

Client Update

Financial Sector M&A: Draft Joint Guidelines on Changes to Acquisitions and Increases of Qualifying Holdings

LONDON

Jeremy G. Hill
jhill@debevoise.com

James C. Scoville
jcscoville@debevoise.com

Benjamin Lyon
blyon@debevoise.com

Edite Ligere
eligere@debevoise.com

On July 3 2015, the three European Supervisory Authorities, (ESMA, EBA and EIOPA) (together, the “ESAs”), published a [consultation document](#) on draft guidelines (the “Guidelines”) for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, with the aim of harmonising supervisory practices and providing clarity to proposed acquirers. The Guidelines will have a significant impact on the way entities, including insurers, undertake M&A transactions in the financial sector in the European Union (the “EU”).

Given the growing integration of financial markets through cross-border acquisitions, insurers are increasingly adopting complex group structures that extend across multiple jurisdictions in the EU. This means that an insurer making a single acquisition or increasing its ‘qualifying holding’ in an entity will likely be subject to scrutiny in several Member States.

To streamline the assessment process, the ESAs have: (i) reviewed and updated the non-binding guidelines that were developed in 2008 by the former three Level-3 Committees on the prudential assessment of acquisitions (the “2008 Guidelines”); and (ii) addressed the main issues identified in the February 2013 European Commission report on the application of the [Acquisitions Directive](#)¹ (the “2013 Report”). The ESAs aim to ensure that identical provisions apply to all three financial sectors of the EU (i.e., banking, investment and pensions/insurance).

¹ Directive 2007/44/EC, which establishes the legal framework for how acquisitions and increases of qualifying holdings in financial institutions should be assessed by competent authorities.

MAIN CHANGES

The Guidelines set out detailed requirements for the notification and assessment of proposed acquisitions of financial institutions in the EU. Among the main changes from the 2008 Guidelines and the 2013 Report are the following:

Indirect Acquisitions of Qualifying Holdings

The Guidelines ask for feedback and preferences in relation to two possible options for examining an indirect acquisition or increase in a holding through cascading holdings:

Option One: A “control criterion” whereby the target supervisor will only need to consider persons who: (i) acquire control over an existing holder of a qualifying holding in a target undertaking; or (ii) directly or indirectly control the proposed direct acquirer of a qualifying holding in a target undertaking (including the ultimate natural person or persons at the top of the corporate chain).

Option Two: A combination of the control criterion and a multiplication criterion. Under this option, target supervisors will multiply the percentages of holdings down the corporate chain and a qualifying holding of 10% or more in the proposed target would be deemed an indirect acquisition. With Option Two, if either test is satisfied, an indirect acquisition will be deemed to be made. If both criteria yield different results, the higher resulting percentage will apply.

Acting in Concert

The Guidelines also clarify the meaning of ‘acting in concert’ and lay out the factors target supervisors should take into account when assessing if parties are acting in concert, in which case target supervisors are required to aggregate their holdings to determine whether they are acquiring a qualifying holding. The Guidelines provide a list of factors indicating that shareholders should be considered as acting in concert. The Guidelines also contain a “white list” of cooperative activities that should not be considered as leading to a conclusion that the parties are acting in concert. This is identical to the white list published by ESMA in November 2013 in relation to acting in concert for the purposes of the Takeover Directive.

Significant Influence

Guidance is provided on the factors target supervisors will take into consideration when determining if the proposed acquirer will be exercising significant control. The non-exhaustive list includes the ownership structure of

the target undertaking and the actual level of involvement of the proposed acquirer in the management of the target undertaking.

THE AIMS OF THE GUIDELINES

For the proposed acquirer:

- to harmonise the conditions under which it will be required to notify the competent authority responsible for the target of its decision to increase its qualifying holding in the financial institution; and
- to ensure that it knows exactly what information it needs to provide to the competent authority for the assessment to be complete in a timely manner. This includes a list of information to be provided in its notification.

For competent regulatory authorities:

- to define a clear and transparent procedure for the prudential assessment, including setting the maximum time period for completing the process; and
- to specify clear criteria that need to be applied in the assessment process.

The ESAs will undoubtedly welcome the views and responses of those in the financial sector. There will be a public hearing on the Guidelines at the EBA's offices in London on 20 August 2015. The consultation process will close on 2 October 2015 and responses should be submitted by that date.

* * *

Please do not hesitate to contact us with any questions.