



BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY

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EUROPEAN SUPERVISORY AUTHORITIES' CONSULTATION

INDIRECT ACQUISITIONS OF QUALIFYING HOLDINGS

1 - On 3 July 2015, the European Supervisory Authorities¹ (the “ESAs”) initiated a joint consultation on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector². In this consultation paper, the ESAs shed light on the issue of indirect acquisitions of qualifying holdings, and invited comments on the two approaches described hereinafter.

Under the sectoral Directives and Regulations, a natural or legal person will be under the obligation to notify to the relevant target supervisor any contemplated transaction which would result in the acquisition, directly or indirectly, of more than 10% of the share capital of a financial institution.

2 - In the absence of legal definition or clear guidance, the notion of “indirect holding” creates uncertainty for the proposed indirect acquirers. The joint paper of the ESAs recommends to set up a clear framework and, for this purpose, submits two potential options for the calculation of indirect holdings:

- Option A based on the control criterion only, and
- Option B which is a mix between the control criterion and the multiplication criterion.

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Question 3 raised by the ESAs concerns the preferred option for determining if a qualifying holding is being indirectly acquired.

3 – Different criteria are applied by regulators within the EU regarding this question. Option A is applicable in some member states such as the UK, France and Portugal while Option B is applicable in some other member states such as Germany and Spain. In the Netherlands, although the Dutch rules do not explicitly state how the indirect holdings should be calculated, the Dutch Central Bank has always solely applied the multiplication

¹ The European Securities and Market Authority, the European Banking Authority and the Joint Committee of the European Supervisory Authorities.

² Joint Consultation Paper – Draft Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, 3 July 2015, ref. JC/CP/2015/003.

criterion; in Italy, the legal framework stipulates that indirect holdings must be calculated based on Option A, but recently local regulators have sometimes applied Option B.

In our view, to assess whether an indirect transaction requires a prior approval from target supervisors, the ESAs should rely on the control criterion only (Option A). This solution is very straightforward and offers to potential acquirers a high level of legal safety. This methodology for the calculation of an indirect participation is already applicable in certain EU countries, such as France and Portugal.

4 - Our answer also relies on a teleological interpretation of the current legal framework. The sectoral Directives and Regulation regulates, for prudential reasons, the access to the share capital of financial institutions.

One of the main objectives of national and European regulators is to ensure that the major shareholders of financial institutions have the skills to exercise an efficient control over the management of these entities. Having carefully considered the integrity and the professional competence of a proposed acquirer, a target supervisor will approve or oppose a transaction.

5 - The concept of “indirect holding” shall be understood in light of the goals that the sectoral Directives and Regulations aimed to achieve. In our opinion, the definition of a qualifying holding, whether direct or indirect, is inextricably linked to a form of control or power of the proposed acquirer over a financial institution. This influence, and this influence only, justifies scrutiny from regulators and the fact that the main shareholders are requested to take specific undertakings going beyond what is normally required for a shareholder of a limited liability company.

Bearing that in mind, a clear distinction should be made between the “passive” investors - who have no intention to play any role in the management of a financial institution and cannot exercise any specific right within this entity - and the “active” investors who, on the other hand, are in a position where they can influence the management of the target undertaking.

6 - In case of a direct holding, there is a legal presumption pursuant to which an investor is deemed “active” if (s)he reaches a 10% participation in the capital of a financial institution. This is justified by the fact that the votes of this shareholder during general meetings may have some weight on the decision process.

In addition, this shareholder may exercise certain specific rights within the entity in which (s)he holds a stake (e.g. requesting the inclusion of specific items on the agenda of the general meetings, requesting the issuance of management report on specific aspects of the company’s operations, or even appointment of director(s) if the ownership of the company is widely dispersed etc.).

7 - In the context of indirect holdings, the control criterion is a key concept to draw a demarcation line between “passive” and “active” investors. If we consider a holding company which has a stake in a financial institution, the non-controlling shareholder of this holding company cannot influence, by any way, the management of the financial institution.

Therefore, given the objectives of the sectoral Directives and Regulations, the participation of the holding company in the financial institution shall not be taken into account when considering the stake held by the non-controlling shareholder of this entity.

Moreover, option B may oblige parties that have no influence over the regulated entity to apply for an authorisation, what might potentially raise practical issues as the acquirer of shares in a holder of a qualifying holding may not have the information about the exact holdings of that entity in the target bank.

8 - Furthermore, this approach based on the control or influence an entity may exercise on a financial institution seems consistent with the current wording of the sectoral Directives and Regulations. Indeed, these texts expressly refer to the holding of a part of the capital or of the voting rights (in case the voting rights would be disconnected from the capital holding), and to any participation which enable the proposed acquirer to exercise a significant influence over the management of the target undertaking. In other words, the scope of the sectoral Directives and Regulation has clearly been designed in order to encompass any and all situations where the contemplated acquisition would result in a change in the control or influence exercised over the company by its shareholders.

9 - Finally, the economic analysis also pushes for the use of the control criterion. The passive investors should be seen as mere financial sponsors who have a distinct role in the financial sector and, more generally, in the market. In practice, these players are only driven by their economical interest. They provide financial soundness to financial institutions but usually do not has the power to exercise, or actually exercises, dominant influence or control, so that any assessments of their suitability would be unnecessarily burdensome.

We recognize that the financial soundness of such investors may be of interest to the regulator as, under certain circumstances, they can have to provide a financial support to the considered financial institution. However, they may be deterred from investing in financial institutions if heavy procedures are imposed in the context of indirect acquisitions. As a result, the financial institutions, who were supposed to be protected and benefit from these directives and regulations, may instead be penalized as a result of the reluctance of investors to invest in their capital structure.

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10 - For the reasons set out above, option A is the best option in our view. However, the ESAs should also start a reflection on the concept of “control”. No definition of “control” exists at a EU level. As a result, whatever the final decision made by the ESAs, discrepancies may appear in the implementation of the sectoral Directives and Regulations.

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Question 4 - We do not have an alternative scenario to submit.