</p>	<p>N/R</p> <p>N/R</p>

	would be necessary.	framework applied (IAS or Directive 86/635/EC) as stated in Section D of the guidelines. As regards prudential reporting, the competent supervisory authority has the power to define the requirements on this matter.	
E) Type of 'instructions' that can be issued by the management of the central body			
10. General remarks	<p>One respondent mentions that due to the democratic structure of cooperatives, the terms of affiliation and the local affiliates' ownership of the central institution, the definition of policies may not be exclusively the competence of the central body. This may even be agreed jointly between the central body and affiliates, according to the specific rules in the governance structure of a Group. However, once agreed, the central body will have the powers to ensure the implementation of and adherence to these policies. In this respect, this respondent agrees with paragraph 25 of CP 41. However, the respondent requests for a clear indication that the list under paragraph 28 of CP 41 is a list of non-exhaustive examples and not a list of 'minimum' requirements.</p> <p>This respondent believes that the term "defining" in the context of some subpoints under paragraph 28 of CP 41 goes too far, and beyond the mere interpretation of Article 3 and suggests replacing it with '<i>monitoring of the implementation of</i>'.</p> <p>Another respondent suggests that the guidelines should make it clear that the affiliated institutions would not lose their autonomy with respect to their day-to-day management and decision making.</p>	<p>CEBS has considered the feedback received, but it is of the view that the list provided on the guidelines should be considered as a minimum requirement. It is CEBS's view that the central body should issue instructions to its affiliated institutions with the aim of ensuring the Group's compliance with the regulatory requirements that the affiliated institutions individually are exempted from pursuant to Article 3.</p> <p>CEBS believes that the level-playing field with banks with a large number of branches (which are not independent like subsidiaries) should be preserved. Therefore, the powers to issue instructions should be given to the central body. That said, it would be up to the central body as to how to define these instructions in conformity with its governance structure. In any case, the central body would always be the entity with the power to issue instructions.</p> <p>CEBS considers this as an essential element for the application of Article 3 to a Group.</p>	N/R

	<p>A few respondents suggest incorporating in paragraph 28 of CP 41 additional text to make clear that this applies to affiliated institutions that make use of the derogations under Article 3 and are not supervised on an individual basis.</p>	<p>Please see sections above on the scope of application of the guidelines</p>	<p>Paragraph 7 (new)</p>
<p>11. Specific remarks</p>	<p>Two respondents suggest that the wording in subpoint 4 of paragraph 28 of CP 41 should be changed, as, stating that the policy and strategic purposes of each affiliate is the same as those of the Central body's is misleading. Even though the strategy and policy of the affiliated institutions should be in conformity with risk management principles applicable to the Group, these are not and cannot be exactly the same. Each of the affiliated institutions is subject to and affected by different geographical and market parameters, and other factors relating to the particular characteristics of the affiliate.</p> <p>One of these respondents also suggests changing the wording of subpoint 7 of para. 28 of CP 41, given that the last part "as well as the other members of their senior management;" is unnecessary and not provided for by the CRD. Article 11(1) of the CRD refers to the level of the persons assessed by supervisors in the case where new directors/board members are appointed for a registered credit institution which fully complies with all prudential requirements on a solo level. From a legal point of view, the current scope of the said Article 11(1) should not be widened by these CEBS guidelines. Moreover, CEBS's proposal may require a large part of the senior managers of cooperative banks, which are a big number, to be subject to such a fit and proper test, something which is not realistic and may impede the competitive position of cooperative banks.</p>	<p>CEBS has considered this feedback and has changed the wording.</p> <p>CEBS has considered this feedback and has changed the wording</p>	<p>Paragraph 29.e)</p> <p>Paragraph 29.c)</p>
<p>F) Use of the EU passport</p>			

<p>12. Comparison with Article 69(1) of the CRD</p>	<p>One respondent believes that the situation and derogations in Article 3 are similar to those set forth in Article 69(1) of the CRD and that the situations falling under these articles should be treated in the same way.</p> <p>There are no restrictions whatsoever in Article 69(1) CRD as regards the EU passport for banks that are daughter companies. We, therefore, think that CEBS should not limit the possibilities of affiliated institutions under Article 3 in this respect either.</p>	<p>CEBS has taken into account the feedback received and has redrafted the entire Section F on the use of the EU passport.</p>	<p>Section 'F) Use of the EU passport' (redrafted)</p>
<p>13. Freedom of services and freedom of establishment</p>	<p>One respondent mentions that when discussing cross-border activities of affiliated institutions and the EU passport, it would be advisable to make a distinction between a) the freedom to provide services (Article 28 of the CRD) and, b) the freedom of establishment (Article 25 of the CRD) as referred to in Title III CRD and CEBS's Guidelines for Passport Notification of 11 February 2009.</p> <p>The respondent is of the opinion that as a result of the high integration of the internal market regarding the freedom of services (especially payments, internet banking), any distinction between servicing customers outside borders of the national Member State is extremely difficult to make, especially in retail banking. It, therefore, seems inappropriate to exclude affiliated institutions from servicing customers across the border. Any such limitation would most probably require significant reorganization with possible negative effects on the bank and the customer. In addition, the respondent argues that direct involvement of the central body with retail customers is an exception as retail activities are the core business of the affiliated banks. The servicing will take place where the client is, as is the case for banks with dependant branches where the servicing of clients takes place in the local branch near the client, although formally this is seen as being done by the one bank. There should be no</p>	<p>CEBS has considered the arguments raised by respondents. However, CEBS notes that in accordance with Article 3, there is no distinction between the establishment of branches and the freedom to provide services such as those proposed by respondents.</p> <p>CEBS makes it clear in its guidelines that, in general, individual affiliate institutions cannot use the EU passport on their own and at their initiative. The EU passport can only be used by the Group as a whole, which means that all notifications have to be made by the central body. In terms of procedure, this means that the central body has to notify the competent authority that it will set-up a branch which will be locally managed by one of its affiliated institutions.</p>	<p>Paragraph 31.e)</p> <p>Paragraph 31 and 32</p>

	<p>disadvantage for affiliated banks in a co-operative Group and, therefore, there should be no limits for the affiliated institutions under Article 3 regarding the freedom of services. The respondent also argues that Article 22 of the CRD requires banks to establish proper and robust governance requirements which also ensure that cross-border activities meet any prudential requirements. The respondent also recalls the notification procedure under Article 28 CRD and in the CEBS's Guidelines for Passport Notification of 11 February 2009, and notes that both notification by an individual affiliated bank or through the central body should be allowed.</p> <p>On the freedom of establishment and the use of the EU passport, the same respondent thinks that CEBS should not focus on the formal argument that affiliated institutions do not fulfill solvency requirements on an individual basis. Such an approach would not be in accordance with the aim and function of Article 3 and would put co-operative Groups at a disadvantage vis-à-vis Groups under Article 69(1) CRD. The focus should be on proper and robust governance requirements as stated in Article 22 of the CRD, as it ensures that the opening of a branch or subsidiary meets any prudential requirements and is in keeping with the appropriate functioning of corporate governance.</p> <p>In addition, the respondent notes that paragraph 28 of the CP 41 already includes "criteria or rules regarding the creation of new establishments", which also refers to cross-border establishments. Thus, the creation of any new cross-border establishment is not an isolated activity of an affiliated institution, but an activity of the Group as a whole, since it is based on/or in line with instructions of the central body and the internal governance rules of the Group.</p>	<p>CEBS agrees to add an explicit reference to 'cross-border activities' in the respective bullet point of paragraph 28 of CP41 as suggested by respondents.</p>	<p>Paragraph 29.i)</p>
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	<p>Finally, the respondent notes that a central body very often acts as a coordinating and servicing entity, with limited banking activities, in particular, in the area of retail banking. It, therefore, may not make any sense to entrust the central body with the creation of cross-border establishments. It could make more sense to create an affiliated institution for the specific purpose of coordinating cross-border establishments. However, especially when cross-border activities are limited and related to specific (border) regions, it might be better for such activities to be run by that affiliate that is geographically the closest.</p> <p>Another respondent argues that the guidelines should make clear that the central body can make use of the EU passport on behalf of the Group.</p>	<p>CEBS has clarified in the guidelines that this is the case.</p>	<p>Paragraph 31.d)</p>
<p>14. The notion of affiliation</p>	<p>As already noted, most respondents stress that the understanding of "affiliation" might differ and suggest that it be made clear in this section of the guidelines that in certain Member States there could exist affiliated institutions that do not make use of the derogations under Article 3 and are supervised on a solo basis; they can, therefore, make use of the EU passport on their own.</p>	<p>CEBS agrees and makes it clear in this section of the guidelines that when the exemptions provided by Article 3 are not used by an affiliated institution (i.e. the affiliated institution is subject to all prudential rules like any other credit institution) this affiliated institution can make use of the EU passport on its own.</p>	<p>Paragraphs 32 and 33</p>